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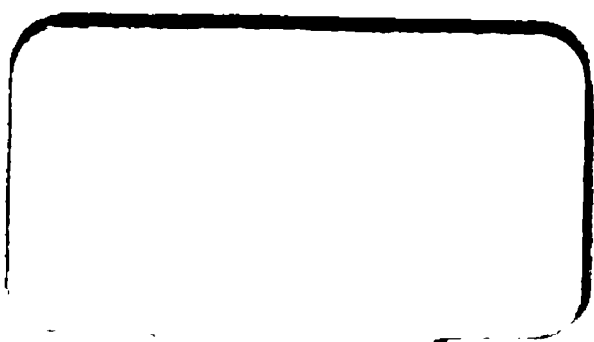
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SUPREME COURT OF THE DISTRICT OF COLUMBIA.

ANDREW WYLIE, Justice.

PROCEEDINGS IN THE TRIAL OF THE CASE

OF

THE UNITED STATES

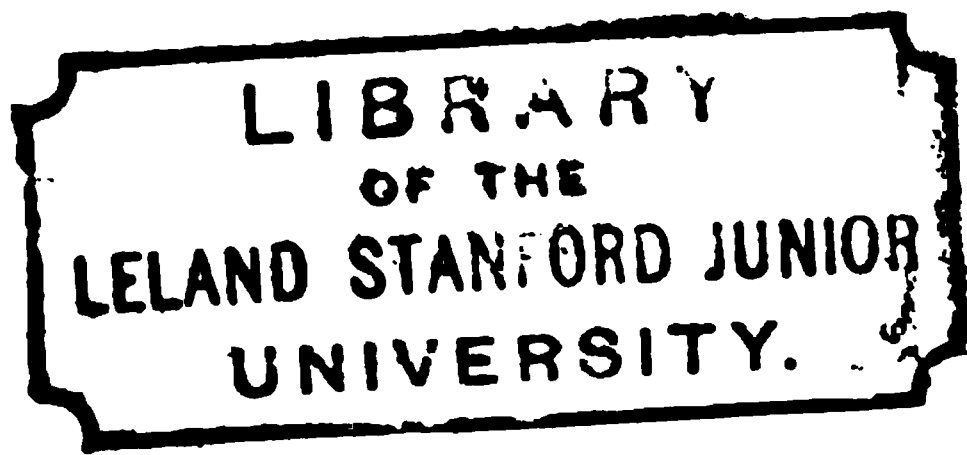
VS.

**JOHN W. DORSEY, JOHN R. MINER, JOHN M. PECK,
STEPHÉN W. DORSEY, HARVEY M. VAILE,
MONTFORT C. RERDELL, THOMAS J.
BRADY, AND WILLIAM H. TURNER.**

FOR CONSPIRACY.

VOL. III.

**WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1882.**



A. 3869

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SOLOMON S. HENKLE,
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very happy to hear him. I do not rise now for the purpose of making any argument, but for the purpose of making this suggestion: if the Attorney-General desires to be heard in this case, and desires to be heard in this case at the close, and, as Mr. Merrick says, is entirely competent, from his familiarity with the case, let him close the argument.

Mr. INGERSOLL. More competent than the rest.

Mr. HENKLE. So that there is no reason why he should simply appear as ornamental, and I suggest that brother Merrick be allowed to make his speech intermediate between counsel for defense, and a reply or two made to him, and then that the Attorney-General close the case if he desire it.

Mr. MERRICK. Do you want to answer me?

Mr. HENKLE. I would be very happy to answer you. I know I should be unable to do it justice, but I am willing to undertake it. This is a matter entirely within the control of the court, as I understand it, and where there are numerous counsel the court frequently exercises its discretion in arranging, so that the plaintiff shall open, and then have an intermediate address and the close.

Mr. BLISS. I do not suppose it is in the power of the court to say what counsel for the Government shall close.

Mr. HENKLE. Nobody asked that.

Mr. BLISS. The proposition made just now——

The COURT. [Interposing.] This is a little family conversation. The court is anxious to consult the convenience of the counsel as much as possible, and this is more a consultation than a discussion. We will take a recess now until 1 o'clock.

At this point (12 o'clock and 13 minutes p. m.) the court took a recess until 1 o'clock.

AFTER RECESS.

The COURT. I think, on account of the storm, we will adjourn the court until to-morrow morning. In the mean time counsel will see if anything more satisfactory can be arranged in regard to the argument of the case. The storm coming on will interrupt counsel in addressing the jury, and, besides that, I believe, there is a little more time wanted for looking up papers.

Whereupon (at 1 o'clock and 15 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

WEDNESDAY, AUGUST 9, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

The COURT. Have you agreed upon the order of your addresses to the jury?

Mr. WILSON. We have agreed, your honor.

Mr. MERRICK. Mr. Ker will open for the prosecution.

The COURT. Let me understand before we start how it is to be.

Mr. WILSON. It is arranged that Mr. Ker will open for the prosecution.

tion. After him there will be two replies on the part of the defense. Then Colonel Bliss, on behalf of the prosecution, will address the court, and to him there will be three replies. Then either the Attorney-General or Mr. Merrick will follow, and to that there will be three replies. Then either the Attorney-General or Mr. Merrick, whichever has not previously occupied the time, will close the case, and it is understood that the Attorney-General may drop out, and if he does not affect the replies of the defense.

Mr. MERRICK. The prosecution having the close, then?

Mr. WILSON. Certainly.

The COURT. And the counsel for the defendants are to arrange themselves as to the order in which the addresses will be made, is that part?

Mr. WILSON. Yes, sir.

The COURT. Mr. Ker, the coast is clear for you now.

Mr. McSWEENEY. Will the court wait a moment for Mr. Ker? There will be a little preliminary concerning a certain paper. [pause, in which Mr. Ingersoll did not appear.] At recess we will call your attention to it. We will not delay.

The COURT. Very well; proceed, Mr. Ker.

Mr. KER. With submission to your honor, and gentlemen of the court, it is customary on occasions of this kind to apologize to the jury for the length of time that has been exhausted in this case. We propose in this instance to break through that time-honored custom and start upon a new line, and we do not propose to apologize for anything. I do not mean that disrespectfully to you, but in the sense that the prosecution has nothing to apologize to your honor started out in this case by saying, "I am going to try this case on the 1st day of June, and I am going to finish it on the 4th day of June or before that." His honor was true to his word. He started on the 1st day of June; I won't ask him to apologize, but he did not keep the balance of that proposition. It was not concluded on the 4th of July, and I want to call your attention to the reason why it was not concluded. The multitude of witnesses, the cloud of witnesses from the great far West, where these star routes were in operation, on behalf of the defendants and occupied the time of the court for many weeks that the 4th of July slipped by. Judge McSweeney may laugh, but when it comes to your turn, explain to the jury that the witnesses you have so faithfully promised them to put in an appearance.

Now, gentlemen, so much for the delay in the case that has been caused by the prosecution. We had a great mass of evidence laid before the jury. It occupies over twenty-one or twenty-two printed pages, altogether. The prosecution's case runs up to over a hundred pages and over. We had a great bag filled with papers, route after route and paper after paper we laid before you, and you, gentlemen of the jury, and you listened to what was read and you examined the papers, and you evinced a patience that is very rare on the part of jurors. I know that at one time his honor said, "Oh, that does not amount to anything," and I do not wonder at it, because when you take these separate papers and look at them by themselves they appear as innocent as a sleeping baby. But when you come to put them together and fix them one with the other, they show a craft and a cunning that stamps them with the brand of crime. Now, we had to put all these papers in evidence before you in order that you should under-

case and that you should see what the evidence was, upon which we asked you to convict.

About four weeks ago, my distinguished friend, Judge McSweeney, rose up before his honor and said, "At the proper time I will make a motion to dismiss this case from before the jury—at the proper time I will make this motion." I say to him, now, that in a day or two will be the proper time to make a motion before you, gentlemen of the jury, but I know you will deny his motion, and the next motion he will have to make will be upon his bended knees at the White House when he is asking executive clemency. His colleague, about three weeks ago, said: "It is the last speech I will have to make in the case," and he said that before you, gentlemen, when addressing his honor, "It is the last speech I will have to make in the case, so go ahead." I have heard him make a dozen since. I have heard him appeal to the court since, and to the jury, and probably he will appeal to you, and I will not object to the strongest appeal he can put, and I will not interrupt him, and when he goes to the White House, arm in arm with his colleague, to get down on his knees to beg from the President the mercy that he would have extended to his clients, why I would not go there to say "no," because he has gone to the proper place to make a proper request; but he is making a great mistake when he steps into a court of justice to make such a request there.

Now, if you take the case as it has been given to you by the prosecution, as I said before, there is very little of that case that you could understand. It seems too innocent to warrant you in saying that there is any crime there, and the counsel on the other side may have been misled when they took these orders and petitions and oaths, and read them over, and said, "Why there is no jury in the land that is intelligent enough to put them together, and you cannot pick out twelve men who have brains enough to put these items together and make a case out of it." Well, I presume ordinarily that is a fact. The misfortune is, that in many instances juries are drawn in such a way that they do not possess the capacity to understand the case, and where there is a mass of documentary evidence, where there is a case that requires more than usual intelligence and consideration, on the part of the defense it is always policy to throw away as many good men as they can, and take as many men who have not the intelligence to understand as they are able to select. But there is a limit to all things. There is a limit to challenges, and there is a limit to their objection, and fortunately we were able to get a jury that, from what I observe as to the manner in which they have taken notes, and the care and the attention which they have paid to the case, will be able to understand it, and will be able to render a just verdict upon the evidence.

Now, this is not an ordinary case. There is not a man who is within the sound of my voice who will ever live to see the equal of this case again, and none of you twelve gentlemen will ever again sit in the jury-box on a case that is as important as this, and one that will go down into history among the legal records as one of the celebrated cases of the country. What was Guiteau's case compared with this? A mere question whether the man was crazy or not, a trifling case in comparison with this. I say to you that in the history of the entire world there is but one case that has a parallel to this on account of the standing of the people engaged in it. The interests of the people of the country have been excited in this case. There is not a hamlet, a city, a town, a county, a State, from one end of this great Union to the other, that does not know of this case, and where the people are not

anxiously and eagerly waiting to know what you are going to what your verdict is. Their verdict is already made up and waiting for yours. It is a matter of the greatest importance. Misfortune sometimes directs the tongue of slander, and that tongue has gone out with the words spoken that are to cast a doubt upon your integrity. It is a misfortune that people throughout the United States should imagine that society here is so soiled with corruption that we could not select twelve honest men who would render an honest verdict. Gentlemen, that makes the case doubly important. Here is the seat of our Government. Here is the place where our national laws are made. Here is the place where the law ought to be enforced in all its strength and purity. Here is a place in the whole United States where the strong arm of the law should be raised to crush out crime. It is in the city of Washington and I say it is a public misfortune that people should imagine that justice cannot be administered here. If this were a monarchy there would be no trouble about Brady and Dorsey. They would not trouble a jury much about it. If we lived in France or Germany or England we do not think they would bother a jury much about them. They would lock them up first, and then investigate it afterwards. But we have different institutions, and we feel a pride in them. Our institutions are upon trial. I have told you that the case is watched from one end of the country to the other. It is watched from one end of the continent to the other. There is not a paper printed in the English language throughout the world that has not an account of the star-rocket where a semi-Cabinet officer is brought before a jury for corruption, where an ex-United States Senator is brought before a jury, where all the power of aristocracy is brought to bear with its influence. And yet like humble private citizens, Stephen W. Dorsey and J. Brady appear here in court before you twelve men, and you pass upon their case just the same as if they were the humblest lowest people that could be found in the community. Of course in a country where they do not understand our institutions, where their sympathies run against us, where their sympathies probably might be for the defendants on account of their standing, they will say, "We can do nothing with them; your institutions are not strong enough to reach out and to grapple with people who hold high and lofty positions. Your institutions are not equal to the task." Gentlemen, when the trial is concluded, when his honor has charged you, when you retire to consider your verdict, when you return to the court-room to render your verdict, it will be a proud and triumphant vindication of American institutions and of the trial and of the purity of the trial before a jury.

Now, I am going to bring this case down to the plainest, closest, narrowest compass that I can. I am not going to waste your time going off into matters that do not belong to the case. I am not going to take up public time by rambling here and there. My business is to bring out the practical details of the case. It is to show the orders, the dates, the acts of these different people so that you can see where each man performed his individual transaction. Now, of course you have heard it during the trial, and whether you heard it or not, your own good sense would tell you, a conspiracy is an agreement, and an agreement may be made by word of mouth; it may be put into writing, or it may have no words spoken; it may be inferred from the facts without a word. And how far that agreement goes his honor will tell you, but it may, as I say, be something in which there was no language spoken and in which no language appears. I want you to bear that

because I do not want you to run away with the idea that we are bound to prove that they were seen together, and that they were heard talking together, and that they made a confession. Now, his honor will tell you that we are not bound to do anything of the kind, and your own good sense will tell you the same thing. The agreement is an inference which you are to draw from all the facts in the case, and a conspiracy is one of the hardest crimes to prove and one of the clearest after it is proved.

Let me, first of all, call your attention to the people who are charged in this indictment. John W. Dorsey, who he is or what he is we have never had the pleasure of knowing, excepting by the speech, not of his counsel, but of Stephen W. Dorsey's. John R. Miner, who he was or what he is we are equally left to conjecture, and the only information we derive is from the unsworn testimony of Mr. Hine. Ordinarily, I would take Mr. Hine's word for anything, but, in a matter of this kind, I think the court will say you are utterly to disregard it. Then we have Thomas J. Brady. Brady was the Second Assistant Postmaster-General, and he went into office in 1876, and he went out of office—now, gentlemen, remember the date—in April, 1881. Stephen W. Dorsey; we know something of him, partly because he has figured in our national history, and partly because his individual counsel, Judge McSweeney, volunteered to tell something about him. And Judge McSweeney stands in the same category with Mr. Hine. They are both pleasant, nice, good gentlemen, and I would believe them both if they were to tell me anything privately, but in this matter his honor will say that you are to utterly disregard what they tell you. Now, Mr. Dorsey was a Senator. That, I suppose, we all know. He came from Arkansas, and did not belong there. He loaned his valuable services to the State, and served in the United States Senate. He went out of office—do not forget it—on the 4th of March, 1881.

THE COURT. The 4th of March, 1881? You are mistaken. The 4th of March, 1879.

MR. KER. Your honor is right. I made a mistake. The 4th of March, 1879. It is not hard to get a few figures mixed. But there is one thing, gentlemen, if at any time, at any stage of this case, I say anything that you have no recollection of, or that you wish to contradict, or that you want me to prove to you by the evidence in the case, get right up and tell me of it. You are to sit in this case. It is not for me to confound your understanding, and it is not for me to tell you that which is not true. We want nothing but the truth, and we want that fully and clearly. You are the people who are to decide this case, and you are the ones most interested in the case outside of the defendants themselves.

Then Mr. Dorsey retired from the Senate on March 4, 1879, and it does not appear from national history that his valuable services have been sought after by any other State. I do not know whether he might not have gone somewhere and tried, if it had not been for this little interruption.

The next is Mr. Rerdell. Who Mr. Rerdell is, is another question. I have not heard a counsel even volunteer, unsworn or any other way, to tell this jury who Montfort C. Rerdell is. We do not know who he is, excepting so much as he chose to tell the three gentlemen who testified to what he told them, and that little portion of it was in no way creditable to Montfort C. Rerdell.

Then, we have Harvey M. Vaile. [Glancing around the court room.] Has he gone home?

Mr. WILSON. No, sir.

Mr. KER. I do not see him here.

Mr. WILSON. He is about.

Mr. KER. However, his check is here in this court.

Mr. HENKLE. Say what you have to say to us.

Mr. KER. Yes. We have Mr. Vaile. Now, Mr. Vaile went stand and told you who he was. He is a farmer. He lives in Independence, Mo. That is a good name for this case—independence, you please, right or wrong. He is a farmer who lives in Missouri is a lawyer. He swore to that. That is a thing I would not swear to as far as I am concerned. I would like somebody else to that for me. I am a member of the bar, but he is a lawyer, he swore to. And he is a mail contractor. See how General laughs at that. Well, Mr. Vaile did take the stand and did tell you who he was, and when you come to recollect what Mr. Vaile told you, you will have to recollect it carefully and put it with the other facts in this case, because our distinguished friends on the other side are going to undertake to put a witness on the stand that we did not extract from him something that was beneficial to our side, and a little bit to theirs. Even to the young gentleman who got upon the stand and told us that he was going to tell us the price of hay. Great grief! The price of hay is away out there! Why, I do not think there is a gentleman on this stand who has not seen that young gentleman knocking around the block in town here. You might have gone into brother Wilson's office and found him seated there, and he was going to tell you about the price of hay.

Mr. Vaile told us something that was a little beneficial. He told us that he had a date or two, and when you come to put the date or two together, you will be astonished at how important it becomes.

Now, let me go back, gentlemen, and again call your attention to the figures. Do you not remember it was testified that these routes were advertised in November, 1877? The service was to begin on the 1st day of July, 1878, and it was to run along for four years. Now, the 1st day of July, 1878, is the date that these contracts were made, the effect, the date that they should have been galvanized into life, the date that they are to run for four years up to June 30, 1882. On the 1st day of July, 1878, they were to start the service. The last of July or the 1st day of August, one month after the service should have been begun, I told you that he met Miner, and he went with Miner to see Brady. That was an act of pure charity. His farmer, lawyer, mail-contractor, and mail-warmer, warmed to Miner. [Looking around the room.] Where is Miner?

Mr. HENKLE. Here. [Indicating himself.]

Mr. KER. Oh, you are Miner, are you? No, no, general, I will never be like Miner. They would never take you up in the street for a pickpocket as they would him. I wanted you to look at the faces of the gentlemen of the jury. I wanted you to see the man that the heart went out toward. He went with Miner to see General Brady. It was to coax Brady to give Miner an extension of time. Miner was not able to put on the service. He could not put the service on. Mr. Vaile wanted to coax Brady to give Miner this grace. They went together to see Brady. What sort of a powerful argument Vaile made, I do not know, but he says, "When I left Brady I promised to go to Independence and to consult with my friends about taking up the service." Of Miner? No. Of John W. Dorsey, of Peoria? No. Of Miner. He was to take charge of the whole business excepting the mail-warmer, Watts. Watts was another Boone. There was not anything

except that he knew something about the routes. Now, Vaile returned home on the 20th of August. On the same day he got a telegraphic dispatch from Brady. That dispatch was read to you. On the 20th of August he got this dispatch from Brady asking him if he was going to put on the service. He says, "I waited for two or three days, and then I answered it." Now, that would be the 23d of August. "I answered it, I would put it all on but Watts's." Here is the 23d of August, when Brady gets the answer that the service is to be put on. On the 29th day of September Vaile came to Washington, and on the 30th day of September Vaile signed the agreement. Now, he says, "We had an agreement before that." Remember what he says, "We had a verbal agreement before that." Well, unless it was a verbal agreement that was made away back in August; it must have been a very short one, for he got here on one day and signed the contract on the next. He says, "We antedated the subcontracts." He was questioned about antedating his subcontracts. It struck Mr. Merrick's honesty. Mr. Merrick never had had dealings with people quite so crooked, and when he came to remember that the contract was dated away back, so as to cut out the poor unfortunate fellows who had made the subcontracts, and were carrying them out, then the rascality of the thing appeared so plainly that it struck Mr. Merrick, and he repeated the question as to the honesty of the transaction. Then his honor said, "It is an honest answer." I suppose it struck his honor that it was a very honest answer for a very dishonest transaction. Now, we have got Mr. Vaile and the dates, and I will refer to them as I go along, and when I come to tell you the act of each person, I want you to bear in mind those dates, for they become very important.

Now let us go a little further back. Let us take the testimony of Boone. Boone says that he was in the Post-office Department, and he saw Stephen W. Dorsey, and Stephen W. Dorsey invited him to his house. Boone went to Dorsey's house; went to Dorsey's room, and there Boone met with Miner, there Boone met with Rerdell, and there Boone met a man that was introduced to him as John M. Peck.

Mr. HENKLE. No, Mr. Ker; that is not the testimony.

Mr. CARPENTER. Let him go on.

Mr. KER. You say no; let me recall it. Did not Mr. Boone on the stand say that a man named Peck that was introduced to him signed these contracts? Did he not say, "I have found out since he was not John M. Peck; that John M. Peck was at Chico Springs." There cannot be much dispute about that. Says he, "I found out from the testimony before the Congressional committee that he was at Chico Springs, and could not be here." Then again he said there was a proposal spoiled, and they took it out of the room. It was Peck's proposal. They brought it back signed with Peck's name, and it was put in. Right here on this witness stand we proved to you beyond a doubt that John R. Miner wrote that proposal and signed Peck's name to his oath and put it in the department. When I come to go over the routes I will point it out to you. It is right there in that bag [indicating], and I say now, if they have a witness who will dare take the stand and say that that is not Miner's signature to that affidavit, and to that proposal, I will sit down until they prove it. We are not here for buncombe. We do not ask a conviction simply because we want it. I do not care a picayune about the whole of them, and I do not care personally whether you convict or acquit. I want simply to see justice done, and as long as I am in the case I will open every door for you to disprove any fact that I offer here to this jury as an inducement for them to convict.

Now, gentlemen, we have settled the point that Peck was not here. There is not a witness who went on the stand outside of the notary Taylor who ever saw John M. Peck. I wish to God that John M. Peck's name were out of that indictment. For I believe if there ever was a man injured, if there ever was a man who has gone to a higher tribunal and whose good name and fame and credit and reputation have been traduced and brought into infamy and disgrace, it is John M. Peck. There is not an act in the whole of this transaction that puts John M. Peck before you as a criminal. Not an act. Miner, Rerdell, John W. Dorsey, and Stephen W. Dorsey shall answer for every transaction, and I will bring it home to them one after the other.

Well, they were all together, and they were going to put these proposals in, and they were going to get the contracts, and they made a selection of the routes that they were to put their bids in upon. They were to bid upon the low routes, once a week, twice a week, and three times a week. They had the experience of Boone, and they had the experience of Watts, and they were getting bids up, and they were preparing them to put in the department, founded upon the experience of these men. The writing was done in Mr. Dorsey's private room in the Senate. The proposals were got together there. They selected a good place for a bad deed. The bids were put in and they were awarded. Now, Mr. Stephen W. Dorsey allowed this to take place in his house and allowed the writing to be done in his committee-room. The awards were made. Then Boone says, "I had to get out." Why he had to get out we could not extort from him. The rule of law is that you cannot cross-examine your own witness unless you are deceived by him; unless he testifies directly opposite to what he told you, and then, of course, it is all under the watchful care of his honor. You know his honor sits on the bench to check us when we go too far, and to check the gentlemen on the other side when they go too far. He is nobody's lawyer. He represents the majesty of the law. If these people came here without any lawyer to defend them, then his honor would see that they got justice, and that justice was administered. He would watch over their interests, and if their attorney had not brains enough to take care of them his honor would step in and say, "Oh, no, you cannot do that." That is the duty of a judge. I think his honor has fulfilled that duty. Once or twice I felt disposed to quarrel with his honor about his ruling, but I have gone over the evidence since and know more about it. I have read it carefully, and I have not a word to say against a solitary ruling made by the court. Well, his honor said, "You cannot cross-examine Boone," and we could not, and we did not find out the reason why Boone left this combination. He came back on the stand yesterday and was shown a contract. Remember Vaile said that he met Miner the first of August or the first of July; somewhere about there. Boone says, "Here is a contract dated in April. That is not antedated. It was made by Miner and it was made by Vaile, and that was in April." Now, he contradicted Vaile in that respect, but he went a step further and said, "They took it away from me by force." That was a contract that Boone was to have, and they took it away from him by force. In order to get rid of the force of that statement of Mr. Boone's, he was asked if he did not keep any books; and smarting under the recollection of losing that valuable contract, he came out and told a little more than he originally contracted to tell. He said, "We ran it on grave-yard principles, and kept no books." Now, if they had let him alone, he would never have told you that. You see, Boone had been in with these people, and expects to go back to the party, and did not want to have any more trouble put in

his way than there was any necessity for. Therefore he did not care to tell any more than he was compelled to tell; and nobody knows better than my distinguished friend, who has shown so much ability in this case, Judge Wilson, that Boone did not testify on our part willingly and cheerfully. Nobody knows better than Judge Wilson that he was never promised either immunity or dollars or cents. Nobody knows better than he the warm heart and the strong arm that Boone placed around his clients when he wept over the testimony that he gave here that was calculated to send them on at the rate of forty miles an hour to the penitentiary in Auburn. Boone did not testify cheerfully for us. If he had, oh, what an opening he could have made. You see we had nothing to offer him; nothing at all. We could not give him anything. We cannot draw a dollar out of the Treasury unless it is approved, and unless it is supervised, and we have no money to throw away upon witnesses. We have not anybody who loves us so much that he is willing to come and testify that he knows all about Colorado and Oregon, and all about the price of hay. But Mr. Boone told you about this transaction that took place there; the inception and beginning of it.

In order to take up this conspiracy, I will be compelled to go off a little again, and call your attention to Mr. Rerdell. I do not know who represents that gentleman. I don't know whether anybody represents him or not. I have never heard a counsel ask a question of a witness that was calculated to clear Mr. Rerdell from suspicion. I have never heard a counsel put a question to a witness on cross-examination that was calculated to benefit Mr. Rerdell in any particular. Mr. Rerdell is called Montfort C. Rerdell. That we do not know. We have a suspicion that way. He is called M. C. Rerdell. That we do not know either, except that people say that his name is written several times here on these pages. They say more than that; "that he is the handiest fellow to write other people's names you ever saw." There is hardly a man that appears in this transaction, excepting those made by Turner and Brady, that Mr. Rerdell has not taken upon himself to sign the name in some shape or other. Then, again, he is called Montfort C. Rerdell. We have a suspicion that way. We have an idea from some of the witnesses on the stand—because you know Rerdell is one of these mysterious gentlemen who is moving around, and who takes a name according to the number of times that he has to change his residence. When it gets hot in one place it is a very easy thing to change the name and go to some other place, and I presume that has been his course of conduct. I don't know, but I think it is written in the history of our country that Mr. Rerdell figured extensively somewhere in Arkansas, and I don't think he would like to go back there unless it was a very cold day. Maybe he could not find a day cold enough to go back there and stay ten minutes. However, Mr. Rerdell has these different names, and we were under the impression that somehow or other we would find somebody who did know him, and that we could ask him where in the mischief he came from and who he was. It was a thing we would like to know, because really, gentlemen, while I think there is not a shadow of doubt as to Mr. Rerdell's appearance in this transaction, I do not like to let him go without knowing anything more about him. You see I have been in this sort of business for a number of years, and there is no telling but when Mr. Rerdell has done penance, as he ought to, in the proper penal institution, that he will not turn up somewhere else; and in the interest of the country I might like to know something about him again. Catch one of these fellows once, and he is dead certain to come to it again. He can't keep away from it.

There is a fascination about it. Well, Mr. Rerdell took it into his head that he would make a confession, that he would go and make a statement of what had been done. So he goes off to Senator Clayton and he wants to be introduced to the Postmaster-General, and Mr. Clayton takes him to the Postmaster-General, Mr. James, and the Postmaster-General listens to what he has to say, and he says, "Now, you go to the Attorney-General," and Mr. Rerdell was taken to the Attorney-General, and there he sat down and made a statement of his connection with this case and the connection of the different people in it. By a singular coincidence, Mr. Rerdell confirms everything that Vaile said. Mr. Rerdell confirms everything that Boone said, and Mr. Rerdell confirms everything that everybody else said, when he made his statement to the Attorney-General. He told Senator Clayton that he would either have to commit perjury, tell the whole story, or quit the country. I don't know whether he ever committed perjury before. May be he did. I have a suspicion that he quit the country, and I don't think that Mr. Rerdell imagined a second dose of the same medicine would be very pleasant. So he went to the Attorney-General and told him all about this case; how the bids were got up at Senator Dorsey's house, how Miner was in it, how Vaile was in it, what Dorsey did, what Brady was to do, what Turner was to do, the percentage that they were to get, the money that was to be paid, the books that were kept, and all about the entire transaction. I do not want to go now into the language of that narrative, because it does not exactly fit in here; but I simply want to bring you back to it, because I know you will remember it. It was the same story that was told to Postmaster-General James: That Brady was to get the money, that Turner was to get his share, that Stephen W. Dorsey had the arrangement fixed up in his house, that John W. Dorsey was in it, and that Vaile was in it, and that Miner was in it, and that they were to divide the proceeds. They were to pay Brady, they were to pay Turner, and they were to divide the proceeds. Just here let me make a remark: When I see Judge Wilson's face light up with a smile I know there is something coming, and that Judge Wilson is striking in upon a happy thought; it is this: Gentlemen, there is a thing called the statute of limitations. All these acts must have been done, or a portion must have been done, within three years. From what time? Within three years from the 20th day of May, 1882. It has been stated before the court; counsel have got up and held this indictment up and said, "This conspiracy is charged on the 23d day of May, 1879." Well, now, you saw how quickly his honor brushed that fly speck away. It must be within three years from the time the indictment was presented to the court. This indictment was presented to the court and filed on the 20th day of May, 1882. We could have put in the indictment any day at all within the three years. It was a mere matter of amusement to put in the 23d. I wrote it because twenty-three seemed to be a pretty good set of figures. I might have made it twenty-four or twenty-five. But you are to guide yourselves by the 20th day of May, 1879. Judge Wilson smiled. The reason was that if there was a conspiracy formed outside of the 20th day of May, and nothing done by these people afterwards, guilty or not guilty, it makes no difference. The statute of limitations shut us off just as clean as a knife would cut through a watermelon. The statute of limitations would bar a prosecution, and where the judge's smile comes in is here: He will tell you or argue to you—they will all do that—that if you find that what was told you was true, that they separated before the 20th day of May, and went on different roads or different branches, as one of the counsel put it, different

arms, and had nothing to do with each other afterwards, then the statute of limitations shuts it out. That is true. We will not deny that, except that it ought to be qualified; that it ought to be qualified. If they started out to cheat the Government every year for years, although they may have separated their little tricks and ingenuity before the 20th day of May—take the law from the court—the judge will tell you they are just as guilty as if they had gone right straight along with it. We live under a peculiar law. It requires something to be done by one of the parties in order to fix the guilt. Now, at common law in the different States, if two or more persons get together and agree to do a thing, and they do not go any further than to make the agreement, they can be convicted of the conspiracy, because the law does not permit people to make unlawful bargains. But, now mark you, gentlemen, under your law you have to wait until one of the parties to the conspiracy does something to effect its object.

Now, let me give you an illustration. Two men or three men agree to beat, whip, or assault a man that they know. This agreement is made on the 19th day of May, 1879. Now, if it were in any of the States they would be punished for making that agreement. But here you have to wait until they do something. Now, after this agreement was made—now remember that I have given you the date the statute of limitations would cut out—they come in and say it was done before that time; it is true we did it, but it was done before that time. Under your law you must wait until an act is done. Now, suppose that on the 21st or on the 22d day of May, 1879, after making this bargain, one of the men went to the house of another and coaxed the man out in order to give him a whipping, the other two probably not there. He was going to coax this man so as to bring him to the other two and get him whipped. Suppose one of the other people took a whip or a knife or something in his hand in order to help him to whip the man. Now, there are two overt acts committed—coaxing the man out, and the man fixing himself with a knife, in order to wound the man so coaxed out. Those are acts that are done in pursuance of the conspiracy, and that brings the original conspiracy within the three years. If Dorsey and company conspired in 1878, and they kept on doing their acts to reach the end, which was to get the money out of the Treasury, every act they did was a renewal of the conspiracy, was a new overt act that fixed their responsibility, and the responsibility never ended as long as an act was being performed. Oh, but a man can withdraw from the conspiracy. Yes; but, gentlemen, when we show that he went into the conspiracy, it is his duty to show by testimony that he withdrew, and there is not a particle of testimony to show that any one of the people connected with this conspiracy ever withdrew from it at all. Quite the reverse. Down to the very moment in which the aid of the law was invoked in order to bring them to justice, in order to stop their stealing, their acts appear just as regular as clock-work; and if this prosecution had not been brought, they would have continued to the end of the contract term.

Now, there you have the beginning; you have the statement of the different parties that was made showing what was done. Now, there is another point, and that is Mr. Brady. He was Second Assistant Postmaster-General, and the law of the United States gave him the power to increase the service. At his pleasure? Oh, no; oh, no; “with due regard to the productiveness and other circumstances.” If there was a sudden war, the Postmaster-General might put on extra mail service. If there were a calamity of some sort, or the mail on a route suddenly

grew out of proportion, he could put on extra service, for there would be a "circumstance." But to make a contract one day, and deliberately double it by hundreds and thousands, there was no such power vested in him.

Well, let us get rid of that. The testimony shows, by Brady's own statement made to Walsh, that he received a portion of the money, and Rerdell confirms Walsh, and Rerdell's statement was made long before Walsh ever thought of going on the stand. Now, as far as Brady is concerned, that is the end of that. If he took the money, why certainly he is liable.

Now, you have all of these people arranged in the proper order, and I have given you the dates that I ask you to remember, and I ask you to remember Vaile's statement that all of these routes were not unproductive, and the greater part of them no service was put on until January. Keeping these facts in your mind, it seems to me that the best way to call your attention to the different items is to take the different routes as the testimony was offered before you, beginning with the first and winding up with the last. I do not want you to think that I am going to pile it up and keep you for several days, for I am not going to do anything of the sort. It has been piled up and magnified to such an extent that it would be impossible for you to forget it; that it would be impossible for my eight or ten friends on the other side, if they were to talk to you in sections of one each, to explain it away, and my business will be to take these facts and figures—here they are [referring to memoranda before him]—shortly and consecutively, and I will shoot them in, and when the time comes let us see if they can ward them off.

ROUTE NO. 34149, KEARNEY TO KENT.

Let us begin with Kearney to Kent. In the first place this is in Nebraska. It was one hundred and twenty-five miles long. It was one trip, and sixty hours for making the trip. John M. Peck was the contractor. The first thing that appears in the record is on the 4th of March, 1878. Peck writes to Brady to send the contract to lock-box 714. May 3, 1878, Brady orders:

From July 1, 1878, embrace Fitzalon next after Sweetwater.

September 24, 1878, Brady orders:

Allow contractor \$112.24 for increasing to Fitzalon, beginning at the first of July, 1878.

February 1, 1879, Peck's oath was made before Taylor. February 2, 1879, there is an offer made by Peck to convey the mail on a reduced schedule. On the 8th of March, 1879, Vaile makes a subcontract, dated March the 8th. On April 3, 1879, the oath of Peck is filed. On July 10, 1879, Brady orders:

From August 1, 1879, increase the service, Kearney to Loup City, 75 miles, to three trips a week, and allow the contractor and subcontractor \$1,122.41; expedite the schedule to 13 hours, and allow the contractor \$2,200.

February 3, 1880, the subcontract was made with Charles H. French. Now, from 1879 to 1882, Vaile drew the pay on this route. You remember the testimony given by Mr. French. He says, "I carried the mail from Kearney to Loup City from 1878, and always carried it in twelve hours." You know it was reduced to thirteen hours, and he says, "I always carried it in twelve."

Now, gentlemen, let me go back and point out to you some other facts that are not contained in the record, but yet that belong to this route.

I do not know whether you have preserved your maps or not, but you will remember that this route was expedited from Kearney to Loup City. Remember it is one-half of the route from Kearney to Loup City. Now, the first thing that appears is the letter of Peck to Brady to send communications to box 714. It has been testified to you that that was Mr. Miner's box. Then, on the 3d of May, Brady makes an order to embrace Fitzalon next after Sweetwater. Remember from May up till September he had made no order upon this route at all, but do not forget that that was the time that Vaile and Miner had been talking to General Brady. That was the time that General Brady had taken the interest that he took in these routes to ask Vaile to put the service on. Now, in that connection, just bear in mind this one fact, that if these people were not carrying the mail at that time, if they had not started the service, if they had done nothing towards carrying the mails, if trips were needed, if increase was needed, as these petitions and oaths and letters will show, if they were true; take Brady's statement to Walsh; take Rerdell's statement to the Attorney-General and couple it with these facts, and ask yourself, was it an honest transaction when he could have declared them failing contractors, readvertised the routes, and opened them up for competition?

Then, on the 24th of September, he allows \$112.24 for Fitzalon. And, gentlemen, it was on the route; it had never been off it. The mail went through it, and he made this allowance knowing that the carrier went through Fitzalon every day that he carried the mail, and there was no occasion for allowing any such sum. On the 22d of October, 1878, Peck sent a letter to French, the subcontractor, about side supplies, and he says in that letter how the side supply can be carried; that it can be served once a week if the postmaster won't kick:

WASHINGTON, October 22, 1878.

C. H. FRENCH, *Loup City, Nebraska*:

DEAR SIR: Every office on a route must be supplied or a reduction will be made, *provided*—

And this "provided" is underscored. I call attention to that—

the fact that the office has not been supplied is not reported. The only way to manage such difficulties as you have is through the local postmasters.

That is good advice.

You can supply an office once a week by a side supply, provided the postmaster at that office is satisfied, and don't kick.

The postmaster is to be satisfied.

The department will not authorize it, but they will not find any fault unless reported.

Of course if it is not reported, how does the department know?

It is better to send petition for increase to your Senator, but notify us when you have done so, that we may help it.

Truly yours,

JOHN M. PECK,
Contractor.

[A note was handed to Mr. Ker by Judge Carpenter.]

Judge Carpenter sends me a polite request that when I read anything please to give him the page. Well, judge, I will accommodate you, but I sat up for three nights to hunt them up. I will give you the page and I will give you the date. If I cannot, I will withdraw it. We intend

to be honest, and to deal fairly and squarely. We will rub you hard, and we expect to be rubbed back. If the postmaster won't kick, we will.

Now, then, on the 1st of February, 1879, Peck's oath is made before Taylor, at page 374. Gentlemen, that oath calls for thirteen hours, three times a week. It was one trip, it was sixty hours. The oath calls for three trips and for thirteen hours. Oh, tell me where they got the information that it was to be boiled down to thirteen hours? However, it was put in. Now, gentlemen, the character of that oath underwent a little scrutiny. Some of the witnesses did not think, according to their testimony, that it was an honest and square oath. John R. Miner wrote that oath. Miner signed Peck's name to that oath. It was perjury as willful and corrupt as ever was committed, and Taylor says the man who represented himself as Peck signed that oath. Oh, John R. Miner, there is not an oath here of poor Peck's, excepting one, that you did not sign. Do not forget that, gentlemen. The oath upon which the increase was based on Peck's route was signed by Miner, and sworn to also by him, if you believe what Taylor said. Do you not remember that we asked him about it and he said, "Yes, he came there with a whole batch of them and swore to them"? [To counsel for defense.] Did you ask him where Peck was? It was none of our business. Did you ask him where the man was that swore to them? We knew. We had nailed it down to Miner, and we did not choose to have you open the door and walk in and wrestle with us on that subject.

The next is February 2, 1879. Now, this oath is made on the 1st of February, and on the 2d of February there is an offer of Peck to carry the mail, and that offer, of course, contains the oath and the letter. Peck's name is signed to that. John R. Miner wrote that letter and John R. Miner signed Peck's name to it. They have offered power of attorney. Is there a power of attorney that could be given that would authorize Miner to commit perjury? Is there a power of attorney that could be given to authorize Miner to swear to an affidavit in Peck's name? His honor will tell you, as your own good sense will tell you, there never was such a power of attorney invented. I suppose if you were to take Miner up by the heels and shake him, you would shake out dozens of them with Peck's name signed to them. He could make one as easy as he could write, and there would be no trouble about his getting enough to fill the court-house if he thought he could convince you he was an innocent lamb.

On March 8 Vaile makes his subcontract. Miner signs that subcontract as attorney for Peck, and Mr. Kerdell is there, and puts his autograph to it as a witness. Now they are working together. On the 3d of April, 1879, the oath was filed. Gentlemen, it was made on the 1st of February, 1879. On the 2d of February Mr. Miner prepared a letter. On the 8th of March Vaile comes in between with his subcontract. On the 3d of April, then, the oath is filed; everything is cut and dried ready in the department, the business is in such a shape that it can go right through, and the oath is put in. Now, on the 3d of April they file the oath. On the 15th of April, 1879—Judge Carpenter will you turn to page 418 and see if I read correctly, near the bottom of the page?

LOCK-BOX 714, WASHINGTON, D. C., April 15, 1879.

C. H. FRENCH, *Loup City, Nebr.:*

DEAR SIR: Yours of the 3d received. We are hoping that Douglas Grove will be put on some of the routes to be advertised soon, to commence October first. The rec-

ords of the department show that South Loup was discontinued a long time ago. I had no notice of it. Centennial has not been discontinued, and we fear cannot be.

Truly, yours,

JOHN M. PECK.

There is not much in that. If he had stopped right there he would have been all right; but he put a P. S. to it. It used to be fashionable not to close a letter without a P. S. But we have become more practical now, and put it all above our signatures.

P. S.—We are hoping that three trips to Loup City will be ordered soon. Senator Saunders has strongly recommended it. It will be well for your people to write him thanking him for what he has done, and ask him to continue to urge it.

Now, that is well put. He writes to Mr. French to get him to get the people started to work, to keep Saunders at it with a petition.

On the 10th of July, 1879, Brady makes the order. It seems that Saunders had pushed the thing along, of course. The people needed it. They required it, as Judge Wilson put it. However, Brady makes an order, and he orders three trips to Loup City, and allows \$1,122.41. Then he cuts down the time to thirteen hours, and allows the contractor and the subcontractor, who was Vaile, \$2,200. Then he puts this in as a saving clause: "It is less than pro rata, but as per agreement." You remember that Mr. Miner had written in Peck's name, offering to carry the mail, and sending the oath along so as to convince Brady that he was doing a good thing, and so that Brady could file it, and if the Postmaster-General looked to see, he would see that his faithful Brady was taking care of the interests of the Government, and had allowed these trips at less than what they ought to have cost. When this route was under investigation there were some petitions that were offered, and one of these was a petition that French had circulated. French had the petition circulated, and when he was on the stand and was asked about that petition, it was shown to him and the question was, "Did you see the words 'schedule, thirteen hours,' in that petition?" He says, "No, I never saw it. It was not there when I circulated it." Why should it be there? He was carrying the mail in twelve hours, and what in the mischief did he want the thirteen for under those circumstances? He says he forwarded the petition to lock-box 714, or rather to Senator Saunders. Senator Saunders says, "I don't remember whether those words were in it or not. I sent it to General Brady." Senator Saunders testified on the stand that he indorsed that petition. It is brought into court here, and the witness says there was no such thing upon it. "I did not ask for it. I was carrying the mail in twelve hours." Here is this expedition ordered by Brady, and the money is paid out for a service that was better performed before the order was made.

Now, let us look at the oath. The oath says that on the present schedule it would take two men and four animals. That is six. On the proposed schedule it would take six men and fourteen animals. That is twenty. Fourteen and six are twenty. That is the way they add. Now, they were to get the difference between six and twenty if they had made the calculation according to the oath, but he agrees to do it for less than that. About four or five hundred dollars is kindly knocked off. Now, turn to the testimony that was given in the case. The present number are two men and five animals. That is seven. "On the expedited schedule, when I went to Cedarville"—don't you remember Cedarville was put on, and he had to go down the road and come back that road again—"I used thirteen animals." That is seven less than

was sworn to in the oath that Miner signed, but he says, "When they took Cedarville off I only used seven animals." That was ten. Just one-half of what Miner falsely swore to when he put in Peck's affidavit. I see some of the gentlemen looking at the record. If I make any mistake, I know they will overhaul me. They are noticing everything that I say or do. If I happen to turn around I see the eyes of the counsel fixed upon me. When one of the jurymen asked me if he might go out, they sent me word that I had sent one of them out. Before I get through it will be a caution if I do not send the defendants out.

Mr. HENKLE. That is what we expect.

Mr. KER. Now, gentlemen, let us take this route after having it fixed up according to the manipulation of Miner and Rerdell, Vaile and Brady, and Mr. Turner, because who told Miner to put it at thirteen hours? Who gave him the cue that it was to be thirteen hours? Where did he find that out? I have asked that question several times. I hope they will answer it, but I hope they will not answer it by any volunteer statements of counsel. The original pay on this route was \$868. Then they increased it to three trips and reduced the time, and the increase amounted to \$4,302.65. They paid the subcontractor \$1,587.40. Gentlemen, there was a clean, clear profit upon this route of \$2,715.25, and they never used a horse, nor a cow, nor a cat, nor a dog, nor a monkey on the route unless it was Miner and Rerdell. That was the profit they derived on that route, and they had nothing in the world to do. That was the profit derived on that route when Thomas J. Brady could have known it by sending to the inspection office that was in his department, that belonged to his office, or by sending out one of his agents he could have found out precisely what the mail was being carried for.

Before I go any further, gentlemen, let me call your attention to a point that possibly will be made. It relates to expedition. The law says that there shall be no pay for expedition unless you use more men and more animals. Now, if they want to change it from sixty hours to fifty hours, and it will require the same men and animals to carry the mail, they cannot make any allowance for the change. To cut it off short and bring it down to familiar terms, if there are more men required it shall be paid pro rata; it shall not exceed pro rata. Ah, but it can be as much less as they choose to make it. If the Postmaster-General finds out that he must increase a route, that it will cost a great deal of money to do it, and that he could put it out by contract at a less price, all he has to do is to terminate the contract, put an end to it, readvertise, allow people to come in and bid on it, and let it out at a decent, honest, and reasonable figure. Nothing prohibits him from making a bargain for much less. Such a bargain never was made in this case, for Brady, accepting the offer, increases it, and allows them to draw \$2,715 as their share of the plunder.

Now, there is one other item connected with this route. Remember that there was to be due regard to productiveness. Let us see how productive it was. You know they begin their fiscal or money year the 1st of July. Up to the 30th day of June, 1879, every office on this route included, the total amount of money that was received was \$2,348.32. Now, if you throw out the offices that ought not to be counted, because they are supplied by other routes and get their pay from other sources—I allude to Kearney supplied by railroad—if you leave out Kearney entirely the total then was \$227.48. For this \$227.48 they paid \$4,302. Let us go to the next year, 1880. Putting in Kearney it was \$2,785.96, but throwing Kearney out it was \$401.51. Take the last year, 1881. It is a very good indication of the growth of the

country and of these rapidly settling districts. The revenues from all the offices amounted to \$2,874.55. Throwing Kearney out, it was \$513.84, right clear up to date; and the country was rapidly settling up; rapidly settling up! Oh, what a set of writers they must have had out in that country! Well, gentlemen, I have concluded on that route, where they paid \$4,302.65 to carry a couple of hundred dollars' worth of mail, and then reduced the time to thirteen hours when the carrier was performing the service in twelve; when they paid for the reduction which was not needed; when they backed it up with false oaths; when they backed it up with a forged petition; when they backed it up by inducing a respectable Senator to go and talk to Brady and to put his name on it, so that they could file all this away in order to meet inquiry. That is one, and it is a very small sample, of the routes in this case.

ROUTE NO. 38135, FROM SAINT CHARLES TO GREENHORN.

The next route is from Saint Charles to Greenhorn. You know that that was advertised as thirty-five miles, and it was advertised as from Saint Charles to Greenhorn. It turned out that Greenhorn was a water-tank and had no post-office there, and it was twelve miles farther on to Pueblo. They gave the correct number of miles, but they did not give the correct terminus. Whether Turner could explain that or not I do not know. I would like to know [looking around for Turner]—he has gone out too. They have sent them all out, and counsel say they represent them. Well, John R. Miner was the contractor and John W. Dorsey witnessed the contract. I will give you the record as it appears here in this case. On the 15th of December, 1877—now, gentlemen, remember the contracts were not signed until March 15, 1878—the postmaster, whose name was Ingersoll, at Pueblo, Colorado, called Brady's attention to the mistake in advertising the route, telling him that it ought to go to Pueblo. On the 15th of April, 1878, after the contract was signed, Postmaster Fairhurst, of Saint Charles, calls Brady's attention to the mistake. On the 30th of August the route was extended to Pueblo, increasing the distance twelve miles and adding \$328.80 for that increase. On the 1st of October, 1878, there is a contract made with a man named E. M. Ames, who signs the contract with Miner. Remember, this 1st of October was the time that Mr. Vaile was making his arrangements and getting his contracts filed. On the 19th of November, 1878, Mr. Ames's subcontract was withdrawn. On the 16th of April, 1879, there is a proposal of Mr. Miner sent to Brady to carry the mail on an expedited schedule. On the 17th day of April, 1879, Miner makes his oath. On the 5th of May, 1879, Miner sends a letter and asks to have all communications sent to Rerdell. On the 8th of May Miner's oath is filed. On the 8th of May Miner sends a letter, the same day he files his oath, and in that letter transmits a lot of petitions that he had received for increase. On the 26th of June, 1879, Brady issues an order increasing one trip from July 14. You will find July 14 is a date that is often used. You know there was no appropriation until the 1st of July, but he makes it July 14, because the law says you shall not have service performed until there is an appropriation; and he came to the conclusion that he would allow Congress fourteen days to get the bill through. On the 11th of November Stephen W. Dorsey filed his subcontract from the 1st day of April. On the 13th of October, 1880, Postmaster Piper writes that the mail to Agate once a week would be sufficient. On the 10th of November, 1880, Brady orders Agate embraced on the route. On the 14th of December, 1880, Brady orders Agate

omitted. On the 7th of December, 1880, S. W. Dorsey withdraws his subcontract.

Now, let us go back and look at some of the figuring that does not appear in the record. Here in 1877 attention is called to the fact that the trips ought to be made up to Pueblo. Brady, Turner, or whoever it was, utterly disregarded that warning. They did not reject all the bids and say, "This is improperly advertised." There is a law upon that subject. When it is improperly advertised then they must readvertise it. But as it was Dorsey, Miner & Co., it made a great difference to Brady, and he did not readvertise it. He waits and makes his contract on the 15th day of March, 1878. On the 15th day of April, one month afterwards, Brady is again notified by the postmaster at Saint Charles of the mistake, and he pays no attention to it. He did not even discontinue and give one month's extra pay, but waited until the 30th day of August, and then ordered that it be run up to Pueblo; and he allows \$328.80 for going that twelve miles. Twelve miles! It was the distance they had bid for, and it was the distance they were carrying it. The mail contractor said, "I always went to Pueblo. I never stopped at Greenhorn." He went through to Pueblo. He did not want to stand there all day looking at a water-tank; he went on where there was some fun, and where he could get something better to drink than he could get out of a water-tank. He went up to Pueblo. But did Brady stop to ask that? Oh, no; \$328.80 to the contractor. Then, in August, 1878, that order was made. In October, 1878, the contract of E. M. Ames was made. Gentlemen, it has been testified to here that there was a man named E. M. Ames; that he had an actual and a veritable existence; that he was not a myth. I know now who E. M. Ames is. He is the fascinating John R. Miner. For a witness on the witness stand said that John R. Miner signed that subcontract, and that was his signature. He wrote Ames's name to it. It is not disputed. There is no question about it. Ames's subcontract was filed. On the 19th day of November, 1878, Mr. Miner again personates Ames. He writes a letter to Brady asking to withdraw Ames's subcontract. That little business was fixed up for some purpose. What that purpose was we have not been able to find out. But that they had some object in view is very evident from the fact that they went to the trouble of writing Ames's name and putting in the contract in October, and in November withdrawing it. There is no doubt about that. The subcontract is to be found on page 525, and the testimony of the witness who identified the handwriting of Miner is on page 1468. I suppose the defendants think it is not worth while to contradict that, or to contradict the witness by bringing another here to say it is not Miner's signature.

The FOREMAN. [Mr. Dickson.] What is the name of the witness you refer to?

Mr. KER. Mr. Blois, I think, who testified to the handwriting. I will look and see.

Mr. HENKLE. It was Blois. You are right.

Mr. KER. It is testified to by Mr. Blois, and it is not denied. He only made a mistake once, and he came back on the stand and corrected it, and I looked over his testimony, and he said he was not sure of it. [To Mr. Wilson.] If you will fix a nice little key-hole, my dear friend Wilson, I will show your own signature to you through it, and I doubt whether you would know it. We have four judges, a general, two colonels—Mr. Hine I don't know where to classify—and I don't know how many colonels are on the outside that have not come in. They have had all this opportunity, and yet have not been able to

contradict it, and cannot show the jury that this little fancy business did not belong to Miner.

Now, let me give you another pair of dates. On the 16th of April, 1879, Rerdell writes a letter to Brady, transmitting a proposal for carrying the mail on an expedited schedule. That was Miner's letter, but the useful Rerdell writes it. Mr. Rerdell had to take a hand, and he fixes this up, and he signs Miner's name to it. Where is Rerdell's power of attorney? Where is John R. Miner, that he does not prosecute Rerdell for this forgery? I guess it was six to one and half a dozen to the other. He had been tacking on Ames's name to subcontracts, and what was to hinder Rerdell from tacking his name on to proposals? Now, on the 17th day of April, 1879, Miner made the oath. Rerdell, the day before, had written the letter in which he was supposed to send this very oath along; but if you believe the jurat, the signature of the notary, it was signed on the 17th. Well, it did not make much difference to them whether it was the 16th, 17th, or any other date. It was the fancy figures that were inside that they wanted Brady and the Postmaster-General to look at, and anything else was mere nonsense. May be they had a new class of expedition. May be Rerdell did not know whether it was after midnight or before midnight when he wrote his letter of the 16th for the oath that was sent on the 17th. This oath was made, and it was sent in to Brady. On the 8th of May, 1879, the oath was filed. Oh, what a time it took them to consider that oath! Rerdell fixed up a little transaction on the 16th of April and wrote his letter, and on the 17th Miner trots out before a notary and makes the oath, and they hold on to it until the 8th day of May, and then they put it in. I want to show you why. On the 8th day of May, 1879, I told you there was a lot of petitions filed. That was a circus among petitions. Let us see how they got them up. There was one of these petitions that had in it "And a faster time." Rerdell wrote those words in the petition. They were in his handwriting. There is no disputing that point. Then there is another petition, and it says "On quicker time." Rerdell did that little writing. He fixed that up. Then there was another petition that said "And faster time." Rerdell fixed that up. He was looking out for expedition. He had no expedition in his head when he wrote the letter and got it signed. On the 8th of May, when he had the little petitions all fixed up, the expedition was taking the proper shape. George Sears, a witness who was examined and who corroborates the other testimony, says, "When I signed that petition it had not 'quicker time' on it." What in the mischief do they want quicker time on it for? Were they not going there faster than Brady ordered it? There was no trouble. They were going it in eight hours. Then on the 26th day of June, 1879, Brady makes the order from July 14, 1879. There was no necessity for him to be in a hurry. He need not have made this order when these petitions were filed. He might have put another date to it and given himself plenty of time to think. There was no cash. He had expedited it all out, and Vaile had drawn two hundred and odd thousand dollars a year. In 1878 Vaile had swallowed up all that appropriation and they were on the new deal. From July 14 he says, "Increase one trip and allow contractor \$438.80." Then comes in the order to reduce the time from sixteen hours to seven hours and allow contractor \$2,630.40. Now, gentlemen, you know that this thing started on twelve and a half hours, and then they supposed it was sixteen hours because it had to go up to Pueblo. Then the people must have their mail carried fast, and he reduced it down to seven hours. He brings it right down to seven hours, basing his calculation for expedition upon the supposi-

tion that it was twelve miles from Greenhorn up to Pueblo. You know he allows twelve miles extra, and you know it was not twelve miles extra, for the distance was advertised properly. But they based this calculation and allowed this sum of money upon the figures that were there given. Now, Mr. Farrish, who was a subcontractor on that route, and who came here and testified, said, "I carried the mail in eight hours before the expedition was ordered." He did not want to stop at a water-tank; Farrish had something better in view. He carried the mail in eight hours, and yet for one hour they paid considerably over \$2,000. That was a costly hour to the United States Government.

On the 11th of November, 1879, S. W. Dorsey files his subcontract. Rerdell witnesses the subcontract. On the 13th of October, 1880, Postmaster Piper writes that mail to Agate once a week would be sufficient. You know Agate was a little side office. The postmaster writes up and says, "If you give us once a week it will be enough mail." It was not enough for Brady. It was not enough for Dorsey. It was not enough for the combination. It would not be cash enough. Because on the 10th of November, 1880, Brady orders Agate to be embraced from December 1, 1880, and allows \$369.90 for carrying the mail. Why, they ran Agate through in the seven-hour schedule. They ran Agate through just as often as they ran the other mail. That is to say, they were supposed to. The general supposition was that they ought to do it, and they got this extra pay for doing it. The postmaster says they never carried it but once. They had one mail carried there and never had any more. I do not know what the reason was. May be Agate was a nice little spot off the route, and may be it would be a handy thing to put on another route. We have not followed that up. It was not a part of this case, and we could not prove it to you; but Agate was a handy place to have, and after putting it on Dorsey's route, or Miner's route, why not throw it off in a month and put it on some other fellow's route and give them all a slice of Agate? On the 10th of November, 1880, Brady ordered Agate on, and on the 14th of December he ordered Agate off, and he allowed one month's pay for taking Agate off the route, when the witnesses all testified, and it is beyond dispute, that they never carried it. Only one trip, the postmaster said, and only one trip the mail was carried. Brady, thoughtful man that he is, stated his reason for throwing Agate off. The reason is that only three miles was added under his order, and it should have been eight. Because the contractor was allowed for three miles instead of eight. Why should Brady persecute this contractor and this subcontractor and compel them to carry an eight-mile distance when they had only received pay for three miles? Oh, his impartiality was beyond doubt and dispute! But if I had been he and had sent Miner and Rerdell to collect the cash, I would have sent a detective with them to keep them from running away with it.

Now, gentlemen, I have shown you that the mail was carried in eight hours before the order was made. Let us see about the oath next. Miner swears that, on the present schedule, one man and one animal are required. I do not think he could have sworn to much less unless he had had a trick mule, packed the mail on its back, turned it loose, given it a kick, and sent it along. But he says if it is expedited it will take two men and four animals. That is six. You know one man and one animal are two, and the difference between two and six was allowed to be paid. Let us see how much that difference was. The difference between two and six was \$2,630. But along comes the subcontractor, and he says something else about it. He says, "I use one

man and two animals," and that is three. Then Judge Wilson took him in hand, and looked at him in the fascinating way that he has, as if he would induce him to say something else, and he said, "When you came down to running it in seven hours you used more men and more animals?" "Why, no," says Farrish, looking at him in astonishment, "I used the same number. There never was any change; only three." Three was the total number all the time; and with that fertility of imagination that belongs to Vaile and Miner and the rest of the combination, Miner steps up and says, "If you run it down to seven hours, it will take two men and four animals, six, and I want \$2,630 for doing this work."

Now, gentlemen, I have got down to the pay, and I want to call your attention to the figures. The original pay was \$548, and it was increased to \$3,945.60. They paid Farrish \$840. They had a clean cut and clear profit of \$3,105.60, drawn from the Government by Miner's perjured oath.

Now let us take the income. The total income was \$5,534.23. Excluding the other offices, it was \$60. If you take the railroad communication, it was \$5,534.23. Pueblo is a large place. There are a half a dozen or a dozen routes running in there. If you put in Pueblo, it is \$5,534.23; take it out, and it is \$60, including Greenhorn, a water-tank, and Saint Charles.

The next year the revenue was \$172.33, and the year after that it was \$175.43. With fast time, seven hours, it increased \$3. Gentlemen, I have given you sufficient data on this route.

At this point (12 o'clock and 30 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. INGERSOLL. The court will recollect that the affidavit was made yesterday for the postponement on account of the absence of one George E. Spencer. That affidavit is filed, and we ask the privilege now of filing a counter-affidavit.

The COURT. The court refused the application and that matter was disposed of.

Mr. INGERSOLL. He asked the privilege of filing the affidavit and he handed it to the clerk.

The COURT. The court cannot grant a privilege to file a paper in regard to a subject which has passed. The court cannot prevent the clerk from marking any papers that are brought to him, but they will not be regarded as court papers.

Mr. INGERSOLL. I will just take up the time of the court one moment with regard to a matter that was before the court on yesterday noon. Here is the answer of the two trustees, Crittenden and James, saying that they know of no reason why that money should not be paid, and they are willing the order should be made.

The COURT. That is a chancery matter. If you will send it up here I will sign it. Now, Mr. Ker, if you are ready you can go on.

ROUTE NO. 41119, TOQUERVILLE TO ADAIRVILLE.

Mr. KER. [Resuming.] The third route that was taken up, gentlemen, was route 41119. That is the route from Toquerville to Adairville.

This route was one hundred and thirty-two miles in length. It was one trip per week, and the time was sixty hours. John M. Peck was the contractor, and the pay was \$1,168. On the 27th day of May, 1878, a contract was made with Nephi Johnson for one trip, the pay being \$1,127. That is a little bit less than the \$1,168 that the Government paid. On the 10th of October, 1878, two additional trips were ordered, and \$2,336 allowed. On the 22d of January, 1879, the oath of Peck was made. On the 8th of March, 1879, Vaile files his subcontract. On the 5th of May, 1879, Vaile's subcontract is withdrawn. On the 8th of May, 1879, Rerdell files his subcontract. On the 9th of May Brady orders the address changed to the care of Rerdell. On the 15th of May Rerdell withdraws his subcontract. On the 24th of May petitions are filed asking for seven trips and a reduction of time to forty-eight hours. On the 19th of June, 1879, the service is curtailed to end at Pahreah, so that after that the route was called Toquerville to Pahreah. On the 23d of June, 1879, there is a proposal of Peck's put in to carry mail on a reduced schedule. On the 25th of June, 1879, Peck's oath is filed. On the 10th of July there is a subcontract made with Nephi Johnson. On the 8th of July, 1879, Brady makes an order to increase four trips and allow \$4,672. He also orders a reduction of time from sixty to thirty-three hours, and allows the contractor \$12,718.22. Now, on the 16th of December, 1879, the postmaster at Pahreah writes that expedition is not needed, and that sixty hours would be sufficient on the route. On the 12th of May, 1880, the postmasters on the route send a letter to Brady stating that the present schedule of time is unnecessary, and that in the winter season it is impracticable, and ask to have the time changed to sixty hours. On the 3d of January, 1882, the Auditor is notified of the withdrawal of Rerdell's subcontract.

Now let us go back and take that which does not appear in the record. On the 27th of May, 1878, the subcontract was made with Nephi Johnson for \$1,127, and this subcontract was signed by Peck; that is, Nephi Johnson says that he made the bargain with John W. Dorsey, and Dorsey went away, and the contract was mailed to him, with Peck's name signed to it. On the 10th of October, 1878, there were two additional trips ordered, and an allowance of \$2,336. Why these trips were ordered, or why this allowance was given, is one of the things that is not explained, unless it could be by the explanation given by Vaile that on the 1st of October he took charge of the business. There is certainly nothing on the record for any increase of that kind. This was on the 10th. On the 11th of October there is a letter sent to Nephi Johnson telling him that these extra trips have been ordered. To that letter Peck's name is signed, and Miner wrote the letter and signed Peck's name to it. Then, on the 6th of November, 1878, Miner writes a letter and signs Peck's name to it. This letter is one addressed to Johnson, and asks him to get up petitions to increase the time to forty-eight hours. Now, gentlemen, in this connection remember it was sixty hours. Remember the petitions called for forty-eight hours and the expedition went below that. On the 22d of January, 1879, the oath of Peck is made. This calls for thirty-three hours—not forty-eight—but thirty-three, and it calls for seven trips a week. Remember there was one on, and Brady made an order for two; that makes three; that at the time the oath was signed there were three trips going, and this oath is signed on the 22d of January. There is a little variation in this oath. Mr. Rerdell writes Peck's name to the oath and writes the oath. He has borrowed Miner's occupation for a short time. On the 8th of March,

1879, Mr. Vaile's subcontract is filed. Miner signs that subcontract as the attorney for Peck, and Mr. Rerdell puts his name down as a witness. On the 12th of April there was a letter sent to Johnson which I would like to read. It is printed on page 618:

WASHINGTON, D. C., *April 12th, 1879.*

NEPHI JOHNSON, Esq., *Johnson, Utah:*

DEAR SIR: I inclose herewith a petition for increase of service on route 41119, which please have numerously signed. Also write other petitions, somewhat after this form, for other points along the route, and have them signed. In writing other petitions do not use the exact language of the inclosed petition, and give as many reasons as you can for the increase. Also have the county officers, members of the legislature, postmasters, &c., along the route to write letters to the Postmaster-General and to your Delegate in Congress earnestly requesting an increase. Please attend at once to this matter, so as to get the increase by July 1st.

If you can get a favorable indorsement from your governor it would help a great deal. After you have the petitions signed and letters written, send all of them to me and I will present them.

All letters relating to this route should be directed to me, as I now have charge of all of Mr. Peck's mail matter.

Very respectfully,

M. C. RERDELL,
Agent J. M. Peck.

This was on the 12th of April. They were getting ready for the subsequent increase. On the 15th of April, 1879, Miner writes a letter to Johnson, and tells Johnson that he is to send all his communications to Rerdell hereafter, and Miner signs Peck's name to that letter. The letter purports to be written by Peck, but in reality it was proved to be in Miner's handwriting. On the 15th of April was this notice. Then on the 5th of May, 1879, Vaile's subcontract was withdrawn.

Now, I want to call your attention to Mr. Vaile's testimony as to this route. He says, "This was not one of the routes that I got; we had a division; I took part of the routes." He named over six, and "the rest were given to Dorsey. I gave them over to John W. Dorsey or S. W. Dorsey." That was his testimony. And yet, when he is asked particularly about this route, he says, "Why, I filed my subcontract on that route in order to draw the pay for that quarter." Now, what difference does it make whether Mr. Vaile had made a division of the routes and excluded this? He says, "I filed my subcontract in order to draw the pay." And he filed his subcontract when he knew that Nephi Johnson was the subcontractor on the route, and the man honestly entitled to have his subcontract put there; and he filed his subcontract to get the pay, and Brady ordered the subcontract to be certified to the Auditor of the Treasury, as he did in every instance in which the contract has been filed, and yet when he certified to the Auditor of the Treasury that the subcontract was filed according to law he certified an untruth, and he certified against the plain and explicit statement of the law that no man shall be allowed to be a contractor or subcontractor until he has filed his oath, and no man can draw pay from the United States in any shape or in any particular until he complies with the law and has filed his oath; and Mr. Brady deliberately certified a fact to the Auditor of the Treasury, misleading that officer, in certifying that these contracts were filed according to law.

Now the letter of withdrawal. Of course there is a letter of Vaile asking to withdraw his subcontract. That is also signed by John M. Peck, but Miner signs Peck's name to this letter, and that is the 5th of May, 1879. Now, on this same day that Peck's letter is put in, signed by Miner, and that Vaile withdraws his contract, S. W. Dorsey steps

to the front. I want to read to you what he did. He writes a letter to Nephi Johnson, and it will be found on page 623:

NEPHI JOHNSON, Esq.,
Johnson, Utah:

DEAR SIR: I beg to inclose you new contract in duplicate for carrying mails between Toquerville and Adairville, which please sign and return to me here. This new contract becomes necessary on account of the dissolution of the firm, and for the further reason that all contracts made with this man in Colonel Peck's name are made without his knowledge or authority.

Now, on the 5th of May, he writes to Nephi Johnson, who has a contract for three years for \$1,127, and with the pro rata rate of increase attached, made by John W. Dorsey, his own brother, and he states to Nephi Johnson, in order to wring from him another contract, in order to compel Nephi Johnson to come to his terms, "Peck repudiates the contract; it was not made with his knowledge or authority."

We do not propose to cut down your prices at all, but, on the contrary, to protect your interests. I personally guarantee that all obligations under this contract shall be fulfilled; and as to my responsibility, I can refer you to Barbour Lewis, J. S. Black, and Hon. S. P. Luckey, of Salt Lake; also to Kountze Bros., bankers, New York City; Citizens' National Bank and Middleton and Co., bankers, Washington, D. C.—

Have you not heard of this Citizens' National Bank before, and have you not heard of Middleton, the assignee of these warrants, that were drawn by S. W. Dorsey, and that were drawn by John W. Dorsey? The names are as familiar as the names of the defendants themselves—

to Senators Jones and Sharon, of Nevada; Mr. Cannon, of Utah, &c.

This is on May 5. Now, then, on the 8th of May in comes a contract made by Rerdell. Rerdell makes a contract with John M. Peck, and that contract calls for three trips a week from July 1, 1878. This is supposed to be made on the 1st of April, 1878. Oh, how quickly they get Vaile's brilliant idea, the lawyer from Independence, that if they antedate the contract they would cut out the other fellows. Rerdell and Dorsey grasp it at once, and they antedate this contract to the 1st of April to cut off Nephi Johnson. They are going to squeeze him into a contract, and Rerdell files this subcontract, and he dates it the 1st of April, and it calls for three trips a week from the 1st of July, 1878. Why, there were not three trips upon the route at that time. It shows as plain as can be that this was made after the three trips were put on, but, in their haste to get it in, they forgot that those three trips were not ordered in the beginning. The whole business was to cut out Nephi Johnson's subcontract in case he were to kick up owing to this letter that was sent on to him on the 5th of May.

Oh, but there is another beautiful point connected with this. The subcontract is made by Peck with Rerdell. Every word of it is written by Rerdell. The signature of Peck is put on by Rerdell. He writes it from beginning to end, and he puts Peck's name to this subcontract and files it, and I submit to you, gentlemen, that it is the plainest piece of testimony that could be given of the machinations of these people in order to beat the subcontractors.

On May 9th Brady orders, "Address to Rerdell, box 706." Then comes May 15th. Rerdell writes a letter to withdraw a subcontract. To that letter Peck's name is put, and Rerdell writes and signs Peck's name to that letter. Oh, but he had a power of attorney to do it. Why, his power of attorney was dated in September, 1879, if he ever had one. I suppose the probabilities are he had a dozen. Miner had authority to sign Peck's name, and I suppose that Miner would not hesitate long

about giving Rerdell a half a dozen powers of attorney. But if we are going to stand on the one that Rerdell had, it is dated in September, 1879, and this fancy work is going on in May.

Mr. McLAIN. [A juror.] May of what year?

Mr. KER. In May of 1879. In September of 1879, if you believe the testimony, if you believe the paper at all, that is the date of the power of attorney to Rerdell; but this business is going on in May. Now, he signs Peck's name to this letter and asks to withdraw his subcontract. Why, would you not suppose that Mr. Turner would at once make a memorandum of that? Would you not suppose that Brady would do as he has done in the other cases and say, "Withdraw the subcontract of Rerdell," and notify the Auditor of the Treasury of the withdrawal of Rerdell's subcontract? But I would like to see where it comes in. Now, just remember that, because I will call your attention to it hereafter. It was put in as the lever that was to squeeze Johnson, and they never removed the lever until Johnson was squeezed. On the 15th this letter was put in. On the 24th of May petitions were filed asking for seven trips and a reduction of time to forty-eight hours. These were the petitions that were sent on to Johnson to be numerously signed, to be copied, and not to be put in the same language, and they were to be sent back, "To me," Rerdell says, "so that I can help it through; so that I can present them myself," I think, is the language used, if I remember right. It is pretty hard to remember the exact words in all these things. "So that I can personally present them." Well, they were presented on the 24th of May, 1879. And just in this connection let me call your attention to how they were presented. Now, you take Rerdell's letter. He wants Johnson to get the petitions up and send them to him. That is here in the book; it is part of the record. He gets them back. Johnson says, "I sent them back." Now, let us see what it is we have. Why, one of the petitions has on it the names of people who do not live on the route at all. I guess they were not enough for Rerdell, and he went to work and filled it up to suit himself. He got up a petition of his own. There wasn't the name of a person living on the route. He filled it up. He fixed it up in his own shape. Then W. D. Johnson, who was the brother of Nephi Johnson, says, "Why, when I filled out that petition I made it six times a week, and here when it is offered to me it is seven." He must have had some invisibly changing ink. It went from six to seven trips, and he says it was changed after it left him.

Then, again, the petitions all called for forty-eight hours. That was the instruction. Now, they were filed on the 24th of May, 1879. Remember, that is after the time that is mentioned in this indictment. All that comes after. This is after the time mentioned in the indictment. On the 19th day of June, 1879, the service was curtailed to end at Pahreah. On the 23d of June there is a proposal sent in to carry the mail seven times a week on a reduced schedule. It says here [referring to the record in his hand]:

I have the honor to transmit herewith my proposition for carrying the mail on route 41119 seven times a week on a reduced schedule. Hoping it will meet with favorable consideration, I am, very respectfully,

JOHN M. PECK.

Well, the witness says the whole of that business was got up by Rerdell. He sends that proposal and he sends the oath that he had already sworn to before a notary public, signing poor Peck's name to it.

Now, then, on the 25th of June this letter and the oaths were filed.

The oath is dated on the 23d. It is filed on the 25th. No, I am mistaken about that. The oath was got up ahead of that. The oath was gotten up in January, 1879, and it was filed in June, 1879. Let us get the correct date. On January 22, 1879, the oath was made, and on June 25, 1879, the oath was filed. They had arranged the matter so that it was all ready for the oath. Then came in the oath for seven times and thirty-three hours. Now, he knew in January he must make it in thirty-three hours, but after that time he writes to Johnson to get up his petitions for forty-eight hours, and then filed an oath for thirty-three hours. It seems to me, as a species of reasoning, that it would be plausible, to say the least, that the date that was affixed to that oath did not amount to much. They put it way back in order to preserve appearances and make believe it had been in all that time, when in reality it was only a recent occurrence. In July, 1878, you will remember, John Dorsey had a little talk with Nephi Johnson. Johnson knows it was July. He fixes the time. Just in that connection its importance does not seem to be much until you remember something else. All along this case, in order to make these dates fit nicely, you have to think of something else. Do you not remember that Vaile testified that he did not go to Brady until August, 1878? Do you not remember that he said he had nothing to do with it until the 29th of September, 1878, and on the 30th of September, 1878, he signed the agreement? Now, then, John W. Dorsey was away out in Utah, and, by the way, he was at Bismarck, too, in that month. Unless he had telephonic communication, or was a first-class medium, I cannot imagine how he communicated with Vaile and Miner and Brady in Washington; but at this conversation with Nephi Johnson, in July, John W. Dorsey said that Miner, Peck, and Vaile were interested in this route with him. That was in July, 1870, and I don't know how John W. Dorsey could have guessed at Vaile's interest unless there was some reality about it. I think it establishes what Boone testified—that they began this little business as early as April, when they euchred him, to use a player's expression, out of a little route he wanted to have.

Then, on July 9, 1879, John W. Dorsey writes to Johnson about the terminus. I will just read that letter. It is on page 619. He says:

I had no fears but that you would correct the mistake judging from my acquaintance with you and your reputation where you are known. I saw Mr. Cannon Monday, and he indorsed the petitions, and spoke in the highest terms of you, and said he would do all he could to get the increase asked for. I have sent all the petitions on to Washington, but I do not suppose that they will present them till they get the new contract, as they will see at once that there is a mistake, and will probably return the contract to you.

Now, you will remember Rerdell has the contract filed, and Stephen Dorsey writes that there must be a change, and John Dorsey meets it. "You will never get the increase until you put in this new contract. It is not us, but the department. They are so shrewd up there, they watch things so carefully, that if you send no proper contract you will never get the increase." Under the force of that persuasion he got Nephi Johnson to make the new contract. He says:

I consider it a matter of form only, but perhaps they would be better satisfied if you would have your brothers and sons' names on as sureties, and witnessed in regular form. If it was my own contract I would not care anything about it. I put the amount just the same as it was in the contract which you returned, which you said was satisfactory. It brings it nearer prorating than any trade I have made since I left home—

He calls it p-r-o-r-a-t-i-n-g. He had not got down to it. He knows better to-day—

and say nothing about the thousand dollars either, but I am satisfied and hope you will make a good deal of money out of it. I hope you will execute it and mail it at once, as I want it in Washington by the time I arrive there, and you will oblige,

Yours, very truly,

J. W. DORSEY.

That is John's own writing. No Rerdell there; no Miner. He will have to stand alone on that.

Now, then, on the 10th of July, 1879, there is a second subcontract made with Nephi Johnson. John W. Dorsey, as you see, arranged about this contract. Peck's name appears upon the contract. You remember Stephen W. Dorsey says he repudiates the thing before. He says Colonel Peck did not allow this man to make contracts, and would not have anything to do with him. But just see here: Miner steps in and writes "John M. Peck" on that contract. How suddenly Dorsey changes around. How suddenly Stephen Dorsey finds out it does not make any difference who signs the contract. The old one was a disadvantage to the gang. The new one was what they wanted. Of course it did not make any difference who signed the new one as long as it came along. They did not leave Rerdell out of that either. He put his name down as a witness. He was not going to stay out of that arrangement. Then they were afraid it might not amount to a great deal, and that Nephi Johnson would not treasure it in the proper way, and would not think as much of it as he ought to think, and Stephen W. Dorsey put his name to it, and guaranteed that contract, the second contract, the one he had wrung out of Nephi Johnson. On this same 10th of July, the same day, Rerdell writes to Johnson that the department has ordered the mail to be carried seven times a week on a schedule of twenty-three hours, and he sends notice on the 10th. On the 10th of July he writes a letter to Johnson telling him the department had made this increase. [Turning to the court.] Your honor, the order was made four days afterwards. Brady, on the 14th of July, as appears by the jacket, made that order. How Rerdell climbed into his mind, and got into his heart and confidence, is more than I can tell. On the 10th he sends forward the word, and, on the 14th, four days after, wonderful guesser, Brady makes the order, "Increase four trips per week from August 1, 1879, and allow contractor \$4,672 per annum." Then he reduces the time from sixty to thirty-three hours, and allows contractor \$12,718.22 per annum, and the subcontractor the same amount, Rerdell's contract being still there, and he gets the whole increase. Gentlemen, I told you that Rerdell withdrew his subcontract. Oh, that was all a sham. He was still on deck. He was still on the papers. He was still the subcontractor. We have not got down to the time when it was policy for him to take it out. Then, on the 16th day of December—you see this increase was to go into effect August 1st—on the 16th day of December, 1879, on page 605, the postmasters along the route, who saw how ridiculous the thing was, wrote on to Brady, as follows:

The undersigned, postmasters and others on and near post-route No. 41119, from Toquerville to Pahrpah, Utah Territory, respectfully represent that the present schedule of time on said route is unnecessary, and, in the winter season especially, impracticable, and we suggest that the same be changed to the following time, namely:

Then they give a sixty-hour schedule. Of course Brady was not going to put it back to sixty hours when it had already been reduced

to thirty-three hours, especially when he remembered that he got his percentage on it, as Walsh said :

We consider the present increased speed entirely unnecessary to the wants of the people, and an uncalled-for expense to the Government. And we consider that the winter storms on the high mountain ridges over which this route passes, makes the present required time almost impracticable, and the people who asked for the daily service did not desire or expect an increase of speed.

There is a letter, signed by the postmasters, sent on to the Postmaster-General. His honor, I think, once remarked, was he to pay attention to postmasters? Of course, he was to pay attention to the records that appeared before him. If a Government officer is informed that the Government is being swindled, no matter where the information comes from, it is his duty to examine into it. He is furnished for that purpose with post-office inspectors. He could have telegraphed to the United States marshal to go and ask. He could have telegraphed to the United States district attorney. He could have telegraphed to the post-office inspector. He could have telegraphed to any person in the service of the Government, "Go and ask if that is true," and he could have informed himself in a very short time of the truth or falsity of this information. Now, these postmasters wrote this on the 16th of December, 1879, and it is put on file. On the 3d of April, 1880, there is another letter that appears on page 619, a good page. It is a letter signed M. C. Rerdell, and it is addressed to Nephi Johnson. It has in the corner, "M. C. Rerdell, agent, box 706."

DEAR SIR: We have concluded to increase your pay \$1,556 per annum, in order to meet the objections you have made in regard to route 41120.

To keep Johnson quiet, they give him \$1,556.

This action is voluntary on our part, and is intended to cover all losses on account of failure of trips or loss of time, and in future you must be expected to bear all fines and deductions.

Johnson could not do it. The postmasters informed Brady it could not be done. It was brought to the attention of Rerdell, and voluntarily they turned over to Johnson \$1,556 to shut him up:

We make this allowance in order to have the service remain as it now exists, as I find that you have been writing letters to your Delegate asking to have the schedule time changed to what it was originally.

Do you see the point? He had been writing to Cannon. He wanted it changed back to sixty hours, and they give him \$1,556, and say, "We do it to keep the schedule on the same time." I will show you the reason hereafter:

If the schedule time on this route were changed back to where it formerly was, at your pay, we would lose considerably. As it is, we have, of course, a small profit.

We have a small profit!

If the schedule time were changed, we certainly would endeavor to have it put back to once a week.

You recollect Johnson said the people would like to have six trips. They all said that. They wanted six trips; but Rerdell and Miner and Dorsey and the crowd had this schedule increased. Johnson did not want that. The postmaster did not want that. Nobody wanted that. Rerdell said, "If you keep on, if it is reduced, if the schedule time is taken off, as it now is, and put back to sixty hours, we will get even with you and make it one trip a week." There is where the threat came in:

Hoping that you will perform the service in the future so as to avoid all fines and deductions, and further, that you will write to your Delegate asking him to withdraw all objections as to the present schedule,

I am, very truly,

M. C. RERDELL.

This was on the 3d of April, 1880. Now, then, things remained quiet until the 9th of May, 1880, when Rerdell again takes his pen in hand and sits down to write to Johnson. The letter is on the same page:

DEAR SIR: Yours of the 20th ult. to hand. In reply, I have to say that your increased pay, which, in my letter of April 3 I proposed to give, was, of course, intended to commence from January 1, 1880. As that seems to be satisfactory to you, I suppose there will be no more trouble between you and me in regard to your compensation. I would like you to write at once to Mr. Cannon, asking him to withdraw his objection to the present schedule as proposed in your letter.

Now, you know Mr. Cannon was the Delegate in Congress. At the last session they turned him out, but at that time he was in. Cannon opposed the schedule, and Rerdell wrote to Johnson and asked him to influence Cannon. Now, then, on the 12th of May, 1880, the postmasters on the route again wrote to Brady and protested against this increase. They said in that letter, on page 605:

The present schedule of time is unnecessary, and in the winter season impracticable, and we ask to have the time changed to 60 hours.

Again, the officers of the United States protest against this outrage. This is on the 12th of May, 1880. On the 3d of January, 1882, Rerdell, by some means that is best known to himself, and that I would like to have explained by somebody on the part of Turner, or somebody on the part of Brady—I told you away over here, a good while ago, that on the 15th of May Rerdell withdrew his subcontract. Away up in 1882 the Auditor was never notified of that fact. On the 3d of January, 1882, the Auditor was notified that Rerdell's subcontract ought to be taken from the files and Nephi Johnson's put on. Whether Rerdell was providing for any controversy or kick or disturbance on the part of Mr. Johnson, or whether he was bearing in mind that Johnson did not want sixty hours, and wanted it put back to simply six trips a week, and if Johnson were to cut up any capers, he would still have his subcontract on file and throw Johnson out, I do not know. It seems to me that that was the reason why they kept it on file and never notified the Auditor. It was a case of dereliction of duty. It was a case in which, I suppose, Mr. Brady exercised his well-known discretion.

I told you that Vaile said he put this subcontract there in order to draw the pay. Let us see who did get the pay. On the 29th of June, 1879, Miner got a warrant and drew the money. Then came the drafts. Rerdell has his name affixed to them as a witness. I am only giving you one instance. I do not care about giving you the whole of them. On the 30th of April, 1880, S. W. Dorsey drew the pay. Then, on the 7th of February, 1882, Rerdell, the subcontractor, drew the pay. So that they were all interested in it, more or less; Vaile, Miner, John W. Dorsey, S. W. Dorsey, Rerdell, Brady, Turner, and the whole of them seem to have been engaged, in some shape or other, in fixing this route up.

The original pay on this route was \$1,168. It was increased until it reached \$19,726.22. The subcontractor received \$7,444. We get that from the record. It left a neat little profit of \$12,282.22. Rerdell said, "Of course we have a small profit." I would like to have that small profit. I would like to have that route for one year's salary. I would go somewhere and enjoy myself. 'Twelve thousand two hundred and eighty-two dollars, and calls it a small profit.

Now, let us see how it compares with the receipts on the route, having due regard to productiveness, as the law says. Let me call your attention to another fact. The manner of getting this productiveness was all within Mr. Brady's reach. You have seen some of the orders

here. On some of the jackets upon which the orders are made you have seen, "Gross receipts," and "Net receipts." So that he received notice of the receipts of the office. Now, if you take all the offices that were on this route, the entire receipts for 1879 were \$1,586.47. That was the receipts of every office on the route. But if you take off Toquer-ville, Virgin City, and Kanab, that were supplied from other sources, it reduces it all down to \$767.76. In 1880 the gross receipts were \$1,042.57, and the net receipts \$386.50. The net receipts ran down from \$700 to \$300. The expedition cut both ways. The Government paid out \$19,311 for it, and the revenues for the office fell off. It was a loss to the Government both ways. Now, in 1881, the total receipts were \$1,094, gross, and the net receipts \$497.46, a little less than \$100 of increase. All that was at an expense of \$19,311.33.

NO. 44155. FROM THE DALLES TO BAKER CITY.

The next route is No. 44155, from The Dalles to Baker City, Oregon. This route was two hundred and seventy-five miles long; the number of trips was two, and the time one hundred and twenty hours. John M. Peck was the contractor, and the pay was \$8,288. Mr. Miner witnessed the proposal in that case. The first thing that occurs on the record is a letter from Mrs. Wilson, the lady who was on the stand, and who, no doubt, made an impression on you gentlemen for intelligence and capability. She writes and tells Brady of the importance of this route, because there was trouble on the other route. There was trouble on the other route that prevented the carrying of the mail, and she thought this route would become very important from that fact. There was no trouble on this route, and it would keep an opening so that she could send the mail. You remember what Mr. Turner did with that letter. He indorsed it "Indian troubles prevent the carrier from carrying the mail," whereas there was nothing of that kind. On the 5th of September, 1878, the department received notice that Mr. Fisk commenced to carry the mail from Canyon City to Baker City. That was the first service, and that was only from Canyon City to Baker City, and not all the way through. On the 18th of September, 1878, the oath of Peck was made. On the 5th of September the first mail went out, and on the 18th of September Peck's oath was signed. On the 1st of October, 1878, along comes Mr. Vaile's subcontract. That is filed. On the 21st of October a letter is sent by Peck to Brady, offering to carry the mail on a schedule of seventy-two hours for \$18,648. On the 28th of October, 1878, Peck's oath is filed for seventy-two hours. On the 29th, the next day, Brady increased the service one trip, and allowed \$4,144, and reduced the time to seventy-two hours, and allowed \$18,648 for the reduction. On the 17th of January, 1879, Brady makes an order increasing Vaile's pay in the same amount. He had forgotten, or I suppose they had all forgotten, that Vaile's subcontract had been filed. On the 27th of June, 1879, Brady orders an increase of four trips, and allows \$41,440. On the 17th of April, 1880, the Postmaster-General orders the service reduced one trip. On the 16th of July, 1880, Brady puts the service back again.

Now, let us return and see how these figures work. In Mrs. Wilson's letter she calls attention to the route. It might be important, because the other route was stopped, and the Indians were troublesome. Mr. Turner, whether neglectfully, whether he was incompetent, or whether he was taking his percentage, great or small, sat down and indorsed that letter to the effect that "Indian troubles prevented the carrier from

carrying the mail," giving an excuse for his not carrying it. Whereas Mrs. Wilson wanted it carried and said it was important. Then Fisk commenced to carry the mail from Canyon City to Baker City. He says, "I carried that mail for Miner, Peck & Co." That was on the 5th of September, 1878. On the 18th of September, 1878, Peck's oath was signed. You will remember he says that it takes so many men and animals on the present schedule. There was no present schedule at all. There was no service being performed on the route. There was only a mail being carried from Canyon City to Baker City that had started a few days before that. This oath was signed by John R. Miner. He wrote Peck's name to it. Then on the 1st of October, 1878, Vaile puts in his subcontract. That is dated the 1st of July. This subcontract is signed by Miner as attorney for Peck. On the 21st of October, 1878, there is a letter to Brady, offering to carry the mail. This is a letter apparently written by Peck to Brady, making an offer to carry the mail for so much money. The offer is to carry it on a schedule of seventy-two hours for \$18,648. That is his offer. That is on the 21st of October, 1878. On the 28th, seven days after the offer was made, they put in the oath. I suppose Brady did not want to accept the \$18,000 bid, until he had something to put there to back it up. Now, gentlemen, in this oath there is not a trip mentioned. He simply says, "I will carry the mail in seventy-two hours for \$18,648." On the 28th the oath was filed. On the 29th Brady makes his order to increase one trip from November 15, 1878, and allow the contractor \$4,144 per annum, and to reduce the time from one hundred and twenty hours to seventy-two hours, and allow the contractor \$18,648 per annum, being less than pro rata. On the 17th of January, 1879, he corrects by allowing the subcontractor the same amount. Then on the 27th of June—you see how soon after Mr. Vaile comes along and agrees to put the service on, Brady chalks these routes up and gives him a chance to look around for somebody to go and buy the horses or to get the subcontractors to put it on. There was no trouble at all about it. This is one of the routes which Vaile said he took along with Miner. There was an agreement no doubt that Vaile was to be secured for all he advanced on certain routes, and these were a part of those routes that were selected, and Brady, according to the agreement, carrying out his bargain, orders on the trips, when if he had been an honest officer he would have declared them failing contractors. Then on the 27th of June he helps them along and orders four trips for \$41,440 additional per annum. Then the Postmaster-General takes off one trip in April, 1880, leaving it six. Brady found it out on the 16th of July, and Brady put it back again. What business had the Postmaster-General to order a trip off one of his routes? He put it back again and let it stand at that figure. Now there were petitions put in in this case. You remember that petitions were sent by people who lived in Baker City. They wanted better mail facilities, but they did not want it over this route. They did not ask for it over this route. They asked for an increase of four additional trips and the people who sent them were people in Baker City, and the man who wrote them and fixed them up for the people in Baker City to sign, was John R. Miner. Now, then, a witness comes along and gives some testimony on the stand. He is shown one of these petitions that Mr. Miner had fixed up and arranged and got together. Listen to what he says:

I do not recognize a single solitary name in our neighborhood along that route; I have acted as sheriff for ten years, and am pretty familiar with the residents of that country.

I judge if he was a sheriff for ten years, he knew the people in that country. He was a mail-carrier too, and he says he does not recognize a name on that petition. That was one of them. Now, then, you remember the words "of seventy-two hours." That petition was handed to you, and your attention was called to it. It was interlined. The words "of seventy-two hours" were interlined, showing that they had fixed it up here—Brady and the rest of the crowd. There never was a through mail from The Dalles to Baker City by this route. There was only a through mail from The Dalles to Canyon City. Remember that, gentlemen. It was testified to here on the stand that that portion of the route, from The Dalles to Canyon City, was never carried through. There never was a connection made, and there never was a schedule of time, and there never was anything done on the route towards carrying the mail. That is testified to by all the witnesses who appeared upon the stand. They had an agent out there who took charge. Where is he? His name is Williamson. Mr. Williamson fixed up the business out there. He has sat in this court-room. He is not here now. They have all gone. They have left with Vaile; we have their certified checks, and they have all gone. The counsel are here to represent them. [Turning to Mr. Henkle.] Yes, general, I see you are here; but where is Williamson? He sat in court, day after day, looking at the witnesses, face to face. He borrowed a cigar and chewed the end off and stuck it in his mouth, and kept sucking it all day long, and I venture to say that he is outside the door sucking that same old cigar. If I had been the judge I would have turned him out neck and heels. A man who cannot come into court without a cigar in his mouth ought to stay away. Well, Williamson acted for Vaile and Miner and Dorsey, and Williamson was the man who fixed it up. Gentlemen, the witnesses say the mail was never carried to Baker City. It was carried from The Dalles to Canyon City, but never to Baker City; never through the whole route. That is the testimony of Mr. Fisk and the other witnesses who were examined. You see, gentlemen, how polite I am to Judge Chandler. He is evidently going to reply to me. I was put forward to open this ball. You know I will have nothing more to say hereafter, and will have to sit here and grin and bear it. I know Judge Chandler is going to reply to me. I have the greatest respect in the world for him, and I will not say a word against him. I think he is a gentleman, a scholar, a lawyer, and everything that is good and nice. When it comes to Judge McSweeney's turn he will be so far at the bottom that he will forget all about me.

Gentlemen, there is a little deduction here, on the 30th of June, 1879. You remember Fisk did not carry the mail through at that time, or at least there was some officious postmaster who made a report to that effect. Now, there was \$216 reported among the deductions for that year. Did I say reported? Well, your honor, it was not reported. Fisk says the contractors fined him \$216 for not carrying the mail. We have searched the records of the Post-Office Department, and I assure your honor that the contractors were never fined. They were putting on a fine of their own. They caught poor Fisk napping, and grabbed \$216 from him.

The COURT. You are prohibited from testifying.

Mr. KER. I am not seeking to testify.

The COURT. But you are talking about something that you have discovered.

Mr. KER. Yes, sir. I will give your honor the page.

Mr. CARPENTER. Let him go on.

Mr. KER. On page 788, Fisk says he was fined \$216. Here are the warrants we put in, month after month and quarter after quarter. We put them all in, and I have searched these warrants over and I find no deduction.

The COURT. I misapprehend you.

Mr. KER. It is all evidence.

Mr. CARPENTER. It does not matter, your honor. We do not object.

Mr. KER. If I were wrong, your honor, I assure you they would give it to me. They have not caught me yet, and even in a matter as small as that I know they would go for me.

Well, now, let us go back to the oath. Miner signs Peck's name. Let us see how well he calculated. On the present schedule it is eight men and ten animals. That is eighteen. If you expedite it to seventy-two hours, it is twenty-six men and sixty-six animals—ninety-two. They are to get the difference between eighteen and ninety-two. When my friend, the judge, comes to argue it he will say "Oh, he made an offer; he did not go by the oath." That is all right. He did make an offer. It was about \$1,200 below the mode of calculating according to this oath, but the same oath is made the basis when you come to add on the additional trips. Do not forget that.

Now, then, it would take ninety-two men and animals. Fisk said he had thirty-five altogether. Masterson says he had fifty-three. And do you not remember, Mr. Foreman, before Schultz got off the stand—he was a man who traded in horses—he was asked, "How many horses had you?" "Oh," he says, "I had fifty-two all told." He did not use the fifty-two horses, yet Miner signs Peck's name to an affidavit that it took sixty-six. Why, you remember asking him that on the stand. He was the man who had horses himself, and he did not use them on the route, and, after pumping him dry, he said, "I used all that I could," and all that he could use was less than that fifty-two that he had, all told.

Now, gentlemen, the original pay was \$8,288. That was increased to \$72,520. Seventy-two thousand five hundred dollars over a route that they did not carry the mail on, over a route that was not needed, over a route where the mail left the place of beginning and went over another route—\$72,520. Your honor would not permit us to ask how much they paid the subcontractor. We could not find it out. I would like, as a matter of curiosity, to have given it to the jury. Seventy-two thousand dollars for carrying the mail one-half of the distance.

Let us see how much it brought in. Why, in 1879, everything included, the total amount was \$3,716.91. But taking the net receipts it was \$629.62. In 1880 the total receipts were \$5,638.35. Now, gentlemen, if you will throw off The Dalles, Baker City, and Canyon City, that were all supplied by three or four more routes, you get the income from this route to be \$685.48. Then, in 1881, the income was \$601.64. It fell off the last year notwithstanding the tremendous increase of pay up to \$72,520. Seventy two thousand five hundred and twenty dollars made no more impression upon Mr. Vaile's mind than if it had been a ten-cent piece. He kept no books. Oh, no. He remembered no increase. No; but he says to Mr. Merrick, "I drew the money like a man." I would like to have been his partner. .

ROUTE NO. 38145, PARROTT CITY TO GARLAND.

The next is route No. 38145. This is Parrott City to Garland, Colorado. It was afterwards changed from Parrott City to Ojo Caliente. It is called

the Ojo Caliente route. This route was originally two hundred and eighty-eight miles. There was one trip a week, and it took seven days to go it in. John W. Dorsey was the contractor, and his original pay was \$2,745. Rerdell was early on hand, and witnessed the proposal. Miner was also about, and he witnessed the contract. The record evidence begins on the 31st of March, 1878, when John W. Dorsey makes a subcontract with J. H. Watts for \$1,800. Now, gentlemen, his pay was \$2,745, and he agrees with Watts for \$1,800. The next is on the 10th of June, 1878. On the 10th of June, 1878, Stephen W. Dorsey writes to Brady, asking to have the service increased to seven trips a week and the schedule reduced. [To Mr. McSweeney.] Judge, it is on pages 810, 811.

Mr. MCSWEENEY. Let it stay there.

Mr. KER. Yes, but let us see if it is not headed Senate Chamber. [Turning to the record.] Good enough.

UNITED STATES SENATE CHAMBER,
Washington, D. C., June 10, 1878.

Here is the letter asking Brady to increase the service, asking his special attention to it, and for him to examine his maps, and he sends a diagram so that Brady should not make any mistake about it. I do not know whether that was the time that Stephen W. Dorsey put his money into it or not, but at all events he was interested in it to the extent of some money.

Then, on the 26th of June, 1878, Brady curtails the service to end at Ojo Caliente, decreasing the distance one hundred and sixteen miles. Gentlemen, you see with what rapidity Mr. Brady puts himself in the position to aid Senator Dorsey's modest request. He lops off a big part of the route, so as to stick it on elsewhere. He brings it down to a reasonable distance. From the 10th to the 26th of June it took Brady to cut this off. On the 1st of October, 1878, Watts's subcontract is filed. You know who Watts is. His name is mentioned by Boone. His name was mentioned by Vaile. Vaile telegraphed to Brady he would not put his route on. I think I have heard his name before. On the 1st of October, 1878, his subcontract is filed. Then, on the 23d of December, 1878, John W. Dorsey sends a letter telling Brady that Watts has refused to carry the mail. On the 26th of December, three days after, Brady notifies the Auditor of Watts's refusal. On the 22d of January, 1879, service is curtailed to end at Animas City, decreasing the distance eighteen miles. On the 30th of January, 1879, John Dorsey makes a subcontract with Anthony Joseph. On the 24th of March, 1879, Captain Dodge writes a complaint that the mail is not properly carried. On the 11th of March, 1879, John Dorsey makes an oath for the increase to eighty hours and three trips. On the 14th of April, 1879, John Dorsey writes a letter to Brady containing his proposal or his oath. On the 14th of April, 1879, Brady receives a letter from Joseph, stating that it is impossible to carry the mail on the schedule time. On the 24th of April, 1879, Stephen Dorsey sends a letter to Brady containing a petition and two letters. On the 24th of April, the same day, John Dorsey sends a letter with his oath. On the 24th of April, the same day, Brady makes an order, "From July 1, 1878, allow \$190.62 for Pagosa Springs," embraced on this route. On the 27th of April Brady orders, "Increase service two trips from May 12, 1879, and allow \$3,316.80. Reduce the time from ninety to fifty hours, and allow \$8,457.84." On the 3d of May, 1879, Brady remits \$80.45 that was deducted. On the 9th of May, 1879, John Dorsey writes to Brady to have

communications addressed to Rerdell. On the 31st of May, 1879, Brady is notified by the postmaster on the route and by Joseph that expedition is not needed and is impracticable. On the 7th of August, 1879, John Dorsey makes a subcontract with Pedro J. Jaramilla. On the 29th of September, 1879, Brady notifies the auditor of Jaramilla's contract. On the 14th of April, 1880, the postmaster and contractor both notify Brady that it is impossible to carry the mail in fifty hours. On the 12th of June, 1880, John Dorsey makes a subcontract with J. L. Sanderson. On the 19th of August, 1880, Brady remits \$1,658.98 deducted from Jaramilla's pay. On the 26th of February, 1881, Brady makes an order, "From January 15th, 1881, increase the service seven trips and allow \$17,910.72." In May, 1879, Mr. Vaile drew the remission.

There were petitions filed on this route. The petitions asked for an increase on a portion of the route, not the whole of it, but on the strength of these petitions Mr. Brady you will find made an increase on the entire route.

Now, let us go back and add the unwritten history of this transaction. The first is March 31, 1878. There is a subcontract with Watts, and Miner signed that contract as a witness, showing that he is about. On the 10th of June, 1878, Dorsey writes to Brady asking to have the service increased. That is the letter that I read to you dated from the Senate Chamber. On the 26th of June, 1878, Brady curtails the service to end at Ojo Caliente. On the 1st of October, 1878, Brady notifies the auditor about Watts's contract. Now, then, on the 22d of December, 1878, Miner comes along, and he writes to Anthony Joseph. The letter is found on page 853. Here it is. [Referring to the record:]

WASHINGTON, D. C., *December 22, 1878.*

ANTHONY JOSEPH, Esq.,
Ferdinand de Taos, New Mexico:

DEAR SIR: John W. Dorsey, a brother of Senator Dorsey, is the contractor on the route from Ojo Caliente to Parrott City, once a week. The route was let to J. H. Watts, of Santa Fé. He telegraphs that he will stop January 1st. Mr. Dorsey is absent at present, and at the request of the Senator I write to request you to put stock on that road and see that it is properly carried until his brother can attend to the matter, and to request you also to let him know at what price you will carry it the balance of the term, three and a half years, once a week, twice a week, three times a week, and six times a week. If your price is reasonable, he will enter into contract with you. Write to John W. Dorsey, box 714, Washington.

JOHN R. MINER.

Away back in December, on the 22d, he was preparing for one, twice, three times, six times a week. Boone says it never was put in the contracts before, "But we got up contracts for this combination, and it was put in"—put in for them.

This was on the 22d of December, 1878. On the 23d of December, 1878—

The COURT. [Interposing.] Whose letter was that?

Mr. KER. The last letter is signed John R. Miner.

The COURT. Was it in Miner's own hand?

Mr. KER. Yes. In his own behalf?

The COURT. In his own behalf.

Mr. KER. Oh, yes. He says he writes it by direction of Senator Dorsey. You know that is John W. Dorsey's route.

The COURT. Yes, John W. Dorsey was the contractor.

Mr. KER. John W. was the contractor.

Mr. HENKLE. Miner writes it at the request of Senator Dorsey. The letter shows.

The COURT. Yes.

the Ojo Caliente route. This route was originally two hundred and eighty-eight miles. There was one trip a week, and it took seven days to go it in. John W. Dorsey was the contractor, and his original pay was \$2,745. Rerdell was early on hand, and witnessed the proposal. Miner was also about, and he witnessed the contract. The record evidence begins on the 31st of March, 1878, when John W. Dorsey makes a subcontract with J. H. Watts for \$1,800. Now, gentlemen, his pay was \$2,745, and he agrees with Watts for \$1,800. The next is on the 10th of June, 1878. On the 10th of June, 1878, Stephen W. Dorsey writes to Brady, asking to have the service increased to seven trips a week and the schedule reduced. [To Mr. McSweeney.] Judge, it is on pages 810, 811.

Mr. MCSWEENEY. Let it stay there.

Mr. KER. Yes, but let us see if it is not headed Senate Chamber. [Turning to the record.] Good enough.

UNITED STATES SENATE CHAMBER,
Washington, D. C., June 10, 1878.

Here is the letter asking Brady to increase the service, asking his special attention to it, and for him to examine his maps, and he sends a diagram so that Brady should not make any mistake about it. I do not know whether that was the time that Stephen W. Dorsey put his money into it or not, but at all events he was interested in it to the extent of some money.

Then, on the 26th of June, 1878, Brady curtails the service to end at Ojo Caliente, decreasing the distance one hundred and sixteen miles. Gentlemen, you see with what rapidity Mr. Brady puts himself in the position to aid Senator Dorsey's modest request. He lops off a big part of the route, so as to stick it on elsewhere. He brings it down to a reasonable distance. From the 10th to the 26th of June it took Brady to cut this off. On the 1st of October, 1878, Watts's subcontract is filed. You know who Watts is. His name is mentioned by Boone. His name was mentioned by Vaile. Vaile telegraphed to Brady he would not put his route on. I think I have heard his name before. On the 1st of October, 1878, his subcontract is filed. Then, on the 23d of December, 1878, John W. Dorsey sends a letter telling Brady that Watts has refused to carry the mail. On the 26th of December, three days after, Brady notifies the Auditor of Watts's refusal. On the 22d of January, 1879, service is curtailed to end at Animas City, decreasing the distance eighteen miles. On the 30th of January, 1879, John Dorsey makes a subcontract with Anthony Joseph. On the 24th of March, 1879, Captain Dodge writes a complaint that the mail is not properly carried. On the 11th of March, 1879, John Dorsey makes an oath for the increase to eighty hours and three trips. On the 14th of April, 1879, John Dorsey writes a letter to Brady containing his proposal or his oath. On the 14th of April, 1879, Brady receives a letter from Joseph, stating that it is impossible to carry the mail on the schedule time. On the 24th of April, 1879, Stephen Dorsey sends a letter to Brady containing a petition and two letters. On the 24th of April, the same day, John Dorsey sends a letter with his oath. On the 24th of April, the same day, Brady makes an order, "From July 1, 1878, allow \$190.62 for Pagosa Springs," embraced on this route. On the 27th of April Brady orders, "Increase service two trips from May 12, 1879, and allow \$3,316.80. Reduce the time from ninety to fifty hours, and allow \$8,457.84." On the 3d of May, 1879, Brady remits \$80.45 that was deducted. On the 9th of May, 1879, John Dorsey writes to Brady to have

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There were petitions filed on this route. The petitions asked for an increase on a portion of the route, not the whole of it, but on the strength of these petitions Mr. Brady you will find made an increase on the entire route.

Now, let us go back and add the unwritten history of this transaction. The first is March 31, 1878. There is a subcontract with Watts, and Miner signed that contract as a witness, showing that he is about. On the 10th of June, 1878, Dorsey writes to Brady asking to have the service increased. That is the letter that I read to you dated from the Senate Chamber. On the 26th of June, 1878, Brady curtails the service to end at Ojo Caliente. On the 1st of October, 1878, Brady notifies the auditor about Watts's contract. Now, then, on the 22d of December, 1878, Miner comes along, and he writes to Anthony Joseph. The letter is found on page 853. Here it is. [Referring to the record:]

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The COURT. [Interposing.] Whose letter was that?

Mr. KER. The last letter is signed John R. Miner.

The COURT. Was it in Miner's own hand?

Mr. KER. Yes. In his own behalf?

The COURT. In his own behalf.

Mr. KER. Oh, yes. He says he writes it by direction of Senator Dorsey. You know that is John W. Dorsey's route.

The COURT. Yes, John W. Dorsey was the contractor.

Mr. KER. John W. was the contractor.

Mr. HENKLE. Miner writes it at the request of Senator Dorsey. The letter shows.

The COURT. Yes.

Mr. KER. [Resuming.] On the 23d of December, 1878, John Dorsey sends a letter notifying Brady that Watts has refused to carry the mail. Miner writes John Dorsey's name to this letter and writes the body of the letter. Then, on the 26th of December, Brady notifies the auditor about Watts's refusal. You see this letter of Miner's was dated the 22d. After the 22d, but in the month of December, Stephen W. Dorsey writes to Joseph himself and asks Joseph to carry the mail for him. You remember when Joseph was on the stand he said he knew Dorsey, he had known him for some years, and Senator Dorsey wrote to him to ask him to carry the mail, and he agreed to do it, and he says, "Senator Dorsey told me he would be responsible for it." You will find that on page 861.

On the 22d of January, 1879, the service was curtailed to end at Animas City. On the 30th of January, 1879, Rerdell paid a visit to Joseph, and went there as the agent for Dorsey. On the same day, the 30th of January, Rerdell and John Dorsey were down there talking to Joseph. John Dorsey makes a subcontract with Joseph to carry the mail, and that subcontract, for some reason or other, was signed by Rerdell, as attorney in fact. Now, this is all in January. On the 24th of March, 1879, Captain Dodge wrote a letter to General Brady complaining about the way in which the mail was carried; complaining that he got no mail, that there was none brought there. On the 11th of March, before Captain Dodge's letter, John Dorsey made his oath, and he puts in that oath eighty hours, and calls for three trips. Of course the question naturally arises, where did he get the eighty hours; who told him it was to be three trips? Still it is there. But then it—

Mr. MCSWEENY. [Interposing.] You do not wish to misrepresent anything. You referred me to page 861. You say that Senator Dorsey wrote to that gentleman, Joseph, to put the service on for him. You hardly mean that. Just let me call your attention to page 861:

Q. Now state, as fully as you can, what were the contents of that letter.—A. That J. W. Dorsey was the contractor on mail route 38145, from Ojo Caliente to Parrott City, and as Mr. J. H. Watts, who had been subcontractor, had advised him—

That is, the Senator—

that he would suspend service on the 1st of January, 1879, he urged me to commence to put on service, and that he would personally be responsible to me for the cost and expenses incurred in performing said service. That is the sum and substance of the contents of that letter.

I simply wish to call your attention to the fact that that letter recites that it was John W. Dorsey that he was acting for.

Mr. KER. John W. Dorsey?

Mr. MCSWEENY. That J. W. Dorsey was the contractor.

The COURT. That is substantially the same as the contents were in the letter of Miner.

Mr. KER. No, sir; it was a subsequent letter written by Senator Dorsey.

The COURT. It was the same substantially as Miner's letter.

Mr. TOTTEN. He is trying to state the contents of that very letter.

Mr. KER. You see how small a hole you can pick. Look on page 861, about the tenth or twelfth line from the top of the page, and you will find a little conversation:

Q. What name was signed to the letter?—A. S. W. Dorsey.

Do you see that?

Mr. MCSWEENY. Certainly.

Mr. KER. [Continuing to read:]

Q. Was it in the same writing as the other letters of Mr. Dorsey?—A. That I could not say. I do not remember.

Q. By whom did it purport to be signed?—A. S. W. Dorsey.

And then comes a long controversy between Mr. Ingersoll and the court to know whether they were going to allow the contents of the letter to be stated, and it goes on down, and he makes a statement of the contents of the letter:

Q. Now state, as fully as you can, what were the contents of that letter.

Then comes his answer:

A. That J. W. Dorsey was the contractor on mail route 38145, from Ojo Caliente to Parrott City, and as Mr. J. H. Watts, who had been subcontractor, had advised him that he would suspend service on the 1st of January, 1879, he urged me to commence to put on service, and that he would personally be responsible to me for the cost and expenses incurred in performing said service.

Now, is there any trouble about that?

Mr. MCSWEENEY. None at all.

Mr. KER. It is not John W. Dorsey's letter; but it is S. W. Dorsey's. I will show you more of it before I get through, and worse than that.

Mr. CARPENTER. Go ahead. Lay on Macduff.

Mr. KER. Now, then, I promised to show you something else. I will do it. On the 9th of April, 1879—turn to page 855—Stephen W. Dorsey wrote another letter to Joseph. Let us read it:

DEAR SIR: The department talks some about discontinuing the mail route from Pagosa Springs to Parrott City, and I write this to ask you to send *every protest within your power*—

That is underscored, you know, to call his attention to it—

by petition and letter against any such proposition. Do this forthwith. Also go to Santa Fé *immediately*—

He has marked that so that there will be no dispute about it. He has put it in italics—

and get letters, not petitions, to the Postmaster-General urging that this route from Ojo Caliente to Parrott City be *made a daily line with a fast schedule*.

Now, he has underscored all that. He is afraid Joseph would not get it down fine enough.

Obtain these letters from all the bankers, all the merchants, the governor, secretary of state, surveyor-general, U. S. attorney, judges of the court, and especially of the military officers. In addition to the letters, get the same persons to sign petitions. Send me at least 6 or 8 petitions. I have written to General Atkinson, Colonel Barnes, Mr. Ritch, and Mr. Wallingford, who you will find in General Atkinson's office. I have also written to General Hatch and Captain Rucker. Get up a petition in Taos, San Juan, Plaza, Alcalde, etc. Please go to Santa Fé *immediately*—

He has that word underscored—

on the receipt of this, as I wish to have the increase made before I leave Washington. Write to your Delegate also. Send all papers to me direct that are not sent to the Postmaster-General. I leave for Washington to-day. I have taken this route myself on account of Peck's illness.

Is there any doubt about that? That is on the 9th of April, 1879. Now, then, on the 14th of April, 1879, there was a letter to Brady with a proposal. That letter was signed J. W. Dorsey. Rerdell had evidently returned from the West, for he wrote that letter and signed Dorsey's name to it. On the same day, April 14, 1879, Brady received a letter from Anthony Joseph, saying, "It is impossible to carry the mail once a week inside of a hundred hours." It seems Joseph was not tak-

ing the expedition as naturally as S. W. Dorsey imagined, for, on the 14th of April, he writes deliberately to the department that it is impossible to carry the mail in less than a hundred hours.

On the 17th of April, 1879, General Hatch sends a letter to Stephen W. Dorsey. You remember I told you that Stephen Dorsey, in his letter to Joseph, says he has written to General Hatch. Now, General Hatch writes back. You will find that on page 817. General Hatch very courteously says, "General Dorsey: Dear sir." They are throwing *Generals* around. He calls him General Dorsey, and he says he would be very thankful for a mail such as Dorsey writes about. You know Stephen W. Dorsey wrote a letter to Hatch to write to the department, but he writes back to Dorsey, "Thank you, I would be glad to have the mail." He was pleased to find that Senator Dorsey was looking after a mail for him when he had not asked for it.

Well, on the 24th of April, 1879, Stephen Dorsey writes a letter to Brady with the petitions for the increase, and he states in this letter to Brady—

I am personally familiar with the facts stated and know the necessity for this additional service. I simply write this to add my testimony to theirs.

You know he got petitions from the same source. If you were to take these petitions and look at them—I do not want to bother you, I want to get through with this case as fast as I can—you will find that they run from page 820-21-22 to 823, and if they had been photographed they would not have been nearer alike than they are. The same thing is signed by hosts of people. Who in the mischief they are we do not know. Whether they come from Texas, or come from Maine, or come from New York, it is impossible for us to know. We do not want to bankrupt the government by hunting them up. But these petitions are all in one hand, and Stephen Dorsey sends them along with the letter telling Brady that he knew all about this route. Of course he did. He had written to Joseph that he was interested in it. He had written to Joseph that he had taken it off Peck's hands, and he writes to Brady saying he knew all about it, and he sends along the letter General Hatch wrote to him. He never knew that we would sit down and study it all out patiently and show how it all fitted one into the other. He never dreamed of that, but he sent it along as the first material upon which to build an an increase.

Shall I proceed still, you honor?

The COURT. We will adjourn now.

Whereupon (at 3 o'clock and 5 minutes p. m.) the court adjourned till to-morrow morning at 10 o'clock.

THURSDAY, AUGUST 10, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. KER. Gentlemen of the jury, people that are in the habit of telling stories are responsible for one which relates to the Duke of Wellington. It is reported of him that on the eve of the battle of Waterloo he turned to one of his aids and said, "Is Sergeant McGlinchy about?" "Here, sir," said the sergeant, making a salute. "Well, then," said the duke, "let the battle begin." Now, I say, is Judge McSweeny about? I do not

see him, but, nevertheless, the battle will have to begin. I see he is represented. Judge Wilson is here. My reason for calling attention to Judge McSweeney is, because he is the peculiar champion of the man who figures the worst and the most in the route I am now engaged upon. I hope he will come in soon, because I want him to get these facts and these figures, and want him to tell you, gentlemen of the jury, if he can, how it is that they fit so nicely, and why it is that the fine hand of his client is seen all the way through. I do not want to take any advantages. I do not want him to go to Ohio, and to say that the Eastern people did not treat him right, because it may be that he will come to the White House some day. Ohio is a great State for sending us Presidents.

I had got half way through this route at the time I stopped yesterday. First was where John Dorsey made a contract with Watts; and that on the 10th of June, 1878, while Stephen Dorsey was still in the Senate, he wrote a letter to Brady asking him to increase this route. Watts made seven trips a week and then Brady curtailed the service to Ojo Caliente in order to accommodate Dorsey who was fixing it up in proper shape to put the expedition on. Next, Brady notifies the auditor of the filing of the subcontract of Watts. Then, on the 22d of December, 1878, while Dorsey was still in the Senate, Miner wrote a letter to Joseph and told Joseph in that letter that he wrote by direction of Stephen W. Dorsey, that John Dorsey was away and could not attend to the route, and that Senator Dorsey wanted Joseph to attend to it for him. The next is a letter from Miner who signed John W. Dorsey's name to it notifying Brady of Watts's refusal to carry the mail. Then, on the 26th of December, Brady notified the auditor of Watts's refusal. Then the service was curtailed to end at Animas City. The curtailing of this service to end at Animas City led to an order on the part of Mr. Brady. He made an order to cut it off at Animas City, and to allow the contractor one month's extra pay. It seems like a hardship to cut down these routes, or to cut any portion of them off, because you know they were all profitable under the expedition rule; but I want to show you how cleverly they managed this little piece of business. To go from Animas City to Parrott City, I think a witness said the distance was eighteen miles. However, they decreased the distance eighteen miles and made an allowance to the contractor for the decrease of one month's extra pay, and then took off of poor Dorsey's yearly allowance in this case \$171.56. They took that deliberately off Dorsey's pay. But then again what Brady took off Dorsey, he was always sure to return two-fold. You know Animas City is on another route. Remember that. I think it is on route 38156, from Silverton to Parrott City. You remember the testimony was that the mail-carrier always went through Animas City to get to Parrott City. He could not go through the other route because it was mountainous and impassable, and therefore he always went through Animas City. That was one of John W. Dorsey's routes, and he simply lopped it off one route and gave him a month's extra pay and deprived him of \$171 a year and put it on the other route. Now let us see what he gives him: Just \$265. He put it on the other route where the carrier was going through the place all the time, and there was nothing lost or gained, and allowed him \$265 for doing what he had been doing all the time. That is a small transaction, but when you take all these routes and put them together and make the addition I tell you they mount up very largely.

Now, in December, 1878, while Stephen W. Dorsey was still in the Senate, he writes a letter to Anthony Joseph, and he says that he wants Joseph to carry the mail, and he holds himself personally responsible

to Anthony Joseph for carrying this mail. That was while he was still in the Senate. The next was in January, 1879, when Rerdell pays a visit to Joseph and acts as John Dorsey's agent. Then comes a subcontract made between John Dorsey and Anthony Joseph. Then comes a letter from Captain Dodge, complaining that the mail was not properly carried. That letter is found on page 811. Now, gentlemen, just listen to what Captain Dodge says in this letter, written on the 4th of March, 1879. This thing ought to have been done, you know, on the 1st of July, 1878:

Last month a detachment of recruits were sent to my company from Santa Fé in a six-mule team. Their descriptive lists were sent by mail. The recruits arrived here just six days in advance of their descriptive lists.

The old, worn-out Army horses beat the mail just six days, and the recruits got there six days ahead of their descriptive lists. Now, this was the letter sent to the department complaining of the manner in which the mail was carried when Stephen W. Dorsey, John W. Dorsey, and Rerdell were arranging to get the mail carried, and when Harvey M. Vaile had made his contract and had dated it away back to cut out anybody that had undertaken to carry the mail, and yet up to the 4th of March, when this letter was written, the mail was not being carried. He says:

A person might as well be in Alaska as at Fort Lewis.

He might just as well be there if they carried the mail about once in six days:

A person might almost as well be in Alaska as at Fort Lewis so far as any benefits to be derived from the public press are concerned. An officer informed me yesterday that he had lost a hundred papers since the first of January, and for myself, I can say that I have received but three numbers of a weekly periodical which has been regularly sent to me since the 20th of December last. I am informed by two gentlemen whom I know to be reliable that in January last, when passing through Ojo Caliente, they saw a large amount of mail which had accumulated in that office, and one of them was allowed to look it over and take out letters addressed to himself and friend.

That is the way a captain in the Army writes about the mail being carried on this route. This is on the 24th of March, 1879. On the 11th of March, before this letter was written, John Dorsey by some means had received information that there ought to be an increase upon this route, and he steps up and makes an oath; that is, he walks up and swears to it after Rerdell had written it and fixed it up for him. He wants an increase to three trips, and he wants to have it done on eighty hours' time. Now, on the 9th of April, 1879, shortly after this oath was made, Stephen Dorsey sent a letter to Joseph, containing forms of petitions to be signed and returned to Dorsey. Stephen Dorsey was so anxious to have this mail carried in proper order that he wrote a letter to Anthony Joseph, and sent him in this letter the blanks and told him, "Here are the forms of the petitions that you are to circulate in order to have an increase." He says in that letter which I read to you yesterday, "I am personally interested in this route." He says, "I have written a letter to General Hatch, and I want these petitions returned before I leave Washington." He expected to go away for the summer, I suppose, and wanted to get the business through before he left Washington. On the 14th of April, 1879, there was a letter of Dorsey sent Brady, along with the proposal, and that letter was written by Rerdell. Now, on the same day that this oath was filed in the department, and the same day that Rerdell's letter goes into the department, there is a letter received from Anthony Joseph. It will be found on page 812. He says:

Hon. THOS. J. BRADY,
Second Asst. P. M. General, Washington:

SIR: The P. M. at Ojo Caliente has placed before me your communication of the 21st of March, 1879, changing the schedule of departures and arrivals of the mail on route No. 38145 (Ojo Caliente to Animas City). As the subcontractor on said route, permit me to inform you that it is impossible to carry the mail on said route once a week inside of 100 hours.

Now you see John Dorsey wanted to have it eighty hours. He fixed it up for three trips at eighty hours, and Joseph, the man that they depended upon to get up the petitions and forward them along, writes to the department and says it is impossible to carry it in less than one hundred hours.

The distance is, from Ojo Caliente to Animas City, 181 miles, the road is mountainous and very rough; the mails are very bulky and heavy, and the rivers are very bad to ford four months in the year. The best that I can do, under the circumstances, is to carry the mail through on a schedule of six days.

Then he gives the schedule that he offers to Brady as the proper schedule for carrying the mail on this route.

Now he was a subcontractor, and he was writing to Brady and informing Brady of the difficulties in the way before Brady made any order in the case at all. This letter was received by Brady on the 30th of April, 1879, and as an indication of its truthfulness, on the 3d of May, 1879, Brady made a remission of fines and deductions on that route. He made a remission of \$80.45 on that route. Of course the remission never went to the subcontractor. On the 9th of May, 1879, John W. Dorsey wrote to Brady and asked to have communications addressed to Mr. Rerdell in future, and as usual Rerdell not only wrote the letter but saved John W. Dorsey the trouble of signing it. On the 31st of May, 1879, the postmasters on the route wrote a letter to Brady. Here we have a letter written by Joseph, the subcontractor, and we have another one that was written on the 31st of May by the postmasters on that route. They say in that letter:

It is impossible to carry the mail in less than 100 hours.

Every postmaster on the route signs this letter, directed to General Brady, and says it is impossible to do it. They tell him why. It is a mountainous country, the snow is very deep. It cannot be done.

On the 17th of April General Hatch sends a letter to S. W. Dorsey. It is found on page 817. Do you not remember, as I told you yesterday, that Dorsey had written a letter to Joseph, and told Joseph he had written to General Hatch in order to get Hatch to write a letter to the department asking for an increase of mail? Here is what Hatch said in reply:

MY DEAR GENERAL:

He calls Dorsey general. He was a general. He was the general of this arrangement. He was rubbing hard against poor Brady. They were both generals, and the question was which was in the lead.

I shall be thankful for a daily line to Pagosa.

Of course he would be thankful. The Army officer wanted all the mail he could get. He did not care who paid for it.

There are large settlements west of the new Fort Lewis, which it will benefit greatly. If the petition going from here will have any influence, it has signers enough to insure it.

Yours, truly,

EDWARD HATCH.

General S. W. DORSEY,
Washington, D. C.

I thought Washington was the only place where they gave a man a

title and fixed it on whether he wanted it or not; but Hatch wanted more mail and thought it was nice to tickle Dorsey and call him a general. That is the way that Hatch wrote back to Dorsey. On the 24th of April Stephen Dorsey gets together all his communications and writes a letter and sends it along with the communication to Brady. You will find it on page 814. He had Hatch's letter and he had the other letters he had written:

Hon. T. J. BRADY,
Second Assistant Postmaster-General:

Now, mark that, gentlemen, he calls him honorable. Dorsey had been called general by Hatch, and he was not going to yield superiority to Brady. Brady was simply honorable. However, I suppose that about a month from now Brady will be tickled to death if somebody will call him honorable:

SIR: I beg to transmit herewith a petition signed by the most prominent citizens of New Mexico, including the chief military as well as civil officers of that Territory, urging an increase of mails on the route named in the petition. As I am personally familiar with the facts stated, and know the necessity for this additional service, I simply write this to add my testimony to theirs.

Yours, truly,

S. W. DORSEY.

Inclosed in that letter you will find eight or ten petitions that were all read, or rather they were not all read, but there was one of them read as a sample, and the balance shown to you. They were all in the same language, and they were all fixed up the same, and they were all signed and sent here in order that Brady might have, as he stated to Walsh, some excuse for doing it. On the 24th of April, the same day that Stephen Dorsey writes to Brady, John Dorsey writes, on page 815. You know Joseph had told Brady it could not be done inside of one hundred hours. You know the postmasters had written and said it could not be done inside of one hundred hours. We will see what John W. Dorsey said about it:

SIR: I have the honor to transmit herewith a statement of the number of men and animals it will require to run the route from Parrott City to Ojo Caliente, on a schedule of fifty hours and three trips a week.

They were getting it down from eighty to fifty hours.

Considering the character of the country, the mountains to be crossed, and the streams to be forded, the time proposed, fifty hours—

He puts it in again—

is equal to seven miles an hour on an ordinary route. It is an extraordinary undertaking to make this time, but believing that the interests of the public service, as well as that of the people of this section demand it, I will undertake it.

Respectfully,

J. W. DORSEY.

Sending in his proposal for fifty hours, he notifies Brady that it is an extraordinary undertaking, and for the third time Brady receives notice that this is an extraordinary undertaking; but John W. Dorsey is equal to it, and with the magnanimity that I thought belonged only to Mr. Vaile, he was willing to do it at the expense of somebody else.

Now, gentlemen, this letter is dated on the 23d of April, 1879; the next day, the 24th, it is sent in. Just let us look at that. It is an extraordinary route as he calls it, and it is extraordinary when you come to look at the figures. He writes his letter telling Brady about the extraordinary route on the 23d, and he sends the letter in on the 24th. It is filed in the department on the 24th. Gentlemen, that letter is dated the 26th day of April. It is dated two days after the letter

was filed in the office. The jurat of the oath is two days after the oath was filed in the office. It is three days after the letter was written, sending the oath along. I do not know how they manage to account for these figures. Somebody should tell us. Somebody ought to give us the information as to how they were able to get these dates fixed in that way. It was either the carelessness of people who felt that they were fortified with a power that we were unable to overcome, or else in the pursuit of their criminal design they became so careless that they failed to obliterate their traces and their marks. Three days after the letter was written the oath purports to have been signed before a notary public. Two days after it was filed in the office with General Brady, it purports to have been sworn to before a notary public. I want to know whether in a case of this kind they should not even offer an explanation why it was done, why they should hide their heads and run away from the court-room and fail to tell us, and fail to listen to the argument, and fail to correct it if there is any imperfection in it. I say again, if on the other side you have any testimony that you want to offer, if you have any explanation that you want to give in regard to any of these transactions, in Heaven's name put your witness on the stand, and I will take a seat and sit down, as I said before, and wait until you get through. Give us some explanation. Do not let it be the talk of counsel alone.

Now, on the 24th of April, the same day that Stephen Dorsey writes his letter, and the same day the oath is filed in the office, Brady makes an order, from July 1, 1878, the date that the service ought to have begun, the date that they were called upon to perform the service :

From July 1st, 1878, allow \$190.62 for Pagosa Springs, and embrace it, being 20 miles.

Why, gentlemen, did not General Hatch say he got no letters ? Was it not reported that there was no mail going over the route ? Yet Brady makes this order, and I say, your honor, under the laws of the United States it is unlawful to make an order dated back from April in one year to July in another. I want to remind you of another thing, gentlemen. This Pagosa Springs was already on the route. It was already there, and the carrier passed through it, and it never cost them anything to carry the mail through there, and yet, in the face of all that, this order is deliberately made, giving them nearly a year's pay for nothing. On the 29th of April, 1879, Brady comes along with his order for increase. He says :

Increase two trips from May 12th, 1879, and allow contractor \$3,316.80, and reduce the time from 90 to 50 hours, and allow the contractor \$8,457.84.

In the face of Joseph's letter, in the face of the letters from the postmasters, in the face of the letter of the contractor himself, warning him of the difficulty, he deliberately puts it down to fifty hours, and orders \$8,457 to be paid for doing it.

Now, then, Stephen Dorsey. On the 30th day of April, 1879, Stephen Dorsey, the very next day, is on hand, and Stephen Dorsey takes his pen in hand and writes a letter to Joseph. It is found on page 856 :

DEAR SIR : The service from Ojo Caliente to Parrott City has been made three times a week, with a schedule of fifty hours, beginning May 12, 1879. Don't fail to start the service promptly upon time, and be sure that the postmasters at the two terminal offices report your arrivals and departures promptly to the department the 30th of June.

Now, he got to underscoring, too. He wants Joseph to remember this, and I want you to remember it, too.

If the mail is carried well now, I think it will be made daily July 1, 1879. I am personally responsible to you for all dues under your contract. Address all letters either to me or M. C. Rerdell, box 706, here.

S. W. DORSEY.

S. W. Dorsey has turned prophet also. "It will be increased on the 1st of July." S. W. Dorsey has also climbed into the affections and into the mind of Brady. On the 3d of May, 1879, Brady makes a remission of \$80.45. On the 29th of April he made the order for increase, and on the 3d of May he is forced to remit a fine that was imposed because of the affidavits filed that they could not carry the mail. Five days after he had increased it to fifty hours, he has to make a remission on account of the inability to carry it in ninety hours. Then comes, on the 5th of May, 1879, the usual order to send all communications to Rerdell. Then comes again, on the 31st of May, 1879, a notice from the postmasters that it would be impossible to carry the mail in less than one hundred hours; that it is impossible to carry it on a fifty-hour schedule. They again tell Mr. Brady that he is asking for an impossibility.

This letter was signed by Joseph, and listen to the consequences that fall upon Mr. Joseph for daring to put his name to the letter. Well, Stephen Dorsey is not in the conspiracy! At page 857, on the 22d day of June, 1879, Stephen Dorsey writes a letter to Joseph. Listen to it:

DEAR SIR: Your two letters to Mr. Rerdell have just come to my attention, and I make haste to answer them.

In regard to the schedule time of 50 hours from Ojo Caliente to Animas City being too fast, I have to say that you are evidently laboring under a singular misapprehension. Fifty hours' time is about three and a half miles an hour, which is slow walking time for a horse or man; a good horse will walk four miles an hour for eight hours every day in the year.

That is what Stephen Dorsey says. John differs with him. John says it is equal to seven miles an hour on an ordinary road. That is what he told Brady when he wrote his letter to Brady sending his oath. He is going to perform a service, he says, that is equal to seven miles an hour—extraordinary. Stephen Dorsey says, "Why, it is only equal to three miles an hour." It makes a big difference who they are talking to. When John is talking to Brady, it is a large undertaking. When Stephen is talking to Joseph, it is a trifling business:

The time is slow compared with the time on almost every route in Colorado. The time on the route from Parrott City to Silverton, over a worse country than your route, is six (6) miles an hour.

Gentlemen, I will get at that next. Do not forget that—six miles an hour:

The average speed on nearly all mountain routes in Colorado is over four (4) miles an hour, and many of them as high as seven (7) miles, and that, too, over mountain roads.

Of course, your men must go night and day, and if they do that they can carry their mail on an easy walk and make the time. *The mail must be carried on time and three trips a week. We cannot and must not permit* the orders of the department to be disregarded in this respect. You lose your pay and we lose ours by doing so; and to talk of the speed being too great, it is so absurd that we have not the face to go to the department about it.

His modesty would prohibit him from going to the department to say anything at all about it.

If you expect to make this time by allowing your carriers to run *only* in the *day-time* you are quite right when you say it can't be made, but it is your business to arrange your stations, put on your stock, and get your carriers so as to keep them going night and day.

Over a route where the witness told you they dare not travel in the night-time.

Your statement—

Now listen to this, gentlemen :

Your statement that it would cost \$12,000 to run this service in 50 hours is equally absurd.

How much did Brady allow him? Brady gave him \$8,457 for expedition alone, and \$3,316 for increase of trips. That is, \$13,242, to say nothing of what had gone before. And yet he has the cheek to tell poor Joseph that \$12,000 is too much. Why did he not tell that to Brady? Why did he not save the Government that amount? Twelve thousand dollars too much! This is Stephen Dorsey, too, who never had anything to do with it—he lost money on it.

Your statement that it would cost \$12,000 to run this service in fifty hours is equally absurd. That would be at the rate of \$26 per mile per annum, while the average cost of horse-back service is less than five dollars (\$5) per mile per annum.

You see how well he had it down—\$5 a mile.

I am afraid the trouble is that you are not giving this matter your personal attention, which you will have to do before you will get it in shape.

Now there is no use of writing to the department about these matters; we are responsible to the Government and you are responsible to us, and this service must be carried according to the instructions of the department. Furthermore you are doing yourself and us a great wrong in getting postmasters to write the department, asking to have the old time restored. This, I hope, will never be done again. If you want anything, we are the proper persons to write to. You have nothing to do with the department except through us.

Finally, you can easily make the time required by the department, to wit, fifty hours, *and you must do it without further delay.*

He has marked that underscored. It is here in italics. He did not want him to forget it.

The mail *must* also be carried *three times a week*, or you will be fined until there will be nothing left to pay you or us.

Do no more writing, but go forward energetically and carry this mail according to your contract, and I will see whether we can pay you something over and above the amount you are now getting, which is \$5,160 per annum, according to our calculation.

Whilst they got \$13,242 slapped right on, they are grumbling and growling at poor Joseph, who got \$5,160, and telling him he must carry it or they would both lose. Of course there would be no doubt about the losing if he did not carry it.

I do not promise to pay you any more than the contract calls for, but if you go forward as you should, I have no doubt I will do something additional. I hope to hear that this service is running on time, and three trips a week.

Yours, truly,

S. W. DORSEY.

How familiar he had become with the mail, and how he amused Joseph with the idea that he was going to give him something additional. You will see how much additional he gave him before I get through.

Then, on the 7th of August, 1879, is the next thing that comes in order. Rerdell writes a letter to Joseph, and he forwards him his quarterly pay, less fines and deductions. Then, on the same day, the 7th of August, John Dorsey makes a subcontract with Pedro J. Jaramillo, and Rerdell signs that as attorney in fact for John Dorsey, and afterwards John Dorsey indorses this contract ratified. They must have had trouble with Joseph, because, in June, Stephen Dorsey wrote to him, and, in August, they make a contract with Pedro J. Jaramillo.

Now, then, on the 22d of August, 1879, Rerdell writes a letter to Anthony Joseph, and he says in that letter to Anthony Joseph that he has made the contract with Pedro J. Jaramillo, and that the contract price is \$1,200 more than the \$5,100 that he had been paying to Joseph, and he makes a demand upon Joseph to come up and pay him the \$1,200, the difference between the two contracts. Now, poor Joseph was on the stand. He says, "I lost everything I had." He carried the mail till he could not carry it any longer. Every dollar he had in the world was sunk in the mail, and Rerdell writes to him, "You must come up with the \$1,200." Now, you know what Joseph did. Let me try and bring it back to your memory. He went down to Stephen Dorsey's ranch in New Mexico, and had a little talk with Stephen Dorsey, and he told Stephen Dorsey that he had been ruined, that he could not carry the mail in the schedule time. Turn to pages 868 and 869. He told his pitiful tale to Stephen Dorsey, that he had been ruined by the fifty hours schedule; that he had gone on until he had not a dollar in the world, and he had no money left, and he begged Stephen Dorsey to give him something, and Stephen Dorsey, with a generosity that is unparalleled, put his hand in his pocket and gave Anthony Joseph something—\$109.39. I suppose it was the last dollar and the last cent that Stephen Dorsey had left in the world, because he said to Joseph, "You cannot expect me to put my hand in my pocket and pay you. I got nothing from the Government. I lost it all." How could Stephen Dorsey be expected to pay for it when he had lost it all? Do you want the pages for that? I refer to pages 868 and 869. I will read you what the witness says. He commences there and tells about the difficulties of carrying the mail:

Q. What do you mean by saying "consume the earnings of the service"?—A. Well, he told me that he was not getting a dollar, or had not received a dollar, from the Government for the service that I had performed from the 1st of April, and that, consequently, he could not pay me out of his own individual pocket, I having failed to perform the service as required in the fifty hours.

Of course he could not pay him out of his own individual pocket. He gave him \$109.39. Then, on the 29th of September, 1879, Brady sends a notice to the auditor of Jaramillo's contract for \$7,300 and some odd dollars. It must have been an occasion when there wasn't much doing. On the 13th day of December, 1879, Rerdell again writes a letter to Anthony Joseph, making a demand upon him to get this money, and he says, "If you do not pay it we will sue you." After Stephen Dorsey had given him \$109.39 to get rid of him, then Rerdell comes back again with his letter and talks about bringing suit.

On the 14th of April, 1880, for the third time, the postmasters along this route notify General Brady that the mail cannot be carried. The postmasters say in their letters that the mail-carriers have done everything in their power to carry the mail; that they have lost every dollar that they had in the world; that it is impossible to carry it, and ask Brady to take it off. This was on the 14th of April, 1880. It is found on page 847. On the 8th of June, 1880, after that letter had been written, Pedro J. Jaramillo, the poor fellow who stood on the stand, says: "I paid \$500 to have them release me from the bargain. I paid \$500 for them to release me from my subcontract. I never made a dollar out of it. I lost everything that I had put into it. I got the money, \$500, and to keep Rerdell from bringing his suit I paid it over to him, and I got a release." And with a cheek, with an impudence that is unparalleled, they filed in the department the release of Pedro J. Jaramillo, in which he gives \$500, and they gave him a release in duplicate, and they

filed that in the department in order to convince the Auditor that they had settled amicably with Pedro Jaramillo, whose contract was on file, and, therefore, they were entitled to the pay.

Then, on the 12th of June, 1880, after Jaramillo had settled with Rerdell and given him the \$500, John Dorsey made a contract with J. L. Sanderson, and Rerdell signed that as attorney in fact. He is making a contract now with a man he could not fool.

On the 19th of August, 1880, Brady remitted \$1,658.98, deducted on the 8th of May from Pedro Jaramillo. Gentlemen, the order for that money was sent to J. W. Bosler, the man who was mentioned in Rerdell's statement as the banker, the cashier, the next friend. The man who received the remission was J. W. Bosler, and a very good fellow he is, too. I know him well. But he got this warrant for \$1,658.98 that they had taken off the pay of Jaramillo. This was made on the 19th day of August, 1880, and on the 8th of June, 1880, Pedro Jaramillo had given \$500 to get clear. You remember it. It was between June and August. He never heard that the \$1,658.98 had been paid over until he came to this city to testify; and true to their instincts, and with a meanness that is unparalleled, they never paid it over. They put the \$1,658 in their pocket that belonged to Pedro Jaramillo after they had squeezed \$500 out of him, and I say nobody but a thief would do an act of that kind. The poor fellow, broken up, ruined completely, gave \$500 to pay them. They collected \$1,658.98 out of his salary and they kept it from him on the mean, miserable pretense that there had been a complete settlement, and that there had been a release between them. They forgot to tell him. And I see that William Turner forgot to notify Pedro Jaramillo, and it was his duty to tell the man that there had been a remission. [Turning to Mr. Turner.] I do not blame you, Turner. You had a very bad tutor.

Now this remission of \$1,658.98 was made after Stephen Dorsey—— [Mr. Wilson here approached and whispered to Mr. Ker.] I will tell that. Turner was not in the inspection division. But he happened to have charge of the papers. He was the man who had charge of the papers. He was not paid to sit down there and write what was told him by another.

John Dorsey was the man who got together the affidavits; who arranged and fixed this business; who put in his own application to the department, and who collected or got the remission of \$1,658 after Stephen Dorsey had assumed control of this route.

Gentlemen, I have pointed out to you how Joseph protested, how the postmasters protested, the oath that was filed, and the protest that was in there—almost a protest—notifying them of the impossibility of performing the service. I have shown you again how, after expedition was put on, the postmasters wrote back and said it could not be done. And yet, gentlemen, in the face of all that, on the 26th of February, 1881, Brady makes another order, and he says:

From January 15th, 1881, increase the service seven trips, and allow the contractor \$17,910.72.

Now, then, here comes another remarkable part of it. With all the notice that General Brady had placed before him, there is a notice that is stronger yet. He says:

And allow the subcontractor \$10,666.64.

In this order he makes it \$17,910.72, to be added to the \$13,242.28

which it was before; he puts on the face of the papers and in his own writing the statement that this very mail is being carried for \$10,000.

Gentlemen, I explained to you when I started out that the petitions in this case only asked for increase of service from Pagosa Springs; but acting upon the petitions, Brady increased the service over the entire route. Now, the testimony of Joseph was that the mail could not be carried in fifty hours. Jaramillo testified to the same fact. Postmaster Trew was on the stand, and he was shown four schedules of time.

Q. Did you sign these?—A. Yes, sir.

They were read to you. It was stated on these schedules that it would be impossible to carry the mail in the time specified, and he was then asked on the witness-stand:

Q. Did you get any more?

Listen to what he says:

I received a humber of these schedules. I never replied to them. I threw them in the waste-basket. I got sick and tired of receiving and replying to them. I sent the same reply every time—that it was impossible. I did not want anything to do with such a route.

That was the testimony of the postmaster on the stand.

Now, then, the oath of Dorsey called for, on the present schedule, three men and seven animals, making a total of ten, and on the expedited schedule it would require nine men and twenty-seven animals, making thirty-six. Jaramillo's testimony was that he used six men and twenty-six animals, a total of thirty-two. Now you know that Dorsey got the rate of from ten to thirty-six, whereas the total number that was used by Jaramillo was thirty-two, and then he was asked why he did not put on more men and more animals. He said if he had put more men and more animals on he could not have done it any better. You cannot expect men to perform an impossibility. They cannot ford a river in the night unless they chuck a man and an animal in the river and watch the chance to see whether they could cross. Then, if it is all right, send them ahead.

Next, gentlemen, let us take the payment in this case. The original pay was \$2,745. Then they cut off Animas City and reduced it to \$1,279.22. Then came along the three trips and made \$13,242.28. Then it was increased to seven trips, making \$31,343.76. Gentlemen, Mr. Stephen W. Dorsey, who had this route at that time, received the modest sum of \$20,672.82, without spending a dollar on the route. At the time that he was talking to Joseph and telling him that he was making nothing he was getting over \$20,000 clean and clear out of this route. This is the longest route I think there is in the whole lot. There is more explanation connected with it.

Now the revenue from every office along this route in the year 1879 was \$402.26. But if you throw off the offices that were supplied by other routes where there was more than one route going in, the entire revenue on this route was \$78. It was \$402, if you put in every office, and \$78 when you take off the offices that were supplied elsewhere, and \$31,000 was paid for that work. Then it increased in 1880. The entire revenues were \$935.82, and the net revenue was \$244.68. You take off the offices that were on the route that were supplied elsewhere in that year and there were \$244 collected. The next year it was \$3,855 for every office, and yet, if we take off the offices that were supplied by the railroad that ran down there at that time, you have \$262.15 as the entire revenue received from this route.

ROUTE NO. 38156, SILVERTON TO PARROTT CITY.

The next is Silverton to Parrott City, Colo., route No. 38156. This was a route of sixty-five miles long. There were two trips a week, and it was run in thirty hours. John W. Dorsey was the contractor, and his pay was \$1,488. Miner was early about. He witnessed the proposals and he witnessed the contract. [Exhibiting a sketch map to the jury.] Here is the route, gentlemen of the jury. It started here at Silverton and ran up to Animas City, and then ran along by Animas City. Animas City was taken off the other route. The other route was stopped right there and Animas City was put on this one. The carrier on this route always went through that city in going to Parrott City.

On the 14th of January, 1878, Postmaster Trew wrote to Brady that the carriers passed through Animas City, and that it should be on this route. On the 1st of May, 1878, John Dorsey made a subcontract with William E. Earle for two trips, at \$2,280. On the 14th of June, 1878, a distance circular was sent out, and it is with the files here, showing that Animas City was still on that route. On the 1st of October, 1878, Earle's subcontract was filed. On the 23d of January, 1879, there was an order made to embrace Animas City. On the 17th of March, 1879, there was a change of schedule from thirty to thirty seven hours. On the 21st of April, 1879, John Dorsey made his oath. On the 5th of May, 1879, Dorsey sent his oath into the department, wrote a letter to send in with it, and on the 6th of May it was filed. On the 5th of May the address is changed to Rerdell. On the 12th of June, 1879, the service was increased to five trips and the time reduced. On the 11th of November, 1879, Stephen Dorsey filed his subcontract. On the 25th of November, 1879, John Dorsey made a contract with Steineger. On the 27th of November, 1879, there was a letter from Rerdell to Brady stating that Dorsey was out at Silverton. On the 21st of January, 1880, Stephen Dorsey's subcontract was withdrawn. On the same day Steineger's subcontract was filed. On the 17th of April, 1880, the service was reduced one trip by the Postmaster-General. Then there was a deduction from the pay remitted. Then there was a petition to Brady stating that it was impossible to carry the mail on the schedule, and asking for a winter schedule. Then there was a letter from Rerdell asking for a winter schedule.

Now, let us go back and take these dates and the occurrences. On the 14th day of January, 1878, before the service began, the postmaster informs Brady that Animas City was on the route, and this was before the contract was signed and before the proposals were accepted or the bids opened. On the 1st of May, 1878, John Dorsey made a subcontract with William E. Earle, and he agreed to pay Earle \$2,280. He was getting \$1,488 himself. He agreed to pay nearly a thousand dollars more than he was receiving. On the 14th of June, 1878, there was a distance circular sent out, which was returned and filed in the department, and which showed that Animas City was on this route. On the 1st of October, 1878, there was a subcontract of Earle filed. On the 23d of January, 1879, there was an order made by Brady to embrace Animas City, and to allow \$215.65 for carrying the mail through Animas City, a place they had been carrying it through all along. On the 17th of March, 1879, there was an order made by Brady to change the schedule from thirty to thirty-seven hours. He gave them seven hours longer to carry the mail, but there is no record here that there was any deduction from their pay on that account. On the 21st of April, 1879, John W. Dorsey made his oath, and he made it for seven trips and fif-

teen hours. Now, gentlemen, I again call your attention to the fact that there is nothing on the record that shows where they got those figures. There is nothing that shows how John Dorsey was to get at the seven trips a week or how it was fixed at fifteen hours; and certainly there has been no testimony offered that shows anything at all about it. It is sufficient that when the oath was made away in advance, that at the proper time Brady follows the oath, and the expedition and increase of pay was allowed accordingly.

Mr. Rerdell wrote that oath. He did not sign it, but he fixed it up. Then on the 5th of May, 1879, Mr. Rerdell wrote a letter and signed Dorsey's name to it, sending the oath along, and the next day, the 6th of May, the oath was filed with the letter that Rerdell had written to accompany it. Then there was the usual change of address to the care of Rerdell, and the letter that was sent changing the address Rerdell saved John Dorsey the trouble of writing and signing, and did it all for him. On the 12th of June, 1879, the service was increased five trips from the 1st of July, 1879, and the contractor allowed \$4,259.12. The time was reduced from thirty-seven hours to fifteen hours, and the contractor allowed \$10,549.51. I forgot to tell you that they changed the time from thirty to thirty-seven hours because Animas City was put on the route. The supposition in the department was that it would take them a little longer to go through Animas City.

On the 11th of November, 1879, Stephen Dorsey filed a subcontract, which purports to have been made on the 1st of April. On the 25th of November, 1879, John Dorsey made a contract with Steineger at \$9,400. It was only in June that Brady allowed \$10,000 for expedition alone; but John Dorsey let it to Steineger for \$9,400, and Stephen Dorsey guaranteed the contract. On the 27th of November, 1879, Rerdell wrote a letter to Brady stating that John Dorsey was at Silverton arranging about the mail. It seems that there was some trouble about carrying the mail. It could not be carried, and there was some complaint about it. On the 21st of January, 1880, Stephen Dorsey's subcontract was withdrawn, and on the same day they filed Steineger's subcontract. Of course, if there was any trouble about it Stephen Dorsey did not want to be on the record. On the 17th of April, 1880, the Postmaster-General ordered this service reduced one trip. On the 19th of August, 1880, Brady writes to John Dorsey a letter, in care of Rerdell, that \$1,845 having been deducted from their pay for the quarter ending March 31, 1880, it had been remitted. It was so important for Brady to inform Dorsey and Rerdell that this remission had taken place that in the midst of his official duties and great press of business he sat down and wrote a personal letter, telling them that this remission had been made. Now, gentlemen, this fine of \$1,845 had been taken off of Steineger's pay. I want to show you another extremely honest transaction. When the money had been deducted from Steineger he was unable to carry the mail. I am speaking from the record. You will find it all recorded on pages 1857 and 1858. Steineger had failed to carry the mail, and they had fined him \$1,845, and he wrote to Rerdell and to Dorsey that if he lost this money he could not carry it. They turned around and sent him \$1,129.02 to help him to carry the mail, giving him the impression and the idea that they were so liberal that, although he had agreed to become responsible for the fines, yet they were going to advance it out of their own pocket and give him \$1,129.02. They kept that, and, as Steineger did not know anything about it, they filed that letter of Steineger's in the department, showing that Steineger had been paid, and the whole thing was certified to the Auditor, and the

\$1,845 was drawn by these contractors and kept by them. Now, take off the \$1,129.02 that they had given Steineger, and it leaves them a net profit of \$715.98 that they put in their pockets, and poor Steineger never heard a word about it until he got here to Washington. He thought he was under obligation to them, and was willing to remember them in his prayers for their liberality in giving him \$1,129.02, when they had deliberately robbed him of the other \$715 that they had put in their pockets and kept from him. On the 8th of November, 1880, the postmasters along the route wrote to Brady a petition, and said that it was impossible to carry the mail, and they begged him to make a winter schedule, so that the mail could be carried and the subcontractor would not be robbed. Now, these postmasters out there saw the efforts of these subcontractors to carry the mail and sympathized with them, and knew it was impossible to do it, and wrote to Brady begging him to change the schedule. As soon as Kerdell found that out he stepped in, too, and wanted a change of schedule, and he writes to Mr. Brady asking for a winter schedule of twenty-four hours, and stating that it would be impossible to carry the mail in fifteen hours. Gentlemen, did Brady change the schedule to twenty-four hours? He never did anything half so foolish as that. He never made an order in the premises. He let it be fifteen hours. Why? Kerdell told the Postmaster-General and he told the Attorney-General why. It was because Brady got 50 per cent. of the fines and deductions. He got a greater percentage of the fines and deductions than he was getting out of the combination. He just let the thing run on, and I tell you every order that was made making these impossible schedules was based upon the same hypothesis. Judge Wilson put in a table of fines and deductions. Look at it. Read it over carefully. Add it up. Give it to the jury. Call the subcontractors and ask them how much they got. I tell you they did not get 10 per cent. of it. But the other side will tell you, "Oh, we are not on trial for robbing the subcontractors." Of course they are not on trial for robbing the subcontractors, but it is part and parcel of the testimony in the case, and you are to take the whole of it and not obliterate part of it; and when you find that a man is ready to rob one man, you will be certain he will be equally ready to rob another. Carroll, Carson, Postmaster Trew, all told you the mail could not be carried in that time. It was impossible to do it.

Now, then, Dorsey's oath. He says it did require three men and ten animals on the present schedule; that it was taking that number. That would make thirteen. If you reduced it to fifteen hours it would take six men and thirty animals, thirty-six. He got an allowance of the difference between thirteen and thirty-six. The testimony of Carroll was that he used four men and twelve animals; that is sixteen. The difference between sixteen and thirty-six is very material. Judge Wilson, in cross-examining, asked him, "Did you not put on more men and animals?" The witness looked at him in astonishment. He probably thought in his ignorance that Judge Wilson had been in that section of country. He answered, "We carried the mail on snow-shoes and dog-sleds," and he told how many horses it would have taken, running day and night, to keep the road broken. The snow fell from fifteen to twenty feet, the postmaster said. Judge Wilson asked him, "Why did you not put on more men and animals to keep the track open?" His answer was, "The snow was too deep to use horses in winter." That was the reason he did not use more; but that never entered into John Dorsey's calculation when he swore deliberately that it would require thirty-six men and animals to carry the mail. It never entered into the

calculation when Turner made the figuring and Brady made the order that allowed it.

The pay on the route was originally \$1,488, and it was increased to \$14,870.01. Steineger's pay was \$9,400, leaving the contractor a clean profit of \$5,470.01. Now let us see the productiveness of this route. On every office on this route in 1879, \$984.48 were received. On the offices that were not supplied by other routes the total receipts were \$83.18. In 1880, when the railroad got to Parrott City, the total receipts were \$2,271.14. On the route in the offices that were not supplied by railroad or in other ways the total receipts were \$185.36. Then, again, in 1881, it ran up to \$5,670.87, and the total receipts from the other offices were \$179.13. Fourteen thousand eight hundred and seventy dollars was the cost for carrying \$179.13 worth of mail. Mr. Pennell told you that when the railroad ran along the settlers went with the railroad. Mr. Pennell told you that when the route was away from the railroad it was settled up very slowly. These figures bear Mr. Pennell out, and I say these figures do not tell anything but truth.

NO. 46132, FROM JULIAN TO COLTON.

Next we come to route No. 46132, from Julian to Colton, in California. It was one hundred and twenty-one miles long, there was one trip a week, and the time was fifty-four hours. John M. Peck was the contractor, and the pay was \$1,188. Miner was a witness to the proposal and a witness to the contract. On the 2d of November, 1878, the subcontract of Chauncey Hayes was withdrawn. It seems that Chauncey Hayes was the subcontractor, but his subcontract is not to be found. [Correcting himself.] I am mistaken. His subcontract is found. On the 30th of December, 1878, the oath of Peck is said to have been signed. On the same day there was a proposal by Peck to carry the mail three trips in twenty-six hours. On the 11th day of April, 1879, the oath was filed. On the 24th of May, 1879, Vaile's subcontract was filed. On the 24th of June, 1879, Brady made an order for increase from July 14, 1879.

This route is very short, but I will give you some very interesting facts. First of all was the contract, and preceding the contract was the proposal. Now, this route was in the name of Peck. They began very early with it. Miner signed Peck's name to the proposal. Miner signed Peck's name to the oath that accompanied the proposal. Boone says there was one of the proposals that was spoiled, and Miner took it out of the room and came back with it, and it had Peck's name signed to it, and it was put in with the rest. Blois tells you that Miner signed that proposal and that oath. In the afternoon apology they have here for a newspaper they have been calling Mr. Blois some very hard names as an expert. When Harvey M. Vaile got on the stand, that paper was pointed out to him, and he was asked who wrote it. "John R. Miner; that is Miner's writing and Miner's signature." He corroborated Blois in every paper where Peck's name was placed, and Blois said Miner had written it. They were shown to him one after the other. "Yes; it looks like Miner's signature." "Miner's signature;" "Miner's signature," and other people's names signed. This proposal was one of them. John R. Miner signed that proposal and that oath. On the 2d of November, 1878, the subcontract with Chauncey Hayes was withdrawn, and there was a letter sent withdrawing that subcontract. Miner wrote Peck's name to that letter. Now, who Chauncey Hayes was we do not know, but we do know that Vaile was on deck, and that Vaile wanted to control this route. You know Vaile got in on the 29th of September, 1878, and

got his subcontracts all fixed up on the 1st day of October, and they found that Hayes's was here, and this contract was withdrawn to give Vaile full swing at the route. Whether Hayes was a man like Ames, that Miner had personated, or not, I do not know. You remember that on the other route he wrote Ames's name to a contract, and wrote Ames's name to the letter withdrawing it. Whether he fixed up the same game in this case or not I do not know.

On the 30th day of December, 1878, the oath of Peck is supposed to be made. John R. Miner wrote that oath, and John R. Miner signed Peck's name to it. If you do not believe it, then you do not believe Harvey M. Vaile. Now, that oath was interlined. It was not fixed up right. It was erased and the figures were changed. I do not know whether John R. Miner erased the figures or not, but he wrote in the alteration. It is so plain and so palpable that if you hold it in the light you can see through it. What supreme laziness this fellow possessed, when he could have sat down and made another oath just as good as the first one. The only drawback was the seal of the notary, and I guess it would not have been much trouble to have hired a notary public by the year. On the 30th of December, the same day that the oath is supposed to have been signed, Miner writes a letter, and he signs Peck's name to it. It is a proposal to carry the mail three trips, twenty-six hours, for the additional compensation of \$1,782. He says, "Oh, well, I sent in the oath, but I am going to do it for less than the oath calls for." Three trips and twenty-six hours. Why, gentlemen, it had been advertised at fifty-four hours, and yet he wanted to carry it in twenty-six hours. On the 24th of May, 1879, along comes Vaile's subcontract. It is dated the 1st of April, 1878. It is headed John W. Dorsey & Co., and Miner signs as attorney for Peck. Rerdell is about, and he witnesses it.

On the 24th of June there was an order. There was no use in doing it any sooner, for, as I explained to you yesterday, the fiscal year begins in July. The order was to increase two trips from the 14th of July, 1879, and allow contractor \$2,376 per annum. He makes another order to reduce the time from fifty-four to twenty-six hours, and allow contractor \$5,346. I do not know what he did with Peck's offer to carry it for \$1,782, or whether he considered it was worth while to notice it at all, or whether he, in his good judgment, did not think that Peck, whose name was signed by Miner, meant what it said, and that he had better disregard it. At any rate, he did disregard it, and, instead of taking the offer at \$1,782, he increased the pay, first for trips \$2,376, and then for expedition \$5,346.

Gentlemen, there were two petitions filed in this route. They ask for thirty-six or thirty-eight hours time. Mr. Turner made an indorsement upon these petitions that the Senators asked for expedition. A Senator sent in the petition "respectfully referred to Hon. Thomas J. Brady." Mr. Turner, with an eye to the interest of the contractor, indorsed it that the Senator wanted expedition. Now, gentlemen, it was brought down to twenty-six hours, and a witness on the stand said, "We missed all connections. We made no connection with any place. We missed it all." He was asked, "In what time would you make connection?" "Why, thirty-six hours, the same as we wanted it. We wanted it thirty-six or thirty-eight hours, and that would have made connection." But they made it twenty six hours. The oath calls for that, and the application calls for that, and so they made it twenty-six hours and missed all connection.

Now, then, the oath says that on the present schedule it requires—present tense—four men and five animals, making nine. Reduced to

twenty-six hours will require nine men and eighteen animals, making twenty-seven. They get the difference between nine and twenty-seven. The witness Bergman testified that he carried it with one man and three animals; that is four. When they reduced it he carried it with three men and twelve animals; that made fifteen. Miner had written it twenty-seven. Bergman says fifteen was all he wanted, and he carried it with fifteen, although the affidavit was made for twenty-seven.

The original pay on this route was \$1,188, and it was increased to \$8,910. We wanted to find out how much they paid Bergman for carrying the mail, and we were shut out; but it came out in the examination that the new contract is thirty hours' time, and that all that they pay for carrying the mail on thirty hours is \$3,483. Yet this was \$8,910, and the increase made them miss all connection.

Let us see what the productiveness was. Take every office on the route, and in 1879 it was \$524. In 1880 it was reduced to \$399. In 1881 it went up to \$479. In 1881 it was less than it was in 1879; so that expedition did not amount to much upon that route.

NO. 46247, FROM REDDING TO ALTURAS.

The next is route No. 46247, from Redding to Alturas, in California. The distance was one hundred and seventy-nine miles; it was originally two trips a week, and the time one hundred and eight hours. John M. Peck was the contractor, and his pay was \$5,988. On the 3d of June, 1878, Brady ordered an additional trip. On the 18th of September, 1878, Peck's oath was signed. On the 3d of December, 1878, there was an offer filed to carry the mail. On the same day Peck's oath was filed. On the same day Brady ordered an increase of three trips. On the 22d of January, 1879, there was another oath of Peck put in. On the 20th of May, 1879, there was a subcontract made with Major & Culverhouse. On the same day there was another subcontract made with Major & Culverhouse. On the 17th of April, 1880, the Postmaster-General ordered a decrease of three trips. On the 26th of August, 1880, Mr. French restored it by putting on three trips.

Now, the peculiarity about this route is the time. You know it was one hundred and eight hours. On the 3d of June Brady began by ordering an additional trip, and he allowed \$2,994 for this additional trip. There are in the jacket that was examined in this case eleven petitions, all in the same language, asking for an increase of service from Redding to Alturas. On the strength of that Brady increased the service an additional trip. Then on the 1st of September, 1878, Peck's oath was signed for seventy-two hours. It was one hundred and eight, but he signed the oath for seventy-two hours. It did not state how many trips, but it was for seventy-two hours. Miner attended to the oath, and wrote the oath and signed Peck's name to it. On the 3d of December, 1878, there was an offer filed by Peck to carry the mail for \$26,946. The oath, then, was only put in as a blind. On the same day the oath and this proposition were filed. On the same day Brady makes his order, and he says:

From December 16, 1878, increase the service three trips per week, reducing the time from 108 to 72 hours, and allow the contractor \$26,946 per annum additional, which is less than pro rata, but as per his agreement.

On the 22d of January, 1879, there is another oath of Peck, calling for seven trips on forty-five hours. You know it was boiled down to seventy-two, and then they got another oath, and they put it in for forty-five hours. On the 20th day of May, 1879, the subcontract was made

with Major & Culverhouse, which was to carry the mail six trips for \$21,000. Rerdell signs this as attorney for Peck. Rerdell officiates. Miner writes the oath, and Rerdell acts as the attorney for Peck and signs the contract, and John Dorsey signs it as a witness. On the 20th of May, 1879, the same day, there is another contract made with Major & Culverhouse. The peculiarity of the two contracts is just this: Rerdell signed one as attorney for Peck. Rerdell signed Peck's name on one contract and John Dorsey signed it on the other, both on the same day. How it was that they came to make that interchange in attorneyship I do not know, but there it is. There are both the contracts; Rerdell attorney in one, and John Dorsey in the other. I will tell you how I think I explain it. In the first contract there was no guarantee. In the second contract, that John Dorsey signed, Stephen Dorsey guarantees the contract. I suppose that Major & Culverhouse did not want to take it without there was a guarantee, and they had to fix it up, and it did not make any difference who signed. John Dorsey was with Stephen Dorsey, and he signed it as attorney for Peck, and Stephen Dorsey then guaranteed it.

Now, on this route Miner drew the pay, and Vaile drew the pay, and Stephen Dorsey drew the pay, and Mr. Bosler drew the pay. They all drew it. They all had a share in it, and if there was any difference of opinion about Stephen Dorsey he got this pay. On the 21st day of May, 1879, he drew it, and again on the 6th of November, 1879, and Mr. Bosler drew it afterwards, and Mr. Bosler was, in point of fact, Stephen Dorsey.

Now, gentlemen, it was reduced to seventy-two hours. The mail carrier says:

I always carried this mail inside of seventy-two hours.

It had always been carried in that time. It had always been carried in forty-four hours, and that was less than the seventy-two hours that Brady reduced it to. Mr. Major, who was on the stand, testified:

We went through in about forty-four hours. In winter time we sometimes consumed sixty-five hours.

He never heard about seventy-two hours. He knew nothing about this little business that was fixed up in Washington. He was carrying it right straight along in forty-four hours, and that accounts for the second oath of Peck, where they were going to make a double deal in it and get it down to forty-five hours, one more than Mr. Major was carrying the mail in, and of course they could have raked it all in and put it in their pocket, and Major would never have known anything about it.

Now, Mr. Major had been a postmaster, and your foreman had some curiosity, and he asked him a question. He says:

When you were postmaster did you not notify the department about this?

Major says:

Of course I did. I sent them in my return. It was all on the return.

You remember that, gentlemen. There in the office before Brady was the return that the mail was carried in forty-four hours, and in the face of that he reduces it to seventy-two hours and allows this immense expedition. Let us see what it was.

The original pay was \$5,988. Then it was increased to \$35,928. They paid Major & Culverhouse \$21,000, and it left them a clean profit of \$14,928 for seventy-two hours time, when the mail went through in forty-four. The profits, or rather the receipts—it is an outrage to call it profits. In 1879, from every office on the route, the amount that was received was \$2,679.90. In 1880 it was \$2,831.83, and in 1881 it was \$2,480.16.

It went down to \$2,480, and it cost \$35,928 to bring that into the public Treasury.

ROUTE NO. 38134, PUEBLO TO ROSITA.

Next we come to route 38134, Pueblo to Rosita, Colorado. You remember that route, gentlemen. There was only one office on the whole route. That was Greenwood. Not Greenhorn. Greenhorn was a place where the carrier went from Saint Charles to the water tank. But this is Greenwood. This was a forty-nine mile route, one trip a week and fifteen hours. John R. Miner was the contractor, and he got \$388 for it. John Dorsey witnessed the contract. I will give you what appears in the record before going into the case.

From July to October, 1878, Frank A. Tuttle was the subcontractor. On the 21st of April, 1879, John W. Dorsey, the subcontractor—not the contractor, but the subcontractor—makes an oath for an increase of seven trips. On the same day he makes another oath. He makes an oath on the 21st of April, and the next day they commenced throwing in their petitions. On the 25th of April, 1879, there is a letter from Governor Pitkin that is filed, and it is indorsed by James B. Belford. On the 26th of April, 1879, there is a letter signed by Chief-Justice Thatcher and Associate Justice Stone, asking for an increase of service. On the 5th of May, 1879, the oath is filed and a letter along with it. You know on the 5th of May they wrote Brady a letter, and on the 6th of May they filed the letter and the oath. On the 8th of May, 1879, John Dorsey asks leave to withdraw his first oath. Then on the second day he files his second oath. On the 8th of July, 1879, Brady orders the increase of trips and reduction of time. On the 22d of October, 1879, there is a contract with Eli Hansom filed. On the 8th of May, 1880, the postmaster at Greenwood notifies the department of the failure of the contractor to carry the mails. On the 31st day of July, 1881, the route is discontinued.

From July to October, 1878, Frank A. Tuttle was the subcontractor, under a contract with a man named Watts, whom you have heard of before. Watts appeared for Miner, and the contract called for \$700. Remember they were originally to get \$388, and that is what Vaile would call a losing contract. On the 19th of August, 1878, there is a letter sent to Tuttle, which is found on page 1040. It is worth reading. It is signed "Miner, Peck & Co."

It is headed :

[Branch office, Kansas City, Mo.—

Branch office! Why, I did not know that Vaile had any need to fix up this branch office in Kansas. However, here it is—

John W. Dorsey & Co., mail contractors.]

WASHINGTON, D. C., August 19th, 1878.

Is it possible they were printing for the man in Missouri, or getting ready his blanks for him?

FRANK A. TUTTLE, Box 44, Pueblo, Colo.:

DEAR SIR: Yours 14th received. We accept your proposition, *provided* (so that there shall be no conflict) that a friend of ours, who has recently gone to Colorado, has not made different arrangements before we can get him word.

They are going to accept Tuttle's proposition for something. Now comes the remarkable part of it:

The petition for expedition should be separate from the petition for increase of number of trips. We make no boast of being *solid* with anybody, but can get what is reasonable.

Yours, truly,

MINER, PECK & CO.

On the 19th of August, 1878, they did not boast of being solid with anybody. They had not measured Brady up. He had not been weighed. They had not tried him sufficiently. They know now how solid they are with him, and they know how solid he is with them, and they are solid together to-day. The only offshoot is Vaile, who gets on the stand and tries to coax you to believe he had nothing to do with it. They are solid—solid even yet.

Well, on the 3d of September, 1878, there is another letter at pages 1041 and 1042. This letter is dated the 3d of September:

WASHINGTON, D. C., 3d Sept., 1878.

FRANK A. TUTTLE:
Yours 23d received.

Now, then, the 19th of August they sent the solid letter. On the 23d of August Tuttle replied to it, because I find this is on the 3d of September:

We have been looking into the chances of having route 38134 increased to three trips a week, and they do not look promising. The only office supplied by the route is Greenwood, according to the rule of the department, as Rosita has mail six times a week from route 38132, and Pueblo is on R. R.

Here is the letter telling them the only office is Greenwood, and therefore they cannot get an increase on this route, because the other route is seven times a week, and a rule of the department is that the offices shall be supplied from the route having the greatest number of trips, and it did not look promising to get trips over this route when there was only one office on it.

We will, however, do what we can to accomplish it.

I have no doubt of that.

If we fail we have an offer to carry the mail once a week at a reasonable price.

Truly yours,

MINER, PECK & CO.

If they could not get it increased to three trips a week, then away goes Frank Tuttle. He was getting \$700. They were only getting \$388, and everything depended on having it increased. If it could not be done Tuttle might as well give up. It was a big inducement to Tuttle to go ahead with the petitions, and they were to be separate, one kind for increase of trips and another kind for increase of expedition, and if he did as directed it would be all right, and if he did not do it, "Tuttle, remember you are gone."

On the 17th of March, 1879, one of the faithful postmasters writes a letter to Mr. James N. Tyner. It is found on page 1030 of the record. It is dated March 17. That was before Brady made his order for increase and so on:

GREENWOOD, COLORADO, March 17, 1879.

Mr. JAMES N. TYNER,
First Assistant P. M. General:

My duty to the department requires that I should suggest the discontinuance of the present mail service (weekly) from Pueblo to Rosita, as we now have a tri-weekly from Florence to Greenhorn, by which we receive all our mail at present, and while we should much prefer the route from Pueblo to Rosita, yet so long as we have the mail promptly by the other route, the service from Pueblo to Rosita is superfluous and a needless expense to the Government. I do not make this suggestion at the instance of any interested parties, but simply as a saving to the department.

I am, dear sir, yours, very respectfully,

A. Q. MONROE, P. M.

Mr. Turner was faithful for once in his life. I rather take a liking to Turner. He is the only man who faces the music. He indorses on this:

Postmaster at Greenwood, the only intermediate office on the route, states that "My duty to the department requires that I should suggest the discontinuance of the present mail service (weekly) from Pueblo to Rosita, as we now have a tri-weekly service from Florence to Greenhorn, by which we receive all our mail."

Now, that was not hid away in a corner, but it was put right out on the jacket. He did one good turn.

This is on the 17th day of March. On the 21st of April, 1879, John Dorsey makes an oath for an increase to seven trips and ten hours. It was fifteen hours. They wanted to get it down to ten, and he says it will take six men and eighteen animals in his oath. Rerdell fixes up that oath for Dorsey to sign. Then, on the same day, for some reason, probably they were manufacturing oaths by the wholesale, there is another oath, and remember that John Dorsey is the subcontractor, and he is not on record. He calls himself the subcontractor, when he is not on record in the case any more than I am. He makes another oath, and he calls it seven men and thirty-eight animals. Oh, how his mind changes in one day! Six men and eighteen animals first. Next it is seven men and thirty-eight animals. Well, Rerdell did not fix that up. Young Mr. Kellogg fixed that business up, and got that oath into shape. It seems he was even better at it than Rerdell. Dorsey was willing to swear to whatever Rerdell wrote. Why should he not be willing to swear to what Kellogg wrote?

From the 22d to the 30th of April petitions were filed for an increase of mail service from Pueblo to Rosita. These petitions did not ask to have it over this route. From Pueblo to Rosita they had a tri-weekly mail that went up by Florence and touched the railroad, and they got their mail on faster time in that way. But they are put in this jacket. [Turning to Mr. Turner.] Now, Mr. Turner, you did not do your duty there. You ought to have put them in the other jacket. They were put into this jacket on this route.

[To the jury.] On the 25th of April, 1879, there is a letter from Governor Pitkin filed, and on the back of the letter Mr. Belford puts an indorsement. Now, that letter asks for an increased service from Pueblo to Rosita, but it did not state the route, and it is forwarded and Mr. Belford puts his name to it:

Respectfully referred to Thomas J. Brady.

When these letters were being read, and when these petitions were being read, it was warm, and your honor said, "What is the use of reading them? Why, they are written by honorable men. Mr. Brady had a right to regard them. Governor Pitkin wrote the letter and Mr. Belford indorsed it." Your honor, Governor Pitkin did not write the letter, unless Mr. Rerdell happens to be Governor Pitkin. The witnesses say it is his handwriting. Oh, if I were accused of writing a letter and I did not do it, I would get right on the stand and say I did not do it. But they never brought you a witness here who said Rerdell did not write that letter. We say he did.

Mr. MCSWEENEY. As Rerdell is not present I avail myself of the opportunity to get an exception to the expression of the gentleman. Make a note of it.

The COURT. What expression do you object to?

Mr. MCSWEENEY. Mr. Rerdell is charged with writing this letter. The gentleman says: "Oh, if I were charged with writing it I would get up in court and deny it." I except to it.

Mr. MERRICK. Now, sir, we will have a talk about that.

The COURT. I just happened to look at the statute this morning.

Mr. MERRICK. We will have to argue it sooner or later. I have something of the same kind to say.

The COURT. The act approved March 16, 1878, volume 20, page 30, entitled "An act to make persons charged with crimes and offenses competent witnesses in the United States and Territorial courts," provides:

Be it enacted, &c., That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, and courts martial and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

Mr. MERRICK. That is, a presumption of guilt—shall not create any presumption. I have a number of authorities on the subject, but I haven't them here, for I did not come from my office to the court-room this morning. "Shall not create any presumption of guilt," but where testimony is in the possession of the other side as to any one specific fact, either side has a right to comment upon the failure to produce that fact, if it be an incidental fact, but not the right to claim that the party is guilty of the crime charged because he did not testify. There is a distinction. You do not presume him to be guilty of the body of the crime if he did not choose to testify from the fact that he did not testify. But where one particular fact is in the possession of the other party you may comment upon what a man would do generally, and you may comment generally upon what a man would do anyhow, may it please your honor, without asking the jury to presume that the man is guilty because he did not testify. May I not go to that jury and say that flight is an evidence of crime? May I not go to that jury and say that the various badges of crime mentioned in the law are evidences of crime? And may I not say that it is the universal rule of humanity that where innocence prevails a man is proud to make a clean breast and avow it? May I not say that as a rule of human nature? But I do not ask them to presume his guilt from the mere fact that the man did not request that he should go on the stand. The law of Congress never intended to arrest the operation of human logic nor to stay the perpetual influences of the laws of nature. I may say that if a man is guilty flight is an evidence of guilt; that where innocence prevails a clean open statement is the rule of human nature.

Mr. CARPENTER. The court has twice decided this question.

Mr. MERRICK. No, sir.

Mr. CARPENTER. Twice.

Mr. MERRICK. It was up incidentally and I did not argue it, and I shall argue it hereafter. I shall present it to your honor in a prayer, and argue the prayer fully.

Mr. CARPENTER. The court has decided it.

Mr. MCSWEENY. If the court please, to argue these questions is itself to violate the statute. Therefore, when your honor the other day said that I had not made my exception, I did not intend to be curt to the court, but I said it was one of those things that required no ruling. It is one of those things named and nominated as improper conduct upon the part of the Government or the prosecuting officers. If a juror were to come staggering into the box wholly intoxicated and incapacitated for action, I would not require the ruling of the court. The court could neither rule one way or the other. What is, is. It would be im-

proper conduct on the part of the juror, and that would be all there is of it. Now, at this time, and at this place, there is an inconsistency of argument, and in this, to wit: The very mention and discussion of it brings on the evil that the statute is intended to guard against, and I will not even mention the statute. We have statutes like unto this in the West. I know the rulings, and, in answer to what is claimed, I will have some, too. It has been decided there that when a party sat by and did not even except, and the court above said, "Why did you not except," the Supreme Court said, "To except would bring to the mind of the jury the very evil that the statute is intended to guard against." It is one of those things that requires delicacy on the part of the prosecution, and our courts have said, "When ye so lack in proprieties, your verdicts thus obtained shall go for nothing." Why do the statutes speak of it at all?

The COURT. In the warmth of discussion, of course, counsel sometimes will —

Mr. MCSWEENEY. [Interposing.] I simply say, as brother Merrick says he is going to have some more, I will wait and get it all together. The more the merrier.

The COURT. Wait until the time comes. In the warmth of discussion, I was going to say, remarks are sometimes uttered by counsel that are strictly improper.

Mr. MCSWEENEY. The other day when I made the remark, Mr. Merrick, instead of taking the hint at all, turned to me fiercely, "Sir, I except; put it down again, and I repeat it." And I did except again. That is the way I was met in debate. There was not any heat about it.

Mr. MERRICK. It was very cool and deliberate, and intended to be.

The COURT. An exception is always taken to the ruling of the court. You cannot except unless it is to some ruling of the court.

Mr. CARPENTER. That was objected to.

The COURT. Here was a remark that the court did not authorize, and, of course, there is no ruling of the court in regard to it. All that the court can say in regard to a remark of this kind is that the jury shall not regard the act of the defendant Berdell, or his failure rather to act, as a witness in the case as a reason and presumption against him.

Mr. HENKLE. Cannot your honor say further than that, that counsel shall not make such remarks?

Mr. MERRICK. The court cannot stop counsel from making the remarks.

The COURT. Counsel have made the remarks, and Mr. Merrick has given notice that he desires to raise this question and have it fully argued hereafter. But until that time comes I shall hold that remarks founded upon the failure of defendants to appear upon the stand as witnesses are out of order.

Mr. CARPENTER. All right. Go ahead.

Mr. MERRICK. I agree to that. Mr. Ker said this, "If I were charged with writing a letter, and did not write it, I would deny it." He did not speak of the defendants.

The COURT. We all understand what that means.

Mr. MERRICK. You cannot exclude reasoning upon the laws of nature.

Mr. CARPENTER. No; nor confine counsel to the rulings of the court.

Mr. WILSON. I want to say one word about this matter.

The COURT. But the court has decided already for you.

Mr. WILSON. I know, but I am going further than that.

The COURT. When the time comes that Mr. Merrick has given notice of for the discussion of this subject, I shall take pleasure in listening to you.

Mr. WILSON. I do not propose to argue this question to the court or to the jury. I say that the mention of this thing is a gross violation of the law, and therefore I ask the court to admonish the counsel that this thing will not be permitted in the argument of this case. I say that Mr. Merrick has no right to stand before this court, in the face of that statute, and say that he proposes even to argue this question; and I say that it is improper for the court to allow him to stand up in the face of that statute and make a proposition of that kind. Now, this statute is intended for the protection of parties who are on trial, and they have no mode of protecting themselves, excepting by the actions and through the admonitions of counsel that this thing will not be permitted, and when Mr. Merrick stands before the court and says that he proposes to do thus and so, we have no means of protecting ourselves other than to call upon the court to admonish him that that thing will not be permitted.

The COURT. The court cannot exercise authority in so arbitrary a style as that, I think. Every statute has to be construed, and if counsel deem it proper to make a motion in regard to the construction of the statute, addressed to the court in the course of the trial, the counsel will not be denied that privilege. Of course the court will hear argument upon almost any motion if it is at all within the bounds of reason. There are some motions which, on the face of them, are so absurd that the court will not listen to argument about them. But without undertaking to express any opinion in regard to this motion which has been indicated by Mr. Merrick, the court for the present, and as long as this argument shall continue, will hold counsel to abstaining from comment upon the failure of any of these defendants to appear as witnesses in the case. I think that is the fair meaning of the law. But still I do not mean to deny the counsel for the Government the privilege of raising that question on any prayer hereafter.

Mr. TOTTEN. Your honor, I desire to note an exception to what brother Merrick said, on the ground that it was misbehavior on the part of the prosecuting officer, and I desire to have it put upon the record that the attention of the court has been called to the misbehavior of the counsel, and that the counsel persists in it, and that we are entitled to have that matter reviewed on appeal in case of necessity.

The COURT. As I said before, the court has made no ruling about it, and you are anticipating what counsel may do.

Mr. TOTTEN. But, your honor, the mischief has been done. The very mischief which we say the statute was devised to prevent has been done this morning, to some extent, and also the other day.

The COURT. What mischief has been done now?

Mr. MERRICK. Where is the misbehavior? I would like the fastidious gentleman who stood here and saw his own letter offered in evidence to tell me where the misbehavior is.

The COURT. We must regard each other as reasonable beings. Every man in this land is presumed to know that this statute exists.

Mr. TOTTEN. I know that.

The COURT. And this statute gives to every man indicted the privilege of not standing as a witness for himself.

Mr. TOTTEN. Very well.

The COURT. Every one of the jurors knows that.

Mr. TOTTEN. Of course.

The COURT. Then the jury, in the progress of the trial, see that the witness does not appear. A jurymen observing that fact knows it just as well as if counsel had informed him or the court had informed him. What harm is done if counsel state a fact which the jury may know, and which every man engaged in the trial knows? No harm can be done.

Mr. TOTTEN. We think there is harm done.

The COURT. The only way that we can enforce this statute is this. The court will advise counsel to make no remarks based upon the failure of the defendant to appear as a witness for himself, and will advise the jury in the words of the statute that the failure of the defendant to appear as a witness on his own behalf shall not create a presumption against him.

Mr. TOTTEN. Very good, your honor. But that was done the other day, so far as counsel are concerned, and it has happened again this morning.

The COURT. What harm, as I said before——

Mr. TOTTEN. [Interposing.] We think it does harm.

The COURT. As I said before, what possible harm can be done or can have happened from the remark that has been made, a remark which merely states what the jury all know?

Mr. TOTTEN. Yes, but your honor may think it is harmless whilst we may think it is not. I simply arose to say that it was misbehavior on the part of the prosecuting officer, and I desire to have it noted, and to have it noted that we object to it and except to it.

The COURT. Except to the behavior of counsel on the other side?

Mr. TOTTEN. Yes, sir.

The COURT. You cannot except to the behavior of counsel on the other side.

Mr. TOTTEN. We shall try it.

The COURT. You can only except, as I said before, to the ruling of the court.

Mr. HENKLE. If the court please, I except to what the court has said.

The COURT. Now you are on strong ground.

Mr. TOTTEN. So do I.

Mr. MCSWEENEY. I suppose if there was an intoxicated juror came into the box there would be a ground for a new trial.

The COURT. But that motion is addressed to the court.

Mr. MCSWEENEY. You can set it aside.

The COURT. General Henkle has seen the point.

Mr. CARPENTER. If the court please, I would like to make one suggestion in regard to this matter. Mr. Merrick says he proposes to argue this question to the court.

The COURT. Mr. Merrick may repent.

Mr. CARPENTER. Very well. I only want to make a suggestion. I do not occupy so much of the time of the court that I cannot be heard a moment. The court says he cannot prevent his arguing it. I admit that. I bow to the ruling as I do to all the rulings of the court, but the court can say to the gentleman, and in my judgment it ought, "File your authorities with me, sir," and we will do the same. I object to this question being argued here to-day on account of the mischief it could do, and ask the court to decide that the gentleman is out of order.

The COURT. The court overrules that intimation.

Mr. MERRICK. I shall claim my right.

The COURT. It is not a motion, because as I understand it has nothing to go on.

Mr. CARPENTER. Your honor can have it in that way.

The COURT. You can do it when the time comes.

Mr. CARPENTER. We will do it now.

The COURT. The court overrules your motion, or whatever it may be named, because it is out of order now.

Mr. CARPENTER. It will be rather too late after he makes the oral argument, I should think.

The COURT. It has been arrested as to that.

Mr. CARPENTER. But he says he won't stay arrested.

Mr. MERRICK. Not if I can help it.

The COURT. [To Mr. Carpenter.] Oh, I do not understand it that way.

Mr. MERRICK. I have always obeyed the slightest intimation of the court, and your honor will vindicate me, and say that I have, too.

The COURT. Let us go on.

Mr. MERRICK. Let us take a recess now.

The COURT. Well, we will take a recess now.

At this point (12 o'clock and 30 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. KER. Well, gentlemen, I was on this route from Pueblo to Rosita. The last letter that I gave you was one of the 25th of April, 1879, written apparently by Governor Pitkin, and indorsed by Mr. Belford, but in reality it was written by Mr. Rerdell. I mention the fact that if I were charged with anything of that kind I would go on the stand —

Mr. HENKLE. [Interposing.] That will not do, Mr. Ker.

The COURT. You must not do that.

Mr. KER. I was going to explain and take that back.

The COURT. You can take it back without explaining.

Mr. KER. What I would do, I do not think is saying what the defendants should do; but I was going to explain it and take it back, and I will say that hereafter I shall endeavor not to even give the gentlemen on the other side a chance to make an appeal to the court. Of course the gentlemen of the jury hear and see what is going on, and you cannot exclude it from the human mind. They cannot act as puppets. On the 26th day of April, 1879, the very next day, there was another letter filed. It is signed by Chief Justice Thatcher and Associate Justice Stone of the supreme court of Colorado. It is dated the 26th day of April, 1879, and is found on page 1022:

DENVER, COLO., April 26, 1879.

SIR: The mail from Pueblo to Rosita ought to run daily, and the time it is made in should be reduced.

That part of our State is now attracting thousands of people, and the additional mail facilities are absolutely imperative.

I hope you will have it made daily immediately.

Very respectfully,

HENRY C. THATCHER,
Chief Justice, Colorado.
WILBER F. STONE,
Associate Justice Supreme Court.

Hon. T. J. BRADY,
Second Asst P. M. General.

When we got down that far the court said :

If you have any more petitions of that kind I do not care about hearing them on your side.

Mr. BLISS. I am simply reading them in pursuance of what we stated at the outset we would do.

The COURT. The presumption is that the act of the officers of the government was right; and these papers which seem to authorize the orders that were made, it seems to me, are not papers that you need produce.

And then Mr. Bliss said :

We only produced them because we undertook to produce everything that was in the jacket.

Now, you will remember that during the trial of this case, while the papers were being presented, there was not an occasion upon which Colonel Bliss said he would do anything that he did not fulfill his promise. Never once during the entire trial of this case has he made a statement that he has not fulfilled to the utmost. I never met in all my experience a more conscientious man in the discharge of his duty or a fairer man before a jury. When your honor made the statement that I have read, we did not know that we would be able to prove anything connected with these letters, although we had an idea; Colonel Bliss, in fairness to the defense, would not say he would prove anything wrong. Gentlemen of the jury, we went beyond what was expected in the case. That letter was written by Montfort C. Rerdell.

The COURT. The Pitkin letter?

Mr. KER. Yes, sir. He wrote the letter of Governor Pitkin, and he wrote the letter of the judges of the supreme court. If he did not write it; if it is not his writing —

Mr. HENKLE. [Interposing.] I want to know your authority for saying that.

Mr. KER. The testimony on pages 1477 and 1479.

Mr. HENKLE. Whose testimony?

Mr. KER. From the testimony of the man who went on the stand and said "that is Rerdell's handwriting."

Mr. HENKLE. Who was that? Blois?

Mr. KER. Yes, sir. If it is not so I will sit down, and you may put a witness on the stand who will say it is not so. Do not depend upon the argument of counsel. Put somebody on the stand who will say it is not Rerdell's writing. I defy you.

Then there is another letter written on the 5th of May, 1879. It is a letter transmitting the oath. John W. Dorsey's name is signed to it. Montfort C. Rerdell signed Dorsey's name to that letter. Then on the 6th of May, 1879, the oath of Dorsey comes—a man who says he was subcontractor, but whose name does not appear on the record. He makes the oath. That is put in and filed in the department. Then on the 8th of May, 1879, Dorsey comes in with a letter, and he asks permission to withdraw his first oath. Rerdell writes Dorsey's name to that letter. Then on the same day he files the other oath. Let me give you the difference again in the figures so that you will see what they are getting at; first he says it required six men and eighteen animals. In the second oath he says it required seven men and thirty-eight animals. The first oath was withdrawn, and the second oath was put in. In his letter asking to withdraw it, he says he has made a mistake. That letter is found on page 1022:

I have the honor to request the privilege of withdrawing the statement I presented some days ago—

It was only presented two days ago—

as to the men and animals required for the transportation of the mails on route 38134, in order to correct an error therein.

And he withdrew it and put in the other oath when he had no more to do with the route than you or I had, unless you believe the testimony of the witnesses who said they were all engaged in this combination.

Then, on the 8th of July, 1879, Brady orders an increase of service of six trips from July 14, 1879, and allows the contractor \$2,328 per annum, and makes the order, "Reduce the time from fifteen to ten hours, and allow contractor \$5,432 per annum additional." That was for a route that only had one office on it, and a route that only had one trip upon it; when Greenwood was supplied from the railroad, supplied from another route entirely; when Rosita was supplied from another source; when on the other route there were seven trips a week, and they were getting their mail satisfactorily; when the postmaster had written to him that they did not require it. In the face of all that Brady makes this order. Then on the 22d of October, 1879, they make a subcontract with Eli Hanson, and in that subcontract he agrees to carry the mail for \$3,100. Why, expedition alone was \$5,432. Rerdell signs this subcontract as the attorney for Miner.

On the 8th of May, 1880, the postmaster at Greenwood informs the department of the failure of the contractor. Even then Hanson did not go on with his contract. I suppose he considered it amusement. On the 31st of July, 1881, the entire route was discontinued as useless.

Postmaster Gooch, who was on the stand, said that Rosita got its mail by Cañon City; that the mail east from Pueblo did not come over this route. When the route became daily only two or three letters passed over the route, and sometimes only the mail bill. There was put in a long batch of reports, and only the mail bill, only the mail bill from one office to the other; not a letter, not a paper, not a package, only the mail bill; and yet there was expedition upon the route. Dorsey, in his first oath said—but what is the use of referring to the present time? I will call your attention to what he said it would require, "seven men and thirty-eight animals," a total of forty-five. In the other oath he says, "six men and eighteen animals," a total of twenty-four; but he said in one oath, it required a total of eight, and he wanted the difference between eight and twenty-four; and then in the other oath he said it was fifteen, and he wanted the difference between fifteen and forty-five. That was, the expedition was between fifteen and forty-five. Tuttle testifies that he had only four men and eight animals, twelve, and if he did not carry passengers—he carried passengers on part of the route—all it would have required would have been two men and three animals, a total of five.

Now, let us see who gets the pay. On May 10, 1879, Vaile drew part of the pay of this route, and Miner receipted for the warrant, as attorney for Vaile. Then, in stepped Stephen W. Dorsey, and he draws the pay, and after he had drawn the pay John W. Bosler comes along and draws the pay, and the witnesses testify that Bosler was Dorsey. Of course he was not the same man, but it was the same business firm. Now, the original pay was \$348, and it was increased to \$8,148. They paid Hanson \$3,100, and had a clean, clear profit of \$5,048. What is the use of my reading to you the receipts. They are put in here page after page. Not a dollar, not a cent, not a letter, not a paper, nothing but the way-bill going from one postmaster to another, and sent as regular as clock-work up to the department, and filed there. Had Brady been an honest officer he would have known what was going on and put a stop to it.

NO. 38140, TRINIDAD TO MADISON.

The next route is No. 38140, from Trinidad to Madison, Colorado. It was forty-five miles long, there was one trip a week, and the time was thirteen hours. John R. Miner was the contractor, and the pay was \$338. John W. Dorsey witnessed the contract in this case. I see some of you gentlemen have maps. There was an elbow made in this route which was caused by putting in Raton. Right above that you will find the railroad, and Pulaski on the railroad. On the 6th of June, 1878, before the contract went into effect, Brady made an order to embrace Raton on the route without increase of distance or pay. On the 18th of September, 1878, Postmaster De Busk wrote a letter asking that Raton be supplied from the railroad, a distance of twelve miles, and not from the mail route. On the 13th of November, 1878, Mr. French comes in and makes an order:

Modify the order of June 6th, 1878, so as to increase the distance 23 miles, and allow the contractor \$172.75 per annum.

Only twelve miles to the railroad, but twenty-three miles by putting it on this route. On the 22d of April, 1879, Brady orders an increase of two trips, and allows the contractor \$1,021.50. Then on the 26th of April, 1879, J. W. Dorsey makes an oath for three trips and twelve hours. On the 28th of April, 1879, John Dorsey writes a letter asking to have it made daily. On the 30th of April, 1879, Dorsey's oath was filed. On the 5th of May, 1879, communications are to be sent to Rerdell. On the 9th of May, 1879, Brady ordered a reduction of time from nineteen and three-quarter hours to twelve hours. On the 10th of May, 1879, Miner sends a letter to Brady with some additional petitions for an increase. On the 11th of November, 1879, the subcontract of S. W. Dorsey is filed. On the 7th of December, 1880, the subcontract with Dorsey is withdrawn.

Now let us put these figures together with the testimony. First, we have to embrace Raton without increase of distance or pay. Next, the postmaster, Mr. De Busk, asks to have it supplied from Pulaski. Then comes the order of French to increase the distance twenty-three miles and allow \$172.75. On the 22d of April, 1879, Brady's order comes to increase the service two trips from May 1, 1879, and allow contractor \$1,021.50 per annum additional. On the 26th of April, 1879, John W. Dorsey makes oath for three trips at twelve hours. Now who told him it was to be three trips at twelve hours, and where did John W. Dorsey get the authority to make the oath? He had no more to do with that route than you or I, unless you believe the testimony that was given on the stand that they were all in league. He is not the subcontractor. Miner was the contractor. Dorsey had nothing to do with the route upon the record. On the 28th of April, 1879, two days afterwards, he writes a letter to Brady, a nice little confidential letter, in which he asks to have the service on this route made daily. He says:

I think it ought to be made daily.

This is from a man who, on the record, had nothing at all to do with it. He was not a Senator; he was not a Member of Congress; he was not a Delegate from Colorado; he was not the governor of the State; he had nothing to do with it. On the 30th of April, 1879, the oath of John W. Dorsey was filed. Remember it was made on the 26th. On the 5th of May, 1879, Miner, who was the contractor, writes and says:

Send all your communications to Rerdell, box 706.

On the 9th of May, 1879, Brady makes an order:

From May 19, 1879, reduce the time from nineteen and three-quarter hours to 12 hours, and allow contractor \$2,758.05 per annum additional.

It was thirteen hours before, and Raton was put on the route without increase of pay or distance, and French came in and made it twenty-three miles, and fixed up a schedule and made it nineteen and three-quarter hours. Now it was to be reduced to twelve hours, and there is an allowance of \$2,758.05.

On the 10th of May, 1879, there is a letter written by Miner to Brady, to be found on page 1101:

SIR: I have the honor to transmit herewith additional petition, asking for increase of service on route 38140, from Trinidad to Madison, Col., and to request that it be placed on file.

Respectfully,

JNO. R. MINER

On page 1102 are some of the petitions and some of the letters. Let me read you one, just as a sample; not because they are not all good reading, but I will give you what I consider the best:

TRINIDAD, COLO., May 5th, 1879.

Hon. T. J. BRADY,

Second Assist. P. M. General, Washington, D. C.:

DEAR SIR: I have this day forwarded a petition to you through Hon. S. W. Dorsey for an increase of mail service between Trinidad, Colo., and Madison, N. M., for 100 miles SE. of Madison. The people have to go to that point for their mail, and when it only arrives once a week it inconveniences the settlers very much. The country along the line is settling up very fast, and the public demand it.

I suppose you are bothered so much with petitions that it takes a great deal of your time. I hope you will consider this one and favor us, as we are an isolated people and can only appeal to you for assistance.

They had appealed to Dorsey before, and he had not done it.

With the wishes of many for your present action in the matter, I remain,

Respectfully,

W. G. RIFENBURG.

First, Miner sends along a letter, and in that letter is this letter, and this letter says they have sent the petitions to S. W. Dorsey, and right in the jacket they are all there. It seems that Dorsey did perform his duty. The only trouble was that Brady had to move, and Brady could not move, because the extra \$2,000,000 had not been passed. Let us see how it goes along. Miner sends the letter on page 1101. It was read, and it was handed over to counsel. Miner sat where he does not sit to-day. It was shown to Miner. Up gets General Henkle, with indignation beaming in every lineament of his countenance, and says, "Miner never wrote that?" He repudiates it. Who forged Miner's name to that letter? Was it Stephen Dorsey; was it John Dorsey, or was it the versatile Rerdell? I will show you who did it after awhile.

On the 11th of November, 1879, the subcontract of S. W. Dorsey was filed, and it was dated the 1st of April, 1879. Therefore he must have been in this business from the 1st of April. Rerdell witnesses the subcontract. Miner, of course, made it with Stephen Dorsey. On the 3d of April, 1879, showing that Rerdell was engaged in this business, he writes a letter to Mr. De Busk, the contractor, and he says, "Let me know where I shall send the pay for the quarter just ended." Its only relevance is to show that Rerdell had some little interest in it. The communications were to go to his box 706, and he wrote the subcontract. Then, on the 21st of October, 1880, Rerdell wrote to the subcontractor, "In the future I shall make payments to William Burgner." On the 6th of December, 1880, Stephen Dorsey withdraws his subcontract. There was a letter sent in withdrawing the subcontract. It is found on page 1105. I will read it:

SIR: We have the honor to request that the subcontract of S. W. Dorsey on routes Nos. 3-102, 3-112, and 38140 be withdrawn from the files of the P. O. Department and

canceled, as the said S. W. Dorsey is no longer subcontractor on said routes, from January 1st, 1881.

Very respectfully,

JNO. R. MINER,
Contractor.
S. W. DORSEY,
Subcontractor.

That letter was passed over, and General Henkle submitted it to his client Miner, and Miner looked at it, and he again repudiated it. He never wrote it. Twice in his life, three times, he found that he had been sinned against. The first time was on route 38135, where his name was forged. That was the route from Saint Charles to Greenhorn. Again, there are two letters on this route, and Miner's name has been forged to them. Who did it? Who was the rascal on the route from Saint Charles to Greenhorn? Blois tells us it was Rerdell who did it. Why? Oh, he says, "I have seen him write. I am familiar with his handwriting. He was in and out of the department." He says that Rerdell attended to the routes of Dorsey, and Miner attended to the routes of Vaile. The other witnesses who were on the stand said that Rerdell was always in and out of the department. So was Vaile, so was Miner. The two of them were in and out. Blois has seen them write. Gentlemen, why, certainly if you had seen me write hundreds and hundreds of times you would know my handwriting. So it was with Blois, who has seen Rerdell write, who had his receipts, who was as familiar with his handwriting as he was with his own, and if he was not familiar, if he made a mistake, again, I say, put somebody on the stand and let them say it is not his writing.

Now, then, Rerdell was figuring in this, and on the 8th of February, 1881, Miner, who seems still to be in it, writes a letter to Burgner and gives him his account for the quarter. I want to show you that Miner did not drop out of this thing; that there was no division of interest; that there was no separation; that they kept on in the same old track, notwithstanding Vaile says, "This is not one of the routes I took." Vaile's factotum, his bosom friend, the man who won his heart and his confidence, Miner, was still operating in this route; and again, on the 30th of July, 1881, Miner sends pay to Burgner.

Now, then, let us see who did draw the pay. The record shows that Vaile got the warrants and the drafts. The record shows that Stephen W. Dorsey got some of the warrants and the drafts. The record shows that Bosler was about and got his share of them. Then, again, Rerdell put in and got a warrant and drew the pay. On every draft that was drawn Rerdell's beautiful name appears as a witness.

Next, let us see what the oath was. Dorsey says:

On the present schedule it takes one man and four animals.

That is a total of five.

On the reduced time, 12 hours, it will take three men and 11 animals.

That is fourteen. He was to get the difference between five and fourteen. Mr. Burgner testifies:

When it was three trips I used one man and four animals.

That was five.

When it came down to 12 hours, it took two men and six horses.

That was eight. Dorsey swore it was fourteen. Burgner says:

I did it with 8.

You know we pointed out to his honor that there was a law that prohibited an office like Raton being put on the route in this way. It did not prohibit it being put on the route, but they could not draw greater pay than two-thirds of the postmaster's pay. The postmaster says he received the magnificent sum of \$17 a year, and he could not get rich on that, so he turned around to carry the mail. He made a contract.

Gentlemen, I want to call your attention to this route. The time was thirteen miles originally. Then Raton was added on, and the schedule was put up to nineteen and three-fourths hours. Then they allowed \$172.75. Then the schedule was brought back to twelve hours, one hour less than the original time, and the pay for that reduction was \$2,758.05, which, if you add to the \$172.75 to Raton, makes the sum of \$2,930.80 that was paid for carrying the mail to Raton. That was the cost of supplying the office of Raton with mail—\$2,930.80.

The original pay in this case was \$338. It was increased to \$4,290.30. They paid Burgner \$1,500. The neat little profit on this route was \$2,790.30.

The COURT. You said the original contract distance was thirteen miles.

Mr. KER. Thirteen hours.

Mr. HENKLE. He meant thirteen hours.

Mr. KER. It was thirteen hours, and they added on Raton, and they called that twenty-three miles.

The COURT. I wished to call your attention to it so that you might make the correction.

Mr. KER. If I said miles, I meant hours. I say that for carrying the mail to Raton, they paid over two thousand dollars. They paid the sum of \$2,930.80. It was originally thirteen hours. They added Raton, and it brought it down to twelve.

The next is the productiveness. In 1879, with all the offices—Trinidad was supplied by railroad, with a number of routes running out of it that do not enter into these nineteen—the total receipts was \$3,718.18. But throw out Trinidad. Leave that off and the total receipts along this route was \$168.09, taking in Madison.

In the year 1880, when expedition was ordered, when they had increased mail facilities, it ran down to \$120.66, and in 1881 it ran up to \$137.35, both being below the original amount that was received before there was expedition or increase of service.

ROUTE 38113, RAWLINS TO WHITE RIVER.

The next is route 38113, Rawlins to White River, Colorado. This was one hundred and eighty miles; there was one trip a week, and they ran at one hundred and eight hours. John W. Dorsey was the contractor, and his pay was \$1,700. Miner was on hand and witnessed both the proposal and the contract. On the 1st of May, 1878, John W. Dorsey made a subcontract with J. A. Wright at \$1,500. That was \$200 less than he was receiving; so that was not a losing contract. The contract was headed "Miner, Peck & Co."

On the 18th of June, 1878, Brady ordered a change to lock-box 714. That is Miner's. On the 1st of October, 1878, Wright's subcontract was filed. On the 3d of December, 1878, there was a letter sent withdrawing Wright's subcontract. On the 26th of December, 1878, John Dorsey made a subcontract with Rerrell. On the 16th of January, 1879, Dorsey makes a contract with one C. F. Perkins. On the 22d of January, 1879, the postmaster at White River writes to Brady that it is impos-

sible for the carriers to get through on the schedule time, and asks him to make the schedule time five days. On the 6th of February, 1879, Rerdell withdraws his subcontract. On the 7th of February, 1879, Brady notifies the auditor of the filing of the subcontract of Mr. Perkins. On the 26th of March, 1879, Perkins makes an oath of the men and animals. On the 14th of April, 1879, John W. Dorsey sends a letter to Brady transmitting Perkins's oath. On the 16th of April, 1879, Perkins's oath was filed. On the same day there was a lot of petitions put in. On the 26th of April John Dorsey sends a letter to Brady in which he speaks about the number of men and animals that are necessary to carry the mail. On the same day John Dorsey makes an oath for three trips a week on a schedule for forty-five hours. On the 1st of May, 1879, Turner puts on the jacket an indorsement that the petitions call for forty-five hours. Really they called for eighty-four. On the 1st of May, 1879, the same day, Brady ordered an increase of two trips and a reduction of time. Then, on the 5th of May, 1879, comes the usual order to change the address to the care of Rerdell. On the 21st of July, 1879, John Dorsey writes to have Perkins's subcontract canceled. On the 11th of November, 1879, Stephen Dorsey comes along with his subcontract. The same month temporary service is placed on the route. On the 27th of December, 1879, there is a subcontract made with John F. Foot. Then, on the 14th of August, 1880, Foot's subcontract was filed. On the 15th of October, 1880, John Dorsey makes a subcontract with Eugene Taylor. On the 19th of October, 1880, Stephen Dorsey sends a letter to Brady withdrawing his subcontract. October 20, 1880, the subcontract of Taylor is filed. Gentlemen, I am reading these over for the convenience of my friends on the other side. They want these dates. They take them down, and I give you the testimony afterwards. On March 3, 1881, petitions were filed. March 8, 1881, Brady makes another order for increase.

Now, let us go back and get the facts as they occurred in the testimony. The contract made on the 1st of May, 1878, between John Dorsey, who is the contractor on this route, and J. A. Wright, is for \$1,500. That was less than he was receiving from the Government. On the 18th of June, 1878, there was a change of address to lock-box 714, that is, to Miner's. On the 1st of October, 1878, Mr. Wright's subcontract was filed. On the 3d of December, 1878, the letter withdrawing Wright's subcontract was sent in, and Miner again appears on the scene, for he saves John Dorsey a great deal of trouble. He not only writes the letter, but he signs Dorsey's name to it. On the 26th of December, 1878, John W. Dorsey makes a subcontract with Rerdell. It was not necessary for John Dorsey to be on hand. Miner was about and attended to this business for him. On the 16th of January, 1879, John Dorsey makes a subcontract with C. F. Perkins, and in that subcontract he provides for three trips, and provides for increase, and I should like somebody to tell me how it was that they knew anything about three trips, or how they knew anything about increase. It only shows how early they began to regard the matter of expedition.

Miner had been doing the business before this of signing the names, but on this occasion Rerdell steps in and signs John W. Dorsey's name. On the 22d of January, 1879, the postmaster at White River writes a letter to Brady, and in that letter he tells him that it is impossible for the carriers to get through on the schedule time. That is found on page 1173. I do not know whether it is worth while to read it to you or not, but I will look at it [after referring to the book]. Well, yes, it contains some information.

WHITE RIVER POST-OFFICE,
SUMMIT COUNTY, COLORADO.

SECOND ASSISTANT POSTMASTER-GENERAL,
Washington, D. C.:

SIR: Route 38113, from White River, Colo., to Rawlins, Wyoming, is through a rough, mountainous region, in which the snow falls very deep, and already on some parts of the route it is now from 15 to 18 inches in depth, which makes it almost impossible for the carriers to get through on the schedule time.

That was one hundred and eight hours. He writes that letter and sends it in. There is more of it. But he says "fix it at five days." He thought that would answer. This is the 22d of January, 1879. On the 6th of February, 1879, there is a letter sent in withdrawing Rerdell's subcontract. That letter purports to be signed by John W. Dorsey and by Montford C. Rerdell. Rerdell wrote his own name, but Miner wrote John W. Dorsey's name to that letter; and just here, gentlemen, they put in a power of attorney—we have seen none from John Dorsey to Miner, we have seen none from John Dorsey to Rerdell—unless this was a dishonest transaction, and there was an effort made to conceal identity, there was no necessity for Miner to sign John Dorsey's name. It might have been signed by Rerdell, or by Miner, and they could honestly explain it to you, "we had perfect authority to do it." But in order to deceive somebody, they put the two different signatures upon this apparently innocent letter. On the 7th of February, 1879, Brady notifies the auditor of the filing of the subcontract of C. F. Perkins. On the 7th of March, 1879, one month afterwards, Rerdell writes a letter to Perkins, and that letter is headed "Senate Chamber," and it is found on page 1121. C. F. Perkins produced it.

UNITED STATES SENATE CHAMBER,
Washington, M'ch 7, 1879.

C. F. PERKINS, Esq.:

D'R SIR: Inclosed please find statement to be made to the department in order to get increase of service on 38113.

Please sign it just as it is, and acknowledge it before a notary public or county clerk. Attend to this at once, as it is necessary before the increase of service is ordered.

Very truly,

J. W. DORSEY,
By M. C. RERDELL.

Sign it just as it is! And just as it was—it was in blank. There was not a man, there was not an animal mentioned in it, and I think it is fresh enough in your recollection where Perkins said:

I went before the notary and signed it and it had none of these figures in it.

It was sent in blank. *Sign it just as it is!* And Perkins signed it and Perkins sent it over to Rerdell.

Now, you know this was in March, 1879. Let us go back to January. Rerdell was out there. He took a trip for the benefit of his health. He talked to Perkins. He questioned Perkins. He says to Perkins:

I want you to tell me the shortest space of time you can run this mail on this route. I want to know if you can carry the mail in eighty-four hours.

And he told Perkins there:

We are going to have this service increased three trips and we are going to get up petitions.

You will find that on page 1117.

In January he informed Perkins what he was going to do, but when

he had his conversation with Brady I do not know. It has not been testified to. But I presume Rerdell knew what he was talking about, and the evidence shows he was an elegant prophet.

Then afterwards he sent petitions out to Perkins, and Perkins says, "I circulated these petitions," and the blank oath and the petitions were all sent in to Rerdell and handed over to him for his fine manipulation. And he did it. He put the men and he put the animals in. He fixed it up to suit himself and he filed it in the department; and he filed the petitions, and he did not forget to fix them up either.

On the 26th of March, 1879, Perkins swore to the oath before a notary public. On the 14th day of April, 1879, there was a letter to Brady transmitting this oath, signed John W. Dorsey, and Rerdell wrote that letter and signed John W. Dorsey's name to it. This was on the 14th day of April. The very next day, the 15th day of April, 1879, John R. Miner sat down and took his pen in his hand and wrote a letter to Perkins, and he says to Perkins, "I want you to address your communications hereafter to Mr. Rerdell, at box 706," and Miner wrote John W. Dorsey's name to that letter. They took turn about, one one day and the other the next. Well, on the 16th day of April, the day after that again, they filed the letter and they filed the oath, and Rerdell filled in the figures in that oath and fixed it up as I told you before. On the 16th day of April, the same day, with the same letter and the oath, the petitions that had been sent to Perkins were filed.

Now, then, on the 26th day of April, 1879—remember, on the 16th they had filed their petitions and the oath, and the business was all ready—John W. Dorsey comes in with a letter. It will be found at page 1122. Let me read it to you:

Hon. T. J. BRADY,
Second Asst P. M. G.:

SIR: In sending my sworn statement respecting the requirements of men and animals on route 38113, I beg to say that the reduction of the time to fifty hours from the present slow schedule will make the service expensive and difficult to perform, and I do not believe that I have put the number of men and animals necessary to run it satisfactorily to the people and the Government as high as I ought to have put them.

Yours, truly,

J. W. DORSEY.

That is, they took Perkins's oath, and they had not fixed it up high enough, and John W. Dorsey writes that letter when he knew that Perkins's oath had gone in fixed up by Rerdell. So he goes into the business of making oaths himself. You know Perkins's oath calls for eighty-four hours. The petitions said eighty-four hours. That was not enough. John W. Dorsey, on the 25th of April, 1879, goes before a notary public, and he swears to the number of men and animals necessary on forty-five hours. Now, you know the petitions all said eighty-four hours. There had been a little misunderstanding. The petitions were for eighty-four hours, and Perkins's oath by some mistake was for eighty-four hours, and Dorsey had to bring it down to forty-five. [Turning to Mr. Turner.] Turner, why did you put on that jacket that the petitions called for forty-five hours? [To the jury.] Miner must have fascinated and charmed Stephen Dorsey, and Stephen Dorsey took him into his house, if you believe Judge McSweeney; and he charmed Vaile, and he charmed Brady, and he charmed Turner. Why don't he stay here to charm me?

On the 1st of May, 1879, Brady makes an order. Now, see what a good prophet Rerdell was:

Increase from May 12th, 1879, two trips, and allow the contractor \$3,400 per annum.

Reduce the time from 108 hours to 45 hours, and allow the contractor \$8,605.25 per annum.

Then, on the 5th of May, 1879, comes the usual request to send communications to Rerdell. He was covering them in. John Dorsey ought to have sent that letter. Rerdell wrote Dorsey's name and wrote the letter.

On the 21st of July, 1879, there was a row, and John Dorsey writes to Brady and asks to have Perkins's subcontract canceled, and Brady obeys the request. Now, why was it? Perkins told you when he was on the stand. He says, "They would not pay me." After they had made a bargain with Perkins, after it had been fixed up, right here on the stand, he says, "They would not pay me, and I threw it up."

Then comes Stephen Dorsey, on the 11th day of November, 1879, and he files his subcontract, and it is dated April 1. Now, in the month of December, 1879—you know Perkins says he threw it up; "they would not pay me"—there was temporary service put on the route, and Judge Wilson looked up indignantly at the witness, and he said, "Did you think it was fair to the contractor to throw up your contract, and never notify him, and never notify the department; did you think that was honest?" And the witness looked at Judge Wilson in amazement. "Why," he says, "they would not pay me." And I do not think that Judge Wilson would sit here himself and allow anybody to catechise him in that way if Rerdell and the crowd did not pay him for his services. And they could never pay him enough for his services. I appreciate his abilities very highly. I never met a gentleman who handled a case so well. It astonished me to see the manner in which he grasped it. [To Mr. Wilson.] I do not think they could pay you enough, and I do not think they will ever pay you enough. They were never known to pay anybody. [To the jury.] Then on the 27th of December, 1879, John Dorsey makes a subcontract with John F. Foot, and that subcontract was for \$10,000. I said John Dorsey made it. Oh, no—Rerdell. That is the John Dorsey. Rerdell is on hand, and he wrote John Dorsey's name.

On the 14th of August, 1880, Foot's subcontract was filed. The object in mentioning when these subcontracts were filed is, that they appeared in the record, and they were notice to Brady of the sum that was being paid for carrying the mail. Then, on the 15th of October, 1880, Dorsey makes a subcontract with Eugene Taylor, and for three trips he was to give him \$10,000, and for six trips he was to give him \$20,000. They were looking ahead; they had a clean, clear vision of what was to come—\$10,000 for three trips, \$20,000 for six. Rerdell was again the prophet. He writes this contract and fixes it up.

He made the contract with Eugene Taylor, and Taylor was a man who had been in the business, and one of those kind of people who will have no nonsense; and he wanted his subcontract on file, but Stephen Dorsey's contract was then on file. Then, a letter comes in on the 19th of October, 1880, asking Brady to have the contract of Stephen Dorsey withdrawn. Let us see if I get it correctly. John Dorsey was the man who was contractor. He signed the letter and Stephen Dorsey signed the letter? Nothing of the sort. Rerdell attended to that business for both of them, and wrote John Dorsey's name and wrote Stephen Dorsey's name. It is right here in the package. He tried to imitate Stephen Dorsey's signature, and the signature of John W. Dorsey, and the signatures appear different, but they are easily detected, and to the man who has seen him write, there is one peculiarity about his writing that could be explained, and that is the letter M. It is a tell-tale letter in everything that he writes, and he never could put his hand to a piece of paper that a man who had seen him write could not tell that letter

M. And it is the truth, because it is not contradicted. If they want to contradict it I will get out the letter and offer it to them and sit down while they do it.

This was on the 19th of October, 1880. On the 20th of October in comes the contract of Taylor. He was bright. There was no fooling about him. He had his contract right in. Then, in February, 1881—in October, 1880, his contract went in—Rerdell again sits down, and he writes a little confidential communication to Mr. Taylor, and he requests Mr. Taylor to get up a lot of petitions and circulate them. There were not enough trips on this route. It could be forced up higher. Taylor's contract called for six trips. They must have six trips, and Rerdell writes to Taylor to circulate petitions. On the 15th day of February, 1881, he sends along another letter, and he says:

If you will get up petitions at once asking that the route be made six or seven times a week, I can get the increase. Get the officers at White to both sign the petition—

What he means by *White*, I suppose they knew—

and write letters to the Postmaster-General asking for an increase. This must be done at once so I can get them by the 1st of March.

By the 1st of March! On the 4th of March the probabilities were that off went Brady's head. This must come in on the 1st of March. Now, you know the circumlocution that was indulged in to get this thing brought out. Mr. Adams went on the stand. He received the letter. There was a gentleman from out there, Mr. Smith, who was a lawyer, and he had passed the letter over to Smith. Then it got into the hands of somebody else. There is no use of us following it up. [To Mr. Wilson.] You did first-rate on cross-examination. Your head was level. But when it comes down to Judge McSweeney, whenever he sees a point to shoot, at it he goes. The Judge came in, and he got hold of a book that looked as if it had been used for letter-pressing, and he turned the leaves over solemnly and deliberately, and Rerdell sat there and bobbed his head "Yes, yes, yes." And Judge McSweeney undertook to cross-examine the witness, and he read a letter out of this letterbook. You will find it on page 1148. Here is what Judge McSweeney read to contradict the witness. Now, this question was this:

"WASHINGTON, D. C., *February 8th, 1881.*"

Was that the date?

A. I could not fix the date. I can fix about the time it came there.

Then Judge McSweeney went at it again.

Q. [Quoting:]

"EUGENE TAYLOR, Esq.:

"DEAR SIR:"

That is the gentleman who showed it to you?—A. Yes, sir.

Then he drew himself up again, and Rerdell shook his head "Yes."

Q. [Quoting:]

"If you will get up petitions at once asking that your route be made six or seven times a week, I can get the increase. Get the officers at White to both sign petitions and write letters to the P. M. General asking for an increase.

"Very truly,

"M. C. RERDELL.

"P. S.—This must be done at once, so I can get them by the first of March."

Does that sound like it, you think?

And the witness says :

A. I was going to say that my recollection of the letter was that it was on a half sheet instead of note paper. I might be mistaken about that.

Then comes the question :

Q. I do not care if it was on a shingle.

[To Mr. McSweeney.] Judge, we use tin roofs here. We have no shingles.

Mr. MCSWEENEY. You use a good deal of brass, too.

Mr. MERRICK. Yes, you're here.

Mr. KER. [Continuing to read.]

What is your memory ?—A. Just what I stated my memory was.

He stuck to it. That is corroboration of what the witnesses say. That was the letter, and if it was not the letter, trot out your witnesses and I will sit down for you to prove it. We do not want to convict your people on a supposition. Now, the witness Adams says, "I went around to get that petition signed. I went to the officers. They would not sign it." He got a corporal and he got a sergeant. I guess he took them out and got them drunk, and they signed it. Out of the whole camp he got a corporal and a sergeant. Well, they are good names. Brady thought so. He swallowed it whole. The petition was signed, sent in, and put in the jacket. Turner did not wince over it. In it went. Everything, so they laid a good fat jacket before Brady. It looked nice.

Then, on the 3d of March, 1881, these petitions were all filed. But, oh, why did Rerdell deem it necessary to alter and change and modify? Was there any necessity for doing all that? Could he not allow the petitions to go in? They were mere matter of form anyhow. What was the use of scratching them? Still, as he had got into the habit, whenever he saw a petition lying there he could not get out of the way of taking out his eraser and scratching something out and writing something else in. These were filed on the 3d of March, one day before the dread day of judgment. On the 4th of March came the change of administration. Brady's tenure was growing short. On the 8th of March, 1881, he follows out the prophecy of Rerdell.

From the 1st of April, 1881, increase the service to seven trips per week, and allow the contractor \$18,275 additional, and allow the subcontractor \$13,333.33 additional.

One man gets \$18,000 additional. The poor subcontractor gets \$13,333.33 for the whole business. Brady saw the order that went before. He knew what the whole pay was—let me see—only \$31,981.25, and he knew that the subcontractor was to get just \$13,333.33. Still, it did not make any difference to him what the subcontractor was to get.

Gentlemen, do not let me get away from this before I read you another interesting portion. On page 1868, on the 8th of March, 1881, the same day, Rerdell heard it. It was not long in coming to him, and he ran off to his office, and he sat down and he wrote a letter to Taylor. He said in that letter to Taylor :

The route is going to be increased, and no one but me had anything to do with the increase. Don't credit it to anybody else. I am the man who did it.

It is on page 1848. I think I said 1868, but it is 1848. I will read it for you :

M. C. Rerdell, ag't, P. O. box 706.]

WASHINGTON, D. C., March 8th, 1881.

EUGENE TAYLOR, Esq.

DEAR SIR: Petitions for increase of service on your route came duly to hand—

You see how clever he is to acknowledge them—

and to-day I am in receipt of an order from the department to increase to 7 times a week, daily service, to take effect April 1st, 1881, but not to increase the speed, as the schedule time remains the same. In regard to the additional distance involved in taking in Dixon, the order for it will be made soon—

He was going to put on the other elbow, Dixon, and that was something in the future, a new bonanza, a new plot—

though I cannot say how much will be allowed, but was told by Judge Lilly that six miles would be allowed. As soon as the order is made I will notify you. I wish to remind you that no one had anything to do towards getting this increase of service but myself, and no one can bring a bill against you for any services in that direction.

Great heavens, were they robbing each other? Was somebody going to steal the thunder from Rerdell, and collect his money?

I do not know whether any such thing may be done, but merely let you know in case a bill should be presented. Of course, I expect you to keep this to yourself, as I am on the very best terms with your attorney here. Let me know about putting on the daily service.

Oh, now I see. He was trying to beat the attorney. He was on the best of terms with the attorney. I would like to know who it was.

Your pay for daily service will be \$23,333.33 per annum, which I hope will make you a nice profit.

Very truly,

M. C. RERDELL.

Well, they increased it. They had beat the contract. They had gone a little better.

Now, then, gentlemen, there is just one more feature about this case. I told you that there was a likelihood of Mr. Brady going out. He did go out in April. They bounced him out clean and clear. Postmaster-General James took a look at that order and he called in French and said, "Revoke it. Revoke it." This was in April. The next day Brady comes in humbly and meekly and says, "Is your administration going to be an economical one?" Postmaster-General James says, "Yes." "Is this revocation of this order to apply to all the others?" "Yes, sir." They never revoked it. It hung on until fall, and Mr. Woodward, as Postmaster-General James says, called his attention to it, and they fixed the business then.

Next, let us see who drew this money. Vaile got part of it. S. W. Dorsey got part of it. John W. Bosler drew a big portion of it, and Rerdell was always on hand to witness the drafts, and Miner was always about to collect the warrants for Vaile. Now, the increase of this route was \$31,981.25, and the pay that they allowed the subcontractor was \$23,000. They had a clean-cut profit on this route of over \$8,000 that they put right in their pockets.

I will read the receipts to you. Rawlins was on this route and it was a railroad station, and a great many routes came out of it. In 1879 the total receipts on this route, including Rawlins, were \$1,245.43. If you take Rawlins off the route the total receipts were \$79.89. In 1880 the total receipts were \$1,592.07. Taking Rawlins off, the receipts were \$305.29. In 1881 the total receipts were \$1,724.14. Dropping Rawlins the amount was \$300.51, and it cost \$31,981.25 to bring that magnificent sum into the public Treasury.

Now, you know, gentlemen, that Mr. Brady had an opportunity to revoke this order. He had his talk with Postmaster-General James, and he inquired about economy, and all that sort of thing, and he went

to his office and he sat right down and did not revoke it. He was solid. He is solid yet. They are all together. He stuck to the order he made. He had received his part of the cash, and he was not going to back out.

NO. 38150, SAGUACHE TO LAKE CITY.

The next route is No. 38150, from Saguache to Lake City. That was given in as the seventeenth on the list, but as it dovetails in with another route, 38152, which was given in twelfth on the list, and I want to bring them together, I will refer to it now. The only peculiarity about this route was where Mr. Turner did some heavy figuring. That is the only peculiarity that there is on the surface. This was a route ninety-five miles long, three trips a week, thirty-six hours. John R. Miner was the contractor, and his pay was \$3,426. John W. Dorsey, witnessed the contract. On the 18th of May, 1878, a contract with J. L. Sanderson was filed headed Miner, Peck & Co. On the 19th of September, 1878, the oath of the subcontractor, Sanderson, was filed. Now, Brady took the oath of the subcontractor in this case, and allowed the expedition on it. The schedule was made twenty-four hours. It don't state how many trips. It was not necessary. One petition and a letter from H. M. Teller were put in. The business was all fixed up, and on the 20th of September, 1878, Brady made his order to increase the service four trips from the first of October, and allow the contractor \$4,568 per annum additional, and to reduce the time from thirty-six to twenty-four hours, and allow the contractor \$15,437 per annum additional. The next is the 1st of October, 1878, when Brady curtails the service to end at Barnum, decreasing the distance twenty-one miles and allowing a month's extra pay. On the 26th of July, 1880, Brady ordered a reduction of the service to three trips per week, and allowed one month's extra pay from August 15, 1880. On the 24th of August, 1880, Brady orders to increase the service to seven trips from September 1, 1880, from Powderhorn to Barnum, and allows \$986.57 additional for it. Now, you know the testimony was given that if Mr. Turner had figured correctly, and had been attending to his business, it would have been, instead of \$15,000, \$11,068. That might be a clerical error on the part of Turner, but after all these orders that were made subsequent to that time, he seems to have kept his clerical error hidden very deeply. He has gone over the figures. How in the name of sense, unless you take it all for granted, he made the same old thing twice, I don't know. However, so far as this route is concerned, the pay was \$3,426, and it was increased to \$20,005.12; from \$3,000 it jumped up to \$20,005.12. There is a point in this route that I will refer to hereafter, merely calling your attention to the fact that Brady ordered seven trips a week from Powderhorn to Barnum. Barnum is the place that his honor asked the whereabouts of. He looked on the map and could not find it. Well, we will get a magnifying glass some day and show it to you. It was only a part and parcel of what succeeded. I will go to the next route, and then you will understand.

NO. 38152, OURAY TO LOS PINOS.

This route was twenty-five miles long; there was one trip per week, and the time was twelve hours. John W. Dorsey was the contractor, and the pay was \$348. Miner witnessed the proposal, and Miner also witnessed the contract. On the 21st of January, 1879, Sanderson wrote

to the postmaster at Los Pinos, directing that the mail be given to his carrier. John W. Dorsey also sends a letter to the postmaster to deliver the mail over to Barlow & Sanderson's carrier. You know General Henkle said, "Oh, these routes were all turned over. We had not a dollar's worth of interest in them." That is a new way to look at it. A man has a contract, and he signs the drafts, and the warrants are drawn through him, and yet he has not a dollar's worth of interest in it. They say, "Therefore this route ought to be excluded." So ought the others. On the 18th of March, 1879, the postmaster at Los Pinos writes, stating that on the 12th of October, 1878, a daily mail was established over route 38146, another route entirely, which went from Los Pinos to Ouray, and that this route 38152 was superfluous and was not needed, because the other route was carrying the mail. One was a daily, and the other was a weekly, and there was no use of carrying the mail upon this route. It was not needed. Barlow & Sanderson were carrying the mail on the other route. They were carrying the mail on both routes, this one I have alluded to, and the one that overlapped it, where they were carrying it seven times a week.

On the 5th of May, 1879, John W. Dorsey's letter was sent, asking to have communication sent to Rerdell. Rerdell writes this letter and writes Dorsey's name to it. Why did Rerdell want to have communication sent over this route if what they claimed was true, that Barlow & Sanderson were running it? On May 11, 1880, the contract with Barlow and Sanderson was ostensibly made and filed. Rerdell figured in it and signed it as attorney. On the 3d of August, 1880, Brady makes an order "From August 15, 1880, discontinue service and allow contractor one month's extra pay." He knew that the service was not being performed. He knew it had never been performed. The postmaster told him in his letter it had not been performed, and yet he allows a month's extra pay. No doubt Barlow and Sanderson kicked. No doubt there was trouble in the camp, because immediately after he had cut off the service that could not be helped, on the 24th of August, 1880, he gives Barlow and Sanderson enough to pay for whatever little inconvenience they had been put to, because he increases the service from Powderhorn to Barnum and allows them \$986 a year. Here is the trouble; and when we get down to another route we will show you how nicely the links fit in, and what little service was being performed in this case. These two routes will stand with that explanation. Somebody was getting the cash on the Ouray and Los Pinos route. Vaile drew a warrant for the pay on the 30th of April, 1879. Then in July Vaile got another warrant. In November, 1879, John Dorsey received a warrant. On the 10th of November, 1879, Rerdell got a warrant and pocketed the cash. Again, on the 1st of March, 1880, Rerdell got a warrant and pocketed the cash. That shows where Barlow & Sanderson came in. I have no doubt they were ostensibly doing the thing, apparently carrying the mail once a week, and kept the business hid, and the route they were really interested upon, the other one, they had to get a little something to pay them for what they actually did upon it when the order was made. Now, they drew altogether \$1,190 out of this route and never carried a letter, never ran a horse, never did a thing on the route. They drew \$1,190 and divided it up between them, and if you take the \$986 that was allowed Barlow & Sanderson, from Powderhorn to Barnum, it comes pretty close to it.

NO. 35015, FROM VERMILLION TO SIOUX FALLS.

The next is route 35015, from Vermillion to Sioux Falls, Dakota.

This was advertised as fifty miles; it was actually seventy miles. There was one trip a week.

Mr. WILSON. I would suggest that it is hardly worth while to begin on another route. It is five minutes of 3 o'clock, and I suggest that we might as well adjourn now.

The COURT. I suppose we shall have to increase the service.

Mr. WILSON. Or expedite it.

Mr. MCSWEENEY. You cannot expedite Mr. Ker.

Mr. WILSON. I make the suggestion for Mr. Ker's benefit, and for the benefit of the jury, too.

Mr. MERRICK. The longer he talks, the more it expedites us.

The COURT. We might lengthen one route, and shorten all the rest. How many more routes have you to furnish us with?

Mr. KER. I think I have five left. I am perfectly willing to go right on. I feel in the humor for it, and will stay at it all night.

The COURT. I have no doubt you would do so with great willingness, but perhaps the others want to adjourn. We have all the summer before us.

Mr. MERRICK. Oh, yes; it is pleasant work.

The COURT. Adjourn the court.

At this point (2 o'clock and 55 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

FRIDAY, AUGUST 11, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. KER. If your honor please, before going on with this case, I desire to say that the Attorney-General directed me to give to the counsel on the other side a list of authorities that he proposes to refer to during the course of his argument. He feels bound to do this not only out of courtesy to the gentlemen on the other side, but in obedience to what is or ought to be the rule of the court. At the proper time he will give your honor an abstract of these authorities so that your honor will have no trouble in looking for them in the books. In the mean time, Judge Wilson, I will give you these authorities. [Submitting a paper to Mr. Wilson.]

Mr. MERRICK. In connection with that, your honor, I would suggest that we have an interchange of authorities at the earliest day practicable, say on Monday morning, as we are proceeding in this matter with entire ignorance of the position of each other, and ought to be advised thereof.

The COURT. I do not know that the court can oblige them to furnish you with their authorities until they make their argument.

Mr. WILSON. Well, your honor, if you will allow me a moment, if we give them the benefit of our authorities at the time we make our argument, we will have given them quite as much information as they give to us. I find this document which is handed to me this morning runs in this line: "Yeates's Reports, vol. 1, p. 370, *Respublica vs. James*

Burns, esq.; East's Reports, vol. 1, p. 555, *Harman vs. Tappenden et al.*," and so it goes on, simply giving the name of the report, the volume, the page, and the case. Of course, I suppose that instead of going to church on Sunday, we are to put in Sunday in finding out what is in these cases, and in guessing what use the Attorney-General is going to make of them. However, we are very much obliged to the Attorney-General for giving us this much information.

The COURT. This is mere grace and favor.

Mr. WILSON. Certainly, and I want to acknowledge the courtesy.

Mr. INGERSOLL. [*Sotto voce.*] It is the first we have had.

Mr. WILSON. I simply say that during our opening on behalf of the defendants if we give them the benefit of the authorities, and the use we make of them, we will give them quite as much information as they give us, and we expect, as a matter of course, to give them the benefit of all our authorities, so that they can reply to them in due form.

The COURT. In making the argument upon authorities, you cannot use your authorities without informing the other side of the point they are cited for, and for what purpose they are referred to.

Mr. WILSON. Now, I would like to know one thing in this connection, whether these authorities are to be used in the closing, or whether they are to be used before the closing argument.

The COURT. No authorities can be used in the closing argument except such as have been referred to before.

Mr. WILSON. That I understand to be the rule, and it is all right. We do not complain. I want to acknowledge the courtesy of the Attorney-General in giving us this paper.

Mr. HENKLE. I suppose the Attorney-General means for us to infer that he intends to use these authorities in his closing argument. I, for myself, am very much obliged for the courtesy.

The COURT. The arrangement agreed upon between the different counsel, as announced to the court on Tuesday morning, did not assign the Attorney-General to the close.

Mr. WILSON. No.

The COURT. I suppose, therefore, that these are authorities which the Attorney-General will use in the place assigned to him, and of course you will have on your side an opportunity to reply.

Mr. WILSON. There was no particular place assigned to the Attorney-General, except that he would either come in at one place, or he would come in at the close. Now, if he comes in at the first place where his name is mentioned we will have ample opportunity to reply.

The COURT. The court will maintain the rule so far that the counsel making the closing argument will not be allowed to refer to new authorities, unless the other side shall have an opportunity to reply. The new authorities will give the other side the opportunity of replying so far as those points are concerned. In the paper served upon the opposite counsel this morning by the Attorney-General, do I understand that the points are stated and the authorities cited?

Mr. WILSON. No.

Mr. MERRICK. It is simply a list of authorities.

Mr. WILSON. I had better show your honor the paper. [Submitting the paper to the court, which was inspected and returned.]

The COURT. Now, Mr. Ker, you may proceed.

Mr. KER. [Resuming his opening.] Gentlemen, the next route in order is

ROUTE NO. 35015, FROM VERMILLION TO SIOUX FALLS, DAKOTA.

It is advertised as fifty miles. The actual distance is seventy miles. It was for one trip, fourteen hours. John W. Dorsey was the contractor. Miner witnessed the proposal and witnessed the contract.

The record evidence is January 14, 1878. A letter received from A. Boynton calling attention to a mistake in the advertised distance. May 2, 1878, Brady makes an order:

On July 1st, 1878, embrace Brighton next after Alsen.

June 21, 1878, Brady orders the change of address to box 714. That is Miner's. On October 5, 1878, Mr. French makes an order:

Allow the contractor \$10.90 per annum pro rata from July 1st, 1878, for two miles increase for Brighton.

On the 31st of March, 1879, Vaile files his subcontract. On the 14th of May, 1879, Vaile files an oath of the number of men and animals required to carry the mail. Rather he makes the oath on the 14th of May, and on the 15th of May he files his oath. On the 10th of July, 1879, there is an order for an increase to six trips. On the 15th of December, 1879, the postmasters on the route wrote to Brady, stating that it would be impossible to carry the mail, and asked him to have the time extended.

Now, let us go back and take it in the order in which the testimony brings it. You will bear in mind that this was fifty miles as advertised and it was seventy miles actually. In January, 1878, long before the contract was signed, there was a letter from Boynton, the postmaster, calling attention to the mistake in the distance, warning the department that they had made a mistake. On the 2d of May, 1878, Brady makes an order:

On July 1st, 1878, embrace Brighton next after Alsen.

By referring to that map, you will find that Brighton was already there, and there was no other way to go except to go through Brighton. On the 21st of June, 1878, there is an order to change the address to box 714. On the 15th of October, 1878, French makes an order to allow the contractor \$10.90, and makes it two miles of increase apparently in the distance.

Now, let me call your attention to this fact: That the order was made on the 5th of October, 1878, and he allows from the 1st of July, 1878. That order was an illegal one, prohibited by act of Congress. On the 31st of March, 1879—not October, 1878, but the 31st of March, 1879—Vaile files his subcontract, and Miner is about and signs that subcontract as attorney for John W. Dorsey.

Now, there were some petitions put in at this time for an increase. They asked to have the trips increased, and they were sent in, not only asking for an increase, but to reduce the time to ten hours. We had those petitions up, and this bad witness who would not be believed, Mr. Blois, said, "Those petitions are in the handwriting of Miner." Mr. Blois did not make any mistake, because Vaile says the same thing. They were handed to him, and he said that was John R. Miner's writing. This is after Vaile files his subcontract. Now, one of these petitions was handed to Mr. Shaw, the postmaster, and he was asked, "Didn't you sign that petition?" He looked at it, and turned it over, "Why, yes, I signed that." "Well," said Mr. Wilson to him, "don't it say there ten hours?" He answered: "I never saw that."

Let me give you his exact language in explanation. You will find it on page 1160 :

I find I signed that, but I did not see that. If I had I should have discovered the ten hours schedule ; I would not have recommended a ten hours schedule on a seventy mile route.

That is what the postmaster said. Why, it is natural that he would not. Seven miles an hour ! That is a pretty good gait, and in most public parks if you go ahead of that they will pull you in and fine you for fast driving. Of course he would not recommend it.

On the 14th of May, 1879—Turner laughs. I suppose he laughed when he made the order. He kept laughing at it most all the time.

Mr. WILSON. That was not in Turner's section.

Mr. KER. Brewer may have told him about it. I imagine he had a good laugh over it, anyhow. Mr. Wilson says it was not in Turner's section. Turner wandered out of his section once in a while, as you will see.

Well, Vaile makes his oath. Now, Vaile was the subcontractor. He had no right to make an oath in the case. He had nothing at all to do with making the oath, yet he swears to the number of men and animals that are required to carry the mail on three trips. Do not forget that—for three trips ; and Miner is about, and Miner writes out the oath, and Vaile steps up and swears to it. What was it he said ? Oh, he said, "It was simply my idea of what would be necessary." He had an idea of what would be necessary ; because Miner wrote it out it was all right. You will find that on page 2234.

On the 15th of May, 1879, the very next day, Vaile's oath is filed for three trips. Now, Mr. Brewer, the clerk, says, "I called Brady's attention to that oath," and to make assurance doubly sure, he wrote it on a piece of paper that he put inside the jacket, and it is right here to day, was shown to you, was read to you, and was marked down here by the stenographer, "I called Brady's attention to it." But on the 10th of July, 1879, Brady makes an order:

Increase the service to 6 trips—

Not three, as the oath called for, but increase it to six trips. Why should Brewer interfere about the oath ? Why should they call his attention to it ? He was doing as he pleased, and he made it six trips—and allow the contractor—

That is Vaile—

\$1,635.60 per annum additional. Expedite schedule to ten hours, and allow \$3,603.10 per annum additional from August 1st, 1879.

Then on the 15th day of December, 1879, the letter comes from all the postmasters to Brady stating :

In our opinion there is no reason why the time ought not to be extended. We therefore ask and petition that the time for carrying the mail on the above route be extended to 16 hours.

You see they wrote this letter to Brady asking to have it put back from ten to sixteen. That is found on page 1197. This letter was sent to Judge Bennett. Judge Bennett had originally put his name on one of the petitions, and the postmasters wrote this letter to Judge Bennett, and Judge Bennett sent the letter along to General Brady, and it reached the office and was put on file and placed among the papers belonging to the route. But General Brady did not take off that expedition and increase the time to sixteen hours. Here was a letter from every post-

master along the road. Here was Judge Bennett's letter to Brady telling him about this increase that was not needed, and the question would naturally arise, "What will Brady do; will he take it off?"

Let me show you what he did do. He wrote to Judge Bennett:

This request cannot be granted for the reason that it would be injustice to competing bidders.

He could not take that expedition off because the people who bid against John W. Dorsey on this route would have an act of injustice performed against them. It was originally fourteen hours and boiled down to ten and an allowance of \$3,608 made for doing that, and yet if it were put up to sixteen or fourteen hours, or put back where it started, it would be an act of injustice to the other bidders. Did not Brady write that letter? If he did not I would like to have the proof of it. I am afraid that my friends might say that I have said something that I could not prove. You will find it on page 1159.

Next, let me give you Vaile's oath that Brady jumped at. It was for three trips a week. They never put three trips on. Brady made it six. It made no difference. Three men and three animals at the present time. That is six. If you reduce it to ten hours it will be five men and ten animals. That is fifteen. Why, the contractor says in his testimony, "for six trips on expedited time all that I used was two men and fifteen animals." That is seventeen—two more than Vaile would have required for three trips. For six trips he used two more than Vaile said would be taken for three. Mr. Leach, the contractor in this case, testified, "I carried the mail from August, 1878, to February, 1880." You will find that on page 1164. I want to read you what Mr. Wilson said to this witness.

Q. Did you notify the contractor that you would not carry it any longer?—A. I don't remember whether I ever wrote such a letter or not, but I don't think I did. I don't remember doing it.

Q. Why did you not, when you threw up that contract or neglected to carry it any longer, notify the contractor of your intention?—A. I notified the postmaster, I believe.

Q. You concluded upon some trip through there that you would not carry the mail any longer, and so you dropped it; that was about it?—A. I had been studying over it a month or two before I quit.

Q. But you did not notify the contractor, only the postmaster?—A. I don't remember whether I notified the contractor or not.

Q. Do you not think it placed the contractor in a very bad position with the department for you to leave the route without notifying him?—A. I didn't know how that was.

He had been asking that question before.

Q. You did not care, did you?—A. All I cared about was to get out of it, and get it off my hands. I had lost everything I had, and I couldn't run it any longer.

Lost all he had and could not run it any longer. The magnanimous Vaile was the subcontractor who had filed his subcontract to cut out this poor fellow, who had no redress, and skinned him down until he could not carry it any longer.

Now, then, Vaile drew the pay on this route, and Miner was on hand and receipted for the warrants, and Miner signed Vaile's name to the drafts in this case. The original pay on this route was \$398. It was increased to \$6,133.50. From \$398 to \$6,133.50. We cannot tell you how much they paid Leach for carrying this mail, because we were stopped from doing that, and therefore we will only have to leave it to conjecture. Leach says he lost all he had and he had to quit it.

Next, we will see how much the receipts were from this mail route. Now, if you take all the offices, taking in Vermillion and Sioux Falls,

that were supplied by railroad in 1879, the total receipts were \$3,432.81. Omitting these places that were supplied by the railroad, the receipts were \$261.51. In 1880, the total receipts were \$4,797.77. The receipts, omitting the two places supplied by railroad, were \$420. In 1881, the receipts entire were \$4,258.65. That is \$400 less than they were the year before, including Sioux Falls and Vermillion. Throw those two places out, and the receipts were \$240. That is over \$200 less than they were the year before, and is an indication that expedition was sending the post-office backwards.

ROUTE NO. 35051, FROM BISMARCK TO TONGUE RIVER, DAKOTA.

The next route is No. 35051. It is from Bismarck to Tongue River, Dakota. It is advertised as two hundred and fifty miles. The real distance was three hundred and three. There was one trip a week, running from Monday to Thursday. John R. Miner was the contractor, and his pay was \$2,350. Rerdell witnessed his proposal.

This is a very extraordinary route. It is a ranch route. Let me give you what is contained in the paper. On the 20th of April, 1878, Stephen W. Dorsey writes to General Rosser, asking him to give the correct distance of the route. April 21, 1878, Mr. Rosser files his answer. That is the next day. June 25, 1878, Miner writes to Brady, asking to have the route discontinued. On the 25th of June, 1878, Boone sends a letter and affidavit, applying to have the route discontinued. On the same day Judge Kidder indorsed Miner's request for the discontinuance of this route, and General Brady marked on that indorsement that Judge Kidder had done so. In July, 1878, there were nine petitions filed, asking for increase and expedition. On the 1st of October, 1878, Vaile filed his subcontract, and the same day Brady notified the Auditor that the subcontract was filed. On the 4th of October, 1878, Miner makes an oath to the number of men and animals on three trips. On the 4th of October, 1878, Miner writes an offer to carry the mail in sixty-five hours. On the 18th of October, 1878, there were two more petitions put in. On the 4th of December, 1878, there were two additional petitions. On the 6th of December, 1878, two more came along. On the 12th of December, 1878, there were two more petitions. On the 23d of December, 1878, Brady made an order to increase to three trips. On the 29th of January, 1879, there was a request to have Vaile's subcontract withdrawn. On the 3d of February, 1879, there was a request to have that request revoked; in other words, they did not want the subcontract withdrawn. On the 1st of March, 1879, Judge Kidder writes a request for a daily mail. On the 2d of August, 1879, Brady makes an order to increase to six trips a week. On the 2d of August, 1879, the order is made and signed by French. On the 5th of January, 1880, the postmaster at Bismarck telegraphed to Brady that the service was a failure. It was impossible to perform it. On the 31st day of July, 1881, the route was discontinued. I refer to page 1293.

Now let us go back and take them in the order in which they occur. First, I want to call your attention to the fact that it was from Monday until Thursday. That was the schedule time. There was a mistake in the distance and Stephen Dorsey who was then a Senator, on the 20th of April, 1878, before there had been anything done excepting to sign the contract, wrote to General Rosser, who was then an engineer on the Pacific Railroad, asking him to give the correct distance, and General Rosser replied the next day by stating that it was three hundred and three miles, and Dorsey's letter and Rosser's letter were both

sent to the department and put on file. This was in April. Then on the 25th of June, before anything had been done, before the mail was to be carried, Miner, who was the contractor, wrote a letter to General Brady. It is found on page 1202. He says:

SIR: The route from Bismarck, Dakota, to Tongue River, No. 35051, according to your advertisement, was let to me at \$2,350, for once a week service.

The distance, as stated by the department, was 250 miles. I bid upon the route, supposing that to be the *real* distance or at least something approximating to it, but, after the award and contracts made by me, I found upon inquiry that the distance by an air line was over three hundred miles, and by the most feasible wagon-road, which we would have to make over three hundred and fifty miles. In the nature of things, neither the department nor myself could have known the actual distance, for the reason that the country through which it is proposed to run this line is not only unsurveyed, but is substantially unexplored.

The distance was only known to the engineers of the Northern Pacific Railway, who have filed certificate in your office that the air-line distance is over 300 miles. No case like this, I am sure, ever came to the attention of the department before.

Having taken the route very low at the distance named in the advertisement, I have to request that you discontinue the route for the following reasons:

Then he gives the five reasons:

1st. There is no office between Bismarck and Tongue River now, and there are no settlements whatever to be supplied with the U. S. mail.

2nd. Tongue River is supplied twice a week by the route from Fort Buford.

3rd. The distance is 350 miles instead of 250 miles as your advertisement said.

4th. The country being unsurveyed and unexplored, no one could tell whether the distance you gave was the true one or not.

5th. The whole country between Bismarck and Tongue River is occupied by hostile Indians, and no mail *can be carried* over this line *except with a large military escort*.

Now, he wanted Brady not to forget it, and therefore he underscored it, as people usually do when they want to attract attention.

It is simply impossible to carry the mails over this route until military posts are established along this route.

I therefore respectfully ask that this route may be discontinued.

This was on the 25th of June, 1878. On the same day Mr. Boone sends in a letter and an affidavit, stating that he believed the facts to be true from what was reported to him. On the same day they went to Judge Kidder and got Judge Kidder to indorse on this petition of Miner's that the facts were true, and recommending that Brady discontinue the route. You will find that on page 1203. Here it is:

Judge Kidder presents this with the statement that he has reason to believe that the facts set forth therein are correct, though he does not know of his personal knowledge.

BRADY.

JUNE 25.

That was on the 25th of June, 1878, before the service began. The next thing that we have in order is the testimony. From the 1st to the 2d of July, John W. Dorsey and Montfort C. Rerdell were out in Bismarck, and they were talking to a man named Pennell, who was a mail contractor, and a very respectable man, in that section of the country, and who is helping to build the Northern Pacific or the Union Pacific Railroad, one or the other. In this talk that they had with Pennell—I want to remind you of the evidence that Pennell gave—he says that Rerdell and himself figured up the stock that it would require for an increase and did not agree in their figures. Rerdell's were away above his. This was July the first, the second, or the third. They started out to build the ranches. He says that Rerdell then told him that the schedule was to be reduced to sixty-five hours. Again Rerdell became a wonderful prophet. He says Rerdell told him he was going to get up

petitions to have the route increased and the schedule reduced. This was in Bismarck, on the 1st or 2d day of July, before they put a horse on the route, when they were getting lumber and men together to go out and build the ranches. Now, then, at this conversation in Bismarck, John Dorsey took a part, and John Dorsey said, "I want you to go into partnership with me." Pennell could not see the necessity for that. John Dorsey says, "This route will be increased to \$25,000." That was the testimony of Mr. Pennell, and you will find it on page 1226; that John Dorsey was prophesying the 1st or 2d of July that it would be increased to \$25,000. If that is not true let us have some testimony. I am giving the page, so that there will be no mistake about it. He told Pennell that there would surely be two increases inside of a year. Pennell said that on the witness stand, and he said John W. Dorsey told him that in the presence of Rerdell in Bismarck, as an inducement to go into it. He said it would be increased to six or seven trips a week. That was in Bismarck. Don't you remember how Judge McSweeney wanted to coax him to say whether General Miles had not married Mr. Sherman, or something of that kind, and finally, arriving at the conclusion that he had made a mistake, he added the word daughter. Pennell said, "No; it was in Bismarck, before we started out." It was before they had ever seen Miles or coaxed him into the arrangement at all. You will find that on page 1226. What else did Dorsey say? "I have a brother who is a Senator. I have a good deal of influence in Washington." You will find that on page 1236, ten pages further on. He had a brother who was a Senator, and he, John W. Dorsey, had a good deal of influence in Washington. Where was Vaile then? This was before Vaile came into it at all, if you take his estimate of dates. But oh, how well they prophesied! How well they prophesied, when four days before that they were writing from this city asking to have the whole of this route discontinued. How quickly the telegraph came into requisition, and how quickly they received notice that the whole thing was going to jump. First came the application in June that they would have to get the military to carry the mail. In July John Dorsey and Rerdell are making their bargain with Mr. Pennell.

You know Rerdell said these petitions were to come in, and in they came, nine of them in a batch. They are dated from the 15th of July to the 28th of July, 1878. I do not want to occupy time in reading them, but if ever you have a chance, gentlemen, as a curiosity, do read them. They state that the country is filling up; that the people are rushing in there like mad, crazy to get in, hundreds and thousands of them. They are coming in droves, respectable people from the East, intelligent people, who had mail every day, men who had mail every hour, rushing into this country, and they wanted mail facilities. Rerdell did not forget to fix them up. I will attend to him hereafter. You know that Vaile testified that on the 1st of August he met Miner, who was in trouble about his routes, and went to Brady to coax Brady to extend the time for him. He had a talk with Brady, and he was going on to tell us what persuasive influence he used, when Mr. Merrick shut him off. He wanted to save that for a future occasion. But he did talk to Brady, and finally Brady got Vaile into the humor of taking charge of the routes himself, and Vaile says, "I left Brady, and promised to go home to Independence and talk to my friends there, and to get an answer." On the 20th of August, 1878, Brady telegraphed over to Vaile, "What are you going to do about the routes; are you going to put them on?" For Dorsey, Miner, and Peck—not

Miner alone—but for the whole of them. Vaile says, “I took two or three days to think it over, and sent back word by telegraph to Brady that I would put them all on but Watts’s.” He did not want Watts’s. He would put them all on but Watts’s. This was the 23d of August, 1878. Then Vaile came back to this city on the 29th of September, 1878, and on the 30th of September he signed the contract that was antedated, and got these subcontracts together that were all antedated, according to his story. Now, in July, 1878, Rerdell was hard at work getting up petitions, and a very successful fellow he was, because he got nine of these petitions signed with a great quantity of names. Then he goes along quietly until the 1st of October, 1878. You know that Pennell started out with John Dorsey, and went some fifteen miles and built a ranch, and then went fifteen miles more and built another ranch, and the whole of them cost \$6,000. You asked that question, Mr. Cox. You asked, “How much did it cost?” And Pennell said \$6,000. The pay was \$2,350 for a year, and yet it cost him \$6,000 to build the ranches. “What were you going to do with them?” “We were going to put one man in every other ranch, that is, thirty miles apart.” “Why were you going to do that?” “Because there was no use to have them only fifteen miles apart. They were only built so that when expedition was put on, and the trips increased, the ranches would be there.” That was Pennell’s testimony. They were fixing them up for six or seven trips a week and the expedited schedule, and they were only to put one man in every other ranch, or thirty miles apart. Then Mr. Pennell said, “We went on building, and kept on building, and there was no mail put on there until January.” When he left, in January, 1879, there was no mail on; but in October, 1878, Vaile files his subcontract, and Brady notified the auditor that Vaile’s subcontract was filed. Again I call the attention of the court and the jury to the fact that it was an unlawful notice, because Vaile never filed the oath that the law required him to file. On the 4th of October, 1878, three days after this subcontract went on file, Miner comes along and makes an oath to the number of men and animals that are required to carry the mail on three trips. Look at page 1202, and listen to the figures:

SIR: The number of men and animals necessary to carry the mails on route 35051, Bismarck to Tongue River, three times a week, is twelve men and thirteen animals. The number of men and animals necessary to carry said mails on a reduced schedule of sixty-five hours is one hundred and fifty men and one hundred and fifty animals.

A man to a horse. But let us go back and make an analysis. Twelve men and thirteen animals were doing the work, he said. Was not that a palpable falsehood, to use a mild term? There was nobody doing the work. But if you put it up to sixty-five hours it would take one hundred and fifty men and one hundred and fifty horses, three hundred. Do you know what the pro rata of that would have been? One hundred and fifty thousand dollars. If Turner were my client I would get him to figure it up and he would bring it out just that. One hundred and fifty thousand dollars was the difference between your figures.

Mr. WILSON. Your figures.

Mr. KER. I don’t say Mr. Turner did it. As long as Mr. Turner stays here and faces me I will be kind to him. If I were on the jury I should not forget it either. Now, Miner on the same day puts in an estimate and says, “I offer to carry this mail in sixty-five hours for \$32,650 additional.” Well, of course, \$32,650 was a great difference from \$150,000. Now, gentlemen, if they had stopped there it would have been all right. There would have been very little trouble; but in fool-

ing among the papers we draw out another jacket, and that other jacket is indorsed, "Oath of the subcontractor filed." It gives the number of men and animals that the subcontractor thinks it would require. When we come to make a calculation of the figures mentioned in the other jacket we find it was just \$32,650. Mr. Turner wrote that jacket. It is in his handwriting. It was Mr. Brewer's route. Brewer had change of the route, but, Mr. Turner, the witnesses say it is your handwriting. Mr. Byron C. Coon knows it well, and that jacket was found in Mr. Turner's handwriting, and it had a different oath and a different number of men and animals, and if you make the calculation it brings it out \$32,650. What became of this oath? Judge Wilson says, "What became of the papers?" Another paper lost; another paper gone. What became of them? "Mr. Woodward, you had the papers under your control." "Yes." "Where is this paper?" "I don't know," says Mr. Woodward. Nobody else knows. It has gone; floated away. Just let me recall your attention to one fact. I have no doubt they will say that Mr. Woodward is a very bad man, and took these papers and hawked them around, and everybody handled them, and therefore they are not responsible for them. Don't forget that the Post Office building is one building, under one head, and it has three assistants there. Don't forget that Mr. Woodward is under the Second Assistant in the inspection division. Mr. Woodward is an inspector; and when the foreman asked him, "Is not that an unusual occurrence?" he said "Certainly not, Mr. Foreman. It is not an unusual occurrence to take a paper from one room and put it in another under the charge of a sworn officer; not at all." Mr. Woodward's character is beyond dispute. If they want to attack him, let them do so. They turned him out once for this thing and he came back, and he is in it now. He was too officious in the matter, and in the good old days when Brady held his office they bounced Mr. Woodward out and sent him off; but when an honest administration came in they took him back and brought him here.

Mr. HENKLE. Is that in evidence?

Mr. KER. Let us go to these petitions. Here come along two petitions on the 18th of October, 1878. Then, on the 4th of December, 1878, there were two more, and they keep coming in to act as gentle reminders. On the 6th of December, 1878, there come in two more, and on the 12th of December, 1878, there are two more. How diligently Rerdell was working. You see these petitions were hunted up, and they turned out to be very familiar. If you will read them you will see they are the same words, except that they start with one or two words at the beginning different. They are almost alike in words. The accommodating Rerdell wrote them and fixed them up to get the people to sign them, true to what he told Mr. Pennell he was going to do. They are right there in that little bag as evidence that he kept his word with Pennell. If he did not write them, let us have a witness who will say so.

Now, on the 23d of December, 1878, Brady makes an order, and he says "Increase to three trips, and allow contractor and subcontractor \$4,700 per annum. Reduce the time to sixty-five hours, and allow the contractor \$27,950 per annum, being less than pro rata, but as per agreement." It was less than pro rata; there is a big difference between \$27,000 and \$150,000; but the oath was there. The oath was on file, and it was a large route, and a great number of men and animals were required to carry it. It was a very modest increase when Brady told Walsh that the oaths were put there merely to enable him to do it. Who contradicts Walsh? They asked him about the Congressional proceedings.

It is open. If they can contradict him on that, let them do it. I will sit down while they read it to you. They cannot contradict him. The only contradiction that they have brought against him in that respect was the contradiction that was paid for by Brady's money, and that was written in his two-cent evening circular that is hawked by the boys through the streets of Washington.

That is the only contradiction they have made. The attention of the court was called to it where they referred to Walsh, the liar. If that is the kind of answer that is to be given to these things, let us know it. I do not think it is the only answer that might be given. Sheridan, whose office they went into, has been seen in the court. I do not doubt that you know him. If they cannot find him and will ask me to do it, I will very soon do it for them. I have seen him sitting in court here. They might have shown by him that it was not true, but they did not attempt anything of the sort. Oh, no. It is in the newspapers. I am sure, gentlemen, that anything you see here going on that is palpable to the vision is sufficient or proper for me to comment upon. Let me give you another little piece of comment on what is going on. About two or three years ago the navy-yard in Philadelphia was offered for sale, and a lot of people were supposed to go and bid on it. One man came along and did all the bidding. He had back of him a crowd of a dozen that did nothing. It was knocked down at such a ridiculously low figure that everybody laughed. The newspapers took it up. They went into the matter and followed it out, and they found that it was the biggest piece of rascality and villainy that had ever been perpetrated. The man who bought it was a contractor, a fellow who built ships and who built docks. One of the newspapers in Philadelphia came out giving the facts and stating what it was, saying that it was a steal and a swindle, and accusing him of having stolen the navy-yard. Well, he walked up to a magistrate's office and got a warrant out, and had the newspaper editor arrested and brought him down to the court for trial. At that time I happened to be the assistant of the district attorney, and he came into the office and wanted us to take off our coats and go right to work to prosecute this editor. When we came to reflect upon this matter, and to remember that it might be merely a day or two before he would walk in himself to be prosecuted for robbing the Government, we did not feel the enthusiasm that I suppose he thought we ought to have felt over it. I imagine that he has taken a dislike to some of us on that account. Well, the libel suit came on, and the jury did not believe there was so much of a libel in it, and did not convict. One day, on Chestnut street, this man, who was over six feet in height, tall and broad-shouldered, came right behind the editor, Colonel McClure, who was walking with Governor Curtin. He came behind the editor with a whip in his hand and hauled off and struck him twice over the shoulders. Governor Curtin started back, and the editor who was thus suddenly assailed started back and threw up his hands, and immediately the fellow put his whip under his coat and ran off. Now, gentlemen, that is just the beginning. Day after day I have seen this fellow sit right in court. He has come all the way from New York to lend his aid and his sympathy to these defendants. Sitting right in court with them, his whole and sole business has been to run around the streets of Washington with his vile, villainous, slanderous tongue, to tell the people I am a bad man and a rascal, and they ought not to believe me. The whole idea is to get some of these jurymen to think his words are true. It was only the other night that a respectable gentleman who holds a position up at the House was going to slap him in the mouth. That is the kind of man that has

come here to aid their vile, villainous paper with his own vile, villainous, slanderous tongue. His name is Nat. McKay.

The COURT. I suppose this is a personal explanation?

Mr. WILSON. I presume so.

Mr. HENKLE. We don't happen to know him.

Mr. KER. Is that an answer to these oaths? The brow-beating of the slanderous Nat. McKay? I don't think it is a proper kind of answer.

Mr. WILSON. That is the first I have heard of Nat. McKay.

Mr. KER. Well, on the 23d of December, 1878, this order was made, and on the 29th of January, 1879, there comes in a request to have Vaile's subcontract withdrawn, and Brady notifies the auditor to that effect. On the 3d of February, 1879, they send in a request to stop the withdrawal. They do not want it done, and Brady notifies the auditor to the same effect. Then, on the 1st of March, 1879, Judge Kidder writes for a daily mail. You know Judge Kidder was the one who indorsed the letter asking to have the route discontinued, and here on the 1st of March, 1879, Judge Kidder comes in with a request for a daily mail. Your honor, Judge Kidder was John R. Miner. Again Miner comes to the front, and if it is not so, if he is not the man who made that request, then let us have a witness who will say so.

The COURT. What evidence have you that Miner is Kidder?

Mr. KER. Here is the paper we offered to the witness. The witness says it was Miner who wrote that.

The COURT. I want to bring out what evidence you have.

Mr. KER. Your honor, I can give them page for page. I make no assertion that I do not propose to give them the page to sustain if they ask me. I cannot afford it. There are eight of them to come behind me, and they will give it to me if I make any mistake.

Mr. WILSON. I call for the production of the paper. Judge Kidder is a well-known man.

Mr. KER. [To a gentleman sitting behind him.] Mr. Blackmar, you have the paper; it is on route 35051. Get the paper of March 1, 1879. It is the request of Judge Kidder for a daily mail. [To Mr. Wilson.] You need not call for it; it is on hand. It will be handed to you. There is no trouble about it, and when you have examined it I am ready to take my seat while you prove it is not his handwriting.

Now, then, gentlemen, there was this letter, and another one, and a letter from that estimable, amiable gentleman whom nobody meets that they do not like, that is, General Bingham. General Bingham writes a personal letter, and he offers in this letter an extract from some paper out West, and immediately upon the strength of all that—they are sending out to hunt Miner up—and another letter signed by a man on the Union Pacific Railroad, and the letter of General Bingham, they run it up to seven trips a week, and he says to commence as quickly as the contractor can put it on.

The COURT. Who is General Bingham?

Mr. KER. If your honor only knew him you would like him. You could not help it. It was one of the most natural things in the world for him to do, and I do not think there is a particle of blame to attach to him for it.

The COURT. I know who he is, and have the pleasure of his acquaintance, and I know what district he represents. I know what part of the country he comes from. But the way the case is presented now he might pass for the Representative of that district in Congress—something of that sort.

Mr. KER. He was asked to sign this letter, and he signed it.

Mr. CARPENTER. Better than that. He was the chairman of the Committee on Post-Offices and Post-Roads. He represented the whole country on that subject.

Mr. KER. Then comes the order to increase the service, and allow \$35,000. That mounted it right clean up to \$70,000. Then comes a telegram from the postmaster at Bismarck :

The service is a failure. It is impossible to perform it in winter on the present schedule.

And then on the 31st day of July, 1881, the route was discontinued. [The paper referred to, supposed to be marked 46 O, was here submitted to the jury for inspection.]

The COURT. You assert that that letter purporting to be signed J. P. Kidder was written by John R. Miner?

Mr. KER. Yes, sir; written by Miner.

The COURT. Now, I should like to see what proof you have on that subject.

Mr. CARPENTER. Does he assert that the signature is Miner's?

Mr. HENKLE. He says that Kidder is Miner.

Mr. CARPENTER. I say, does he assert that the signature of Kidder is made by Miner?

Mr. HENKLE. Yes.

Mr. CARPENTER. There is no evidence to prove that, your honor.

The COURT. I want to see what authority he has for the assertion.

Mr. KER. [Indicating his notes.] In transcribing this I have put down 460. It is clearly a mistake of the figures of the page; but when I get a chance, after recess, I will refer you to it and give you the page.

Mr. DICKSON. [The foreman.] That error is occasioned probably by the paper being marked "46 O."

Mr. KER. I will have to hunt up the page in which the testimony is given.

Mr. HENKLE. The letter he refers to is 23 O.

Mr. DICKSON. [The foreman.] 46 O is another paper, then.

Mr. KER. [After searching the record.] During recess I will find it. I have made a mistake in putting down the page. The foreman says I have got the wrong number.

The COURT. Very well.

Mr. KER. Now, on the 21st day of July—remember, gentlemen, I do not claim that Miner wrote Kidder's signature, but I do claim that Miner wrote the letter for him. Miner wrote the letter.

The COURT. We all misunderstood you, then.

Mr. KER. How is that, sir?

The COURT. I acknowledge that I misunderstood you. I supposed that you were claiming that the signature as well as the body of the letter was written by Miner.

Mr. KER. Oh, no; the body of the letter is written by Miner. Whether Judge Kidder signed it or not, I cannot say. But I referred to the fact that Judge Kidder asked to have the route discontinued first, and subsequently came back and asked to have a daily mail put on, and Miner wrote that letter, and it was Miner's request and not Judge Kidder's.

The COURT. Now, we have it explained.

Mr. HENKLE. Why did you not say that, Mr. Ker?

Mr. KER. I thought I said it plainly enough.

Mr. HENKLE. You said Miner was Kidder.

Mr. KER. Certainly. Kidder did not want it. But Miner wrote it —

Then I referred to General Bingham. General Bingham did not want the mail; somebody else wanted it. But is it not in Miner's handwriting? Do you deny it? If it is not in Miner's handwriting, let us have an understanding about it.

Mr. WILSON. [Submitting the paper to Mr. Ker.] That is not in Miner's handwriting. You will say so yourself when you look at it.

Mr. KER. It has been testified that it is. Will anybody get on the stand there and say it is not?

Mr. WILSON. You will say yourself it is not when you look at it. Now, you have got things confused, and I want to set you straight.

Mr. KER. I hope you will.

Mr. WILSON. I will do it, right now.

Mr. KER. I do not want to give a single item that is not true.

Mr. WILSON. That is not Miner's handwriting. That is Kidder's handwriting. You can see that yourself.

Mr. KER. I have not yet examined it.

Mr. WILSON. Now look at that. [Submitting another paper.] Here is one that is in Miner's handwriting and is signed by Miner. You have things confused. That is all. That is indorsed by Maginnis.

Mr. KER. That is the one I referred to.

Mr. WILSON. I knew you had got things confused.

The COURT. There was no intention to mislead anybody.

Mr. WILSON. No. I say he has got it confused; that is all. [To the foreman.] Here is 46 O. You were right about that. Turn over on the back. Now, on the back it is from Maginnis. He has got it confused. That is all there is about it.

Mr. KER. Here it is, gentlemen:

SIR: I desire to call your attention to the necessity of daily mail service from Bismarck to Fort Keogh, in the Valley of the Yellowstone.

The tide of emigration which precedes the building of a railroad on the frontier is always large. Parties always seek for locations on the probable line of a new road.

Is not that the one referred to? That is signed by J. T. Kidder. That I say Mr. Miner wrote. I do not say he wrote them all. [To Mr. Wilson.] The one you showed me is not the one I referred to. Now, there is no doubt about that. Miner wrote that.

Mr. WILSON. No, no; it is all straightened out. You got it a little confused.

Mr. KER. It is all straightened out. I have just read it as it is on page 1216, and the judge says it is all straightened out, so I suppose there is no doubt about it being Miner's writing.

Now, you know, gentlemen, this service was not performed until the beginning of January, 1879. The pay on this route was drawn by Vaile. Miner signed the receipts and received the drafts, and Rerdell witnessed the drafts on the routes. You remember on the witness stand Vaile was interrogated about this route. It is the only one of the whole nineteen that the combination ran themselves. In every case they had a subcontractor. On this route they had none, and I want to show you precisely how they ran the route.

The report came that the mail was not being carried. The men who were running it for them told you how they carried it. Mr. Lambert, who was one of their carriers, hired by them, paid by them, says, "I ran it in eight days." He ran it through in eight days. That is on page 1247. And Mr. Burns, who was another carrier, says, "I ran it through in nine days." There is a big difference between sixty-five hours and nine days. But they were running it themselves, and there was no intermediate post-office, nothing on the route.

This is the route where Rerdell wanted them to get up a little elbow on it fifteen miles away, and to appoint one of the fellows who was sodding the ranches, digging around there, postmaster; and he wanted to have a post-office established, according to Mr. Pennell's testimony, and they were to leave the man who had charge of the ranch, and he was to be the postmaster, and he was to get out a grasshopper mail, because there was nobody else to receive it. This route which they were managing it themselves. This is the route that Vaile said, as he stood upon the stand, "We lost money on," and he turned his head away—"a regular sink, a regular sink." Seventy thousand dollars a regular sink! And he looked so sick and disgusted over it that I did not doubt it was a regular sink; but I want to explain to you why it was a regular sink; because they did not carry the mail, and the evidence is clean and clear that they did not do it. An honest administration came in and shook the change out of him. He took the \$70,000, and the Government forced him to pay it back. A regular sink. Six thousand dollars to build ranches. He did not carry the mail, and the Government shook it out of him. Of course it was a sink. I only wish he had sunk it in General Henkle's pocket.

Mr. HENKLE. Thank you. I wish so, too.

Mr. KER. If he had, we would have had something to show for it. He would have given it to a good man, who would have spent some of it.

Next let me take

ROUTE NO. 40104, MINERAL PARK TO PIOCHE, ARIZONA.

Originally it was two hundred and thirty-two miles, one trip a week, and eighty-four hours. John Dorsey was the contractor, and the pay was \$2,982. To give you record testimony, June 18, 1878, Brady orders the change of address to box 714. That is Miner's. On the 6th of August, 1878, the postmaster at Pioche writes that the service is not commenced. On the 31st of August, 1878, the postmaster at Pioche says, "Service began this day." On the 21st of October, 1878, Delegate Stephens writes for service twice a week. November 26, 1878, John W. Dorsey makes his oath. On the same day there is a proposal sent in to carry the mail. On the 27th of November, 1878, Peck asks leave to sublet. On the 29th of November, 1878, Brady gives permission to sublet. On the 20th of December, 1878, petitions are filed for increase to three trips. On the 24th of December, 1878, Brady makes an order to increase the service and reduce the time. On the 31st of December, 1878, Vaile files his subcontract. On the 5th of May, 1879, John Dorsey writes to change the address to the care of Rerdell. On the 5th of May, 1879, the same day, Vaile withdraws his subcontract. On the 7th of May, 1879, Rerdell files his own subcontract. On the 8th of May, 1879, the department is notified of Vaile's withdrawal and Rerdell's coming in. On the 15th of May, 1879, Rerdell withdraws his subcontract. On the 20th of May, 1879, Brady gives an order to Turner to make up a case on Pioche for increase. Then, on the 23d of July, 1879, French writes out the order for increase. On the same day French writes a letter to the postmasters notifying them of the increase. On the 18th of August, 1879, the postmaster at Pioche reports that service begins. On the 25th of August, 1879, there is a letter from a man named Horace Beene, notifying the Postmaster-General about the mails. On the 22d of January, 1880, Brady makes an order to reduce the service to one trip. On the 28th of January, 1880, he rescinds this order, and orders it for four trips. On the 10th of April, 1880, French allows a month's extra pay on service

reduced. On the 29th of June, 1880, John Dorsey makes a subcontract with McKibbin. On the 29th of July, 1880, Rerdell's subcontract is withdrawn. On the 12th of August, 1880, McKibbin's subcontract is withdrawn. On the 23d of August, 1880, John Dorsey makes a contract with Salisbury. Then, on the 17th of March, 1881, Jennings files his subcontract.

Gentlemen, this is a nice little route. You remember what Vaile testified to. He says, "I turned this route over to John Dorsey, Peck, and Stephen W. Dorsey." And you will find that on page 2219. This is the route that was turned over to them. It began with eighty-four hours and one trip. The first was a notice to change the address to Miner's box, 714. Next the postmaster at Pioche writes on the 6th of August, 1878, that no service had commenced. Of course it had not. Vaile said they had not put it on. On the 31st of August, 1878, the postmaster writes, "Service began this day." This is at Pioche. On the 21st of October, 1878, Delegate Stevens writes for service twice a week. On the 26th of November, 1878, John Dorsey makes an oath for three trips and sixty hours, and how he got the sixty hours I suppose might be explained, but I cannot do it. Now, Miner fixed up this oath for John W. Dorsey. He did not sign Dorsey's name to it, but he fixed the oath up for him—wrote all of it. On the 26th of November, 1878, the same day, Dorsey's proposal was sent in. That Miner fixed up, and that Miner, I believe, signed. No, Miner did not sign it. He fixed it up. The proposal was made to carry the mail three trips, sixty hours, for \$19,318 additional. On the next day, the 27th of November, 1878, a letter is sent in from Peck, asking leave to sublet the route. Miner wrote that letter. Gentlemen, Peck had no more to do with that route than you or I. He was not the contractor; he was not the subcontractor. He had nothing to do with the route as far as the evidence shows on the face of the papers; and unless Brady knew from previous conversation that Peck was one of the combination, how could he have known that this was a proper request? Miner wrote that letter and signed Peck's name to it, and Brady made an order allowing Peck to sublet the route. On the 20th of December, 1878, there is a petition filed for an increase of three trips and sixty hours. This petition originally did not call for anything of the kind. Rerdell erased that petition, and Rerdell wrote in that petition the words, "Three trips on a schedule of sixty hours, instead of eighty-four hours." It was eighty-four. These are the words Rerdell wrote in that petition in his own handwriting. You will find it on page 1845.

Now, there was another petition. I want to call your attention to this. I say Rerdell wrote those words in one; but there is another petition, Ehrenberg to Mineral Park. You could hold it up to the light and you would see the balance of the *g* where it had been changed and altered for the other route. The same language, the same signers. Both petitions were precisely the same, only words had been scratched out and one made to fit one route and the other made to fit the other route, and they both bore the same date and they were both altered to suit the routes—Ehrenberg to Mineral Park. [To a gentleman sitting behind him.] Mr. Blackmar, won't you get that out, if you please. It is on route 40105, December 20, 1878. Two petitions. I want the jury to remember that. Miner wrote one of them. Miner erased the words and wrote the alterations in one petition, and Rerdell wrote them in the other. That is the testimony. There is no getting away from it. It is not disputed. Men who know the writing say that is their writing. If it is not, it is the easiest thing in the world for them to bring some-

body who knows it is not. This was on the 20th of December. On the 24th of December, 1878, Brady makes an order:

From January 16th, 1879, increase the service two trips and reduce the time 84 to 60 hours. Allow the contractor \$19,318 per annum additional, being less than pro rata, but as per agreement.

[Submitting a paper to the jury.] There it is. Hold that up. You can read E-h-e-r-e-n-b-e-r-g, Eherenberg. You can see it as plain as can be. [Indicating.] Look all down there.

Then on the 31st day of December, 1878, Vaile filed his subcontract, and that subcontract Miner signed as attorney. On the 5th of May, 1879, the address was changed to the care of Rerdell. On the same day Vaile withdrew his subcontract, and to both of these letters Rerdell signs the name of John W. Dorsey.

Now, on the 7th of May—[to Mr. McLain, a juror, who is inspecting the paper.] You can see the b-e-r-g on the second line.

Mr. HENKLE. [To Mr. Ker.] Here is the other one. [Submitting paper.] Who wrote this one?

Mr. KER. One is written by Miner, and the other by Rerdell.

Mr. HENKLE. This is 12 P. Who wrote this?

Mr. KER. 12 P is written by Miner.

Mr. HENKLE. That, you say, is written by Miner.

Mr. KER. They are twins, you know. The two petitions are exactly alike. They filed them on different routes.

Mr. HENKLE. Who wrote the other one?

Mr. KER. Rerdell. The one written by Rerdell is 11 P. They were both written the same day. The papers on this route are marked P.

One of these petitions was filed on route 40105 that is not in this combination at all, and the other was filed on route 40104. That is the one I am speaking of now.

After Vaile's contract was withdrawn, Rerdell writing his name to it, on the 8th of May, 1879, Brady notifies the Auditor of the withdrawal of Vaile's contract. On the 15th of May, 1879, Rerdell files his subcontract. Gentlemen, remember these dates; remember this occurrence. There was a man who was a subcontractor on that route, and yet, notwithstanding they knew he was honestly entitled to draw the pay, they put Rerdell's subcontract on file. Vaile put his on file first and withdrew it, and then comes Rerdell. I want you to see where the work comes in. On the 20th of May, 1879, Brady says to Turner, "Make up a case for increase." That is his language, and it is signed by Brady. On the 1st of July, 1879, there is a subcontract made with Jennings. There had been another contract, but on the 1st of July they made the second contract with him. The contract provides for three trips for \$12,600, six trips for \$25,200, seven trips for \$28,000. It was already three trips, and they were working for more. Then there is put in a letter from Sidney Dillon, asking for an increase from Pioche to Prescott. Prescott is not on this route. It has nothing to do with this route; but Mr. Dillon's letter for an increase to Prescott is filed on this route. The increase that followed was made upon this letter: "From August 1st, 1879, increase service four trips per week and allow contractor and subcontractor \$29,733.33 additional." Mr. French wrote immediately to the postmaster, stating, "Report immediately if this service is not put on." It was to go on August 1st, 1879. On the 18th of August, 1879, the postmaster at Pioche reports, "Service began on this day." Then on the 25th of August, 1879, Horace D. Beene, a lawyer at Ward, Nevada, wrote a letter to General Brady. Gentlemen, I must read this letter for you. It is on pages 1308 and 1309:

SECOND ASST. P. M. GENERAL,
Washington, D. C.:

SIR: I readily understand the position in which a citizen places himself when he approaches a department of Government for the purpose of complaining of an abuse merely because it is such. I know the odds he encounters and the care with which he should make assertions. I appreciate the fact that his communication does not always accomplish its purpose, and that its design is subject to a misinterpretation.

In view of these things I have not undertaken this letter hastily, nor is it my intention to forsake the subject of it until every avenue of redress is exhausted.

The subject to which I refer is postal route No. 40104, from Mineral Park, Arizona, to Pioche, Nevada; distance, about 230 miles, daily.

I call your attention to these facts: that an average of less than six letters a day goes over this route either way; that the population of St. Joseph is less than 20; that of St. Thomas less than 30, and that of Mineral Park very small—I do not know the exact number.

Another thing worthy of note is, that the business of Mineral Park and its surrounding country goes to San Francisco more directly in another direction.

That was up to Prescott, I think.

I do not know the causes that led to the establishment of this route. It was not done by petition from the Pioche end of the route. I am sure it would not have been done by the advice of any official who knew the facts and advised without personal interest.

There is, in fact, no real reason why that route should have been established as a daily, and none whatever for its continuance as such.

Its effect is that the Government pays largely for a service that is useless, and that accomplishes no purpose except that of enriching parties directly interested.

As a citizen, I request that this thing be investigated and remedied.

And to that end—

Listen to what he says—

if this letter fails of its purpose, I shall use a copy of it as a preface to other communications to be sent through surer channels to the highest authority.

Yours, truly,

HORACE D. BEENE.

Look at how the judge [Mr. Wilson] laughs. This lawyer lived in Ward, Nevada, and he traveled all over the country. He goes down there and is intimate with everything connected with the route. It is in the same county, although he was a hundred miles away. Those people are not like you and I. They don't sit around and wait for clients. They go and hunt them up. He practiced in California, and he practiced in Nevada, and he practiced wherever he could. He was a moving lawyer, and as honest a lawyer as ever practiced in the far West. The poor fellow is dead and gone to a higher tribunal, but I trust his spirit is watching over the effort that he honestly made to correct a great abuse. He wrote this letter to General Brady, and it was put on file. Brady was frightened, and made an order on the 22d of January, 1880, to reduce the service one trip, and the time to eighty-four hours, restoring the route to its original time, without one month's extra pay. He put it back again. Then, on the 28th of January, 1880, he makes another order. Between the 25th and the 28th they must have stormed the Second Assistant's office. Every influence that could be brought to bear to stiffen up his weak back was brought to bear, and he modifies his other order and cuts it down and says, "Rescind that order." Wipe it out and make a new order. "Reduce the service four trips." He took it all off and reduced it four trips without the one month's extra pay. He had a vision of the lawyer before him. He knew that there was a letter back of it. He trembled. He knew the man. He sent out to Nevada, and he found out who Beene was, and that he was not a man to be trifled with; and he cut the service down. But on the 10th of April, 1880, whether it was whispered in French's ear or not, French allows them one month's extra pay on the service dispensed with.

Mr. TOTTEN. Where is that order?

Mr. KER. On page 1862.

Mr. TOTTEN. Is it with or without pay?

Mr. KER. With pay. French gives them one month's pay. Brady cut it down without it.

Mr. HENKLE. You ought to have indicted French. Why did you not indict French?

Mr. KER. Here, on page 1310, is the order to reduce it to its old proportion. Then, again, on page 1310, is the order to rescind that order, and to cut it down to four trips; and on page 1862 is the order of French to give this one month's extra pay. Whether French did it voluntarily, or whether it was whispered to him, or what it was, it makes no difference. He allowed it. He is not here on trial.

Mr. HENKLE. I see he is not.

Mr. KER. On the 29th of June, 1880, John Dorsey made a contract with McKibbin, and Rerdell signs as attorney for Dorsey. McKibbin was brought in to stiffen Brady's back. The idea of cutting it down! Terrific! On the 9th of July, 1880, a letter was written by Vaile to the Postmaster-General, or, rather, Miner wrote it for him. Then Vaile makes an addition to it to make it stronger, and signs his own name. He gives an explanation of the whole thing. I will not read it now. I will pass over it now; but I will read it to you hereafter. It would be a pity not to read it. On the 29th of July, 1880, Rerdell writes another letter withdrawing his subcontract, and he signs John Dorsey's name to it. Why, gentlemen, away over in the records of this case, on the 5th of May, 1879, Rerdell had withdrawn his subcontract. On the 5th of May he had sent in a letter——

Mr. HENKLE. [Interposing.] Do I understand you to say that Vaile wrote a letter?

Mr. KER. Yes, sir.

Mr. CARPENTER. To the Sixth Auditor?

Mr. KER. Certainly. I will read it after a while.

Mr. HENKLE. I understand it now. All right.

Mr. KER. It is a wonder you don't know about it.

Mr. HENKLE. I do. I wanted it in all the time.

Mr. KER. You did?

Mr. HENKLE. Yes.

Mr. KER. We tried to get it in half a dozen times.

Mr. HENKLE. I never objected; not I.

Mr. KER. It is singular his honor did not understand what we all wanted. Well, I said Rerdell withdrew his own subcontract. I suppose it was kept there as they kept all those things in order to tame down the refractory subcontractors. Then there is a letter sent in withdrawing the McKibbin subcontract. Rerdell writes that letter. On the 23d of August, 1880, they make a contract with Salisbury, and Rerdell signs that contract as the attorney for Dorsey. Mr. Salisbury, it seems, did not move Brady or stiffen his back up any, and out he goes, and along comes Mr. Jennings' subcontract and it is filed, and that is the cause that led to all this little disturbance.

[Referring to the record.] I will begin with page 1332, gentlemen, and will turn them over and let you see them. [Turning over pages of records.] Here are the way-bills that were sent from one office to another, and they state how many letters are in the pouch. They are sent by one postmaster and received by another. It is a pity they do not let you read this record. I will read it for you:

Mail consisting of five letters and a bill was dispatched this morning.

Mail consisting of one letter and this bill was dispatched this morning.

Mail consisting of this mail bill was dispatched this morning.

So it goes from page to page. The mail bill was the only thing they carried more than two-thirds of the time, and then came one or two letters. Why did not Rerdell, and Vaile, and Miner, write to each other, and send the letters over the route? They might have used a three-cent stamp occasionally to keep the mail going. But they let the mail bill go over alone. That was what was carried over the route. Well, you know Jennings got careless. When a fellow has a mail bag and nothing in it but the confounded mail bill, what is the use of making the trip? He could just as readily lie off under a tree and take a smoke, or furnish himself with a bottle of the good whisky they keep out there, and take a drink and amuse himself generally. It was simply amusement carrying that mail. Jennings knew it, and he did not carry it, and there was trouble. They came down on him like a stroke of lightning under an honest administration, and they went for him, and they went for Vaile, and they went for the whole crowd. Then Vaile wrote back this letter that General Henkle was crazy to get before the jury. It is on page 2247. We had a hard time to get it in, general, but we got it in at the tail end. I tell you, you fought well.

Mr. HENKLE. I did not fight at all.

Mr. KER. Let me read it to you. This is not one of the routes that Vaile had in his charge. Oh, no; he had six, you know. This is not one of them:

WASHINGTON, D. C., *July 9, 1880.*

Hon. J. M. MCGREW:

SIR: In reply to yours of July 8th, relating to the Jennings case, I would state that I did not receive the money in manner and form as stated by one M. C. Rerdell, nor was the draft of J. W. Dorsey, on said route 40104, for the quarter named, to get an advance of money for myself or for my own use.

It was not for his use; oh, no.

At the time I receipted for my pay as subcontractor on said route, I did not in fact receive any money, but did so receipt that J. W. Dorsey might negotiate his draft on said route, and for no other purpose.

Although I was subcontractor of record on said route at the time named, I was not a subcontractor in my own behalf, but as trustee for J. W. Dorsey, S. W. Dorsey, Isaac Jennings, and others, to collect said money and pay it over as said parties should direct. I further state that all money that ever came into my hands from said route I did pay over to the parties named as trustee, as by them directed.

Acting as trustee of said Jennings, and believing that he had performed the mail service on said route as by him agreed, and in accordance with the laws and regulations of the Post-Office Department, I did pay said Jennings, on the 1st day of April, 1879, the sum of \$1,257.73, the sum of money he was entitled to provided he had carried the mails three times per week on the schedule required, which I fully believed at that time he had done, and for a long time after.

I further state that I am informed that said Jennings is not responsible; that it would be utterly impossible for me to receive back the \$2,800, or any part thereof; that in fact this sum of money sought to be collected of me, if collected for said Jennings's benefit, or go into his hands in addition to the sum he now has unlawfully, doubly remunerating him for his neglect of duty.

I further state that all the money collected on said route not paid to said Jennings was paid to liquidate the debts of J. W. Dorsey, S. W. Dorsey, and others previously contracted, and not one dollar ever remained in my hands.

I further state I believe both J. W. Dorsey and S. W. Dorsey are irresponsible—

That is a nice character he gives them.

Mr. MCSWEENY. Yes; for a conspirator; I think so.

Mr. KER—

and it would be impossible for me to collect any part of said money from them.

I believe that.

Mr. MCSWEENY. Just so.

Mr. KER. [Continuing:]

As above stated, said money came into my hand only as their agent or trustee, and at once paid out as they directed; that my subcontract was put on file simply to enable J. W. Dorsey to negotiate his draft on said route, when in fact said Jennings was the real subcontractor. Said Jennings agreed to perform the service on said route strictly in accordance with the laws and regulations of the department, for the annual sum of \$12,600.00, the duplicate of which contract was delivered over to S. W. Dorsey by myself, and which I believe is now in the hands of M. C. Rerdell, and which, or a copy thereof, I demand shall be filed with you in this case, that you may see what said Jennings agreed to do.

This is certainly a strange claim. Jennings agreed to perform mail service on said route. I believed he had done it and paid him accordingly. It turns out long after he did not properly perform the service, but was attempting a swindle, and a deduction is ordered for not performing the service properly. Then this man, the guilty party, having got money from me as trustee wrongfully, as well as from the Government, and asks that the auditor compel me to pay him the sum of \$2,800.00, when, as I am informed, he is seeking to get this same deduction remitted.

Surely if he succeeded in all this he will make a good thing out of his rascality and I a good victim without remedy. I state again I did not hypothecate said draft for myself, did not receive one cent as subcontractor, but became the payee of said draft that said J. W. Dorsey might negotiate it, and I to dispose of the proceeds as he should direct, all of which I did. Therefore I request you not to compel me to pay the sum of money asked, but if I am liable at all let the parties seek their redress at law where all the facts can be obtained and justice rendered me. And it is also well known that I am a man of means, and any judgment rendered against me could and would be collected, dollar for dollar.

I am, very respectfully,

H. M. VAILE.

A JUROR. [Mr. Tobriner.] When was that dated?

Mr. KER. The date of this letter is the 9th of July, 1880. He says he was the subcontractor, and that he held this route as trustee for J. W. and S. W. Dorsey, Jennings, and others, and that he paid Jennings, supposing Jennings had performed the service. It turned out, you know, that he did not perform it, and immediately Jennings was seized upon to pay back \$2,800. Jennings then comes in and says I am not to do that. Go after Vaile or somebody else; and they went after Vaile, and wrote to him, and that brought down Vaile's answer. Now, gentlemen, it becomes important to remember the statements made by Vaile in this letter. He says that he could not collect this money from S. W. Dorsey; that Dorsey is irresponsible. That is true. He says, "Send it to a court of law where I can have justice." He wanted to get it before a court of law instead of before the department. Gentlemen, do you remember Vaile's testimony? He says that he turned these routes over to Dorsey. He got six himself. To keep? No. To secure him for the money that he was investing. Did he get them all to himself? No. "I got 40 per cent. of them, and Miner had 30 per cent. of them." That is seventy. The other 30 per cent. belonged to John W. Dorsey, S. W. Dorsey, and Rerdell. That is Vaile's testimony. He held six routes.

Mr. HENKLE. That is his testimony as to the division under the contract of August 16, 1878. He says that after April 1, 1879, they had no joint interest whatever.

Mr. CARPENTER. The record does not say anything about Rerdell's having an interest. That is an entire misstatement of the testimony.

Mr. KER. Look at page 2202. Read it. It says there, "I got 40 per cent., and Miner got 30 per cent., and we joined our interests together."

Mr. HENKLE. Yes; that is true for 1878.

Mr. KER. What difference does it make when it was?

Mr. HENKLE. Because in 1879 they separated.

Mr. KER. They joined their interests in 1878, he says. He had 40

per cent., and Miner had 30 per cent., and that left the other 30 per cent. for the combination. That is his testimony there. When the time comes, or now, read it to the jury. Do not let us have any misunderstanding. If there is a mistake about it, correct it.

Mr. CARPENTER. Won't you read from the testimony, where he says that S. W. Dorsey, and John W. Dorsey, and Rerdell had the other 30 per cent.?

Mr. KER. He did not say so.

Mr. CARPENTER. You said he said so.

Mr. KER. I say it. I don't say he said it.

Mr. CARPENTER. You said Vaile said so.

Mr. KER. Don't he say, "I turned the balance of the routes over to Dorsey. I had six routes taken to secure me, and I had 40 per cent. and Miner had 30 per cent., and we put our interests together." Where did the other 30 per cent. go? Miner and Vaile joined their interests. Thirty and 40 are 70.

Mr. CARPENTER. They are.

Mr. KER. It is printed there. Is there a mistake about it?

Mr. WILSON. That is right.

Mr. KER. Correct it. Put him on the stand.

Mr. CARPENTER. What I complain of is that you said the other 30 per cent. was held by the two Dorseys and Rerdell. There is no such testimony in the case.

Mr. KER. My dear sir, I cannot alter it. He said the routes were in their name and he agreed to run them. He took six to secure himself, and the balance were held by Dorsey. Look on the page and you will find it.

Mr. HENKLE. What is the page?

Mr. KER. Page 2202. He turned them over to Dorsey. You see how they try to confuse you when they come to argument. He stated on page 2202 what interest he had. I have not marked down the page where he spoke about the division of the contract, because he went over it half a dozen times. It is fresh in the minds of the jury, I think. He spoke about the division. He spoke about taking charge of the routes and antedating the contracts in order to cut off the subcontractors, and he mentioned the six routes that he had taken into his own charge. He gave those six routes and stated their numbers. I will give you the numbers if you want them.

Mr. HENKLE. If you will allow me I will read from page 2202.

Mr. KER. That is what I have been wanting you to do.

Mr. HENKLE. He is referring to the arrangement that was made on August 16, 1878, and speaks of what routes he and Miner took after the division, and the question is:

Q. What personal control did you have over the running of these mail routes from the time you became connected with them?—A. I and my men had absolute control of them. I may say I had as absolute control over them as any one could have. They were in my charge the same as if I had bid for them.

Q. After this arrangement you have spoken of?—A. Yes, sir.

That is the arrangement of August, 16, 1878.

Mr. CARPENTER. He is speaking of the arrangement after the division.

Mr. HENKLE. That was before. He says that after 1879 they had no community of interest except that he and Miner went together.

Mr. KER. Let me read:

Q. Did you take personal charge of them or employ a party to do that?—A. I employed other parties. When I say I had absolute control of them, perhaps that is too

broad. Mr. Miner was interested with me; in other words, I having taken 40 per cent. of these matters and Mr. Miner 30 per cent., we joined those two interests after the division.

Mr. HENKLE. That was after 1879.

Mr. KER. Well, thirty and forty are seventy. Where were the other thirty? Where were they?

Mr. HENKLE. There was not another thirty after the division.

Mr. KER. You see, gentlemen, they try to upset me. It is a very clever thing for them to do. What I want to call your attention to is the fact that they had this interest.

Here is a route that is increased up to \$52,033 for carrying a way-bill from one end of the route to the other. They were paying \$28,000 and they had a clean profit on this route of \$24,033. Twenty-four thousand and thirty-three dollars was given clean and clear to the contractors, and when the Government asked for \$2,800 to be paid back; the magnanimous Vaile, the liberal Vaile, the man who did not regard \$50,000 on an increase any more than he would regard writing a letter, had no remembrance of anything connected with it. Fifty thousand dollars, \$30,000, \$40,000, and \$20,000 heaped on. Two hundred and five thousand dollars given to Harvey M. Vaile for one year's service on those routes; one-half of the whole steal, and yet he did not remember anything about it. He cries and snivels like a whipped child over \$2,800. He says, "I can't collect it from Stephen Dorsey. He is irresponsible." Dorsey had a ranch in New Mexico. The only man in the world who ever collected a dollar from him was Anthony Joseph, and I will guarantee he did it at the mouth of a six-shooter or else he would never have gotten it. Vaile was lawyer enough to know that he could never bring suit against Stephen W. Dorsey, for Dorsey would say it was an infamous contract, and the court would say so too. Neither in law nor in equity could he have collected that \$2,800, for it was the proceeds of plunder. He could not have got it, and he knew it, and knew it well. He knew they would never give it to him. He had driven a hard bargain, and I don't blame Dorsey for laughing at him and saying, "Pay your \$2,800. You squeezed me when you had me in a tight place. I will squeeze you now." That is the secret of this letter. He is crying over \$2,800. The man who had received \$205,000 in a year and didn't know it. He settled up every quarter. He kept no books, and it made no impression upon his mind whatever. Does not this throw a flood of light upon the entire subject? He had his 40 per cent. and Miner had his 30 per cent., and he took one-half of the routes to manage, and he got \$205,000. Four hundred and ten thousand dollars was the total amount of this steal, and he got half of it, and they watched with each other, and worked with each other, and helped each other along. One got 40 per cent. and the other got 30. Where did the other 30 go? Judge Carpenter rises up and says there is no evidence that Dorsey got it. I do not believe he did. There is no evidence that Dorsey got it. It went to Thomas J. Brady, but Dorsey knew it. It was Brady's end of the whack. That 30 per cent. was Brady's. It was Brady's share. Don't charge poor Dorsey with more than he is guilty of. He had taken enough of it, and he was sufficiently sensible to allow Brady his share.

At this point (12 o'clock and 30 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. KER. [Resuming.] Gentlemen, I was telling you, when we were about to take a recess, or rather I had told you, of how the percentage was divided, and how Vaile had 40 per cent. and Miner had 30, making 70, and the other 30 per cent. there is a question as to where it went. I only give you my view of it, that it went to Brady, and, if it did not go to Brady, I would like my friends on the other side to show to the contrary. During recess I was thinking the matter over very carefully, and trying to recall what Vaile said about that, and it occurred to me that I remembered Vaile's statement that they had made an arrangement between them, and he was made the treasurer, and Miner was made the secretary. Vaile was the treasurer of the concern. He got 40 per cent., Miner got 30, and I suppose the treasurer paid the odd 30 to Mr. Brady. Oh, it is true, he says, "I never paid any money to Brady or saw it paid. I know nothing at all about that." Well, that is reasonable. He was the treasurer, but he knows nothing about the \$205,000 that was paid to him, and if he does not know about the \$205,000 it is reasonable to suppose that he does not know anything at all about the 30 per cent. I presume that he did not pay it; but I presume also that it went right straight to headquarters, nevertheless, and if it did not, then let us have some testimony to that effect.

Let us go on. I have two more routes to finish, and I want to get through with them, because I suppose that you are tired listening to me. I know that I am tired of talking about it. My mind is so well made up that I naturally feel that your mind ought to be made up. At the same time I cannot neglect the duty I have of giving you every part of the testimony I have connected with these routes.

ROUTE 40113, TRES ALAMOS TO CLIFTON, ARIZONA.

Route 40113, Tres Alamos to Clifton, in Arizona, one hundred and ninety-seven miles, one trip a week, eighty-four hours. John W. Dorsey was the contractor. His pay was \$1,568. Miner witnessed the contract. On the 21st of April, 1879, John W. Dorsey made an oath for three trips at forty hours. Eighty-four hours it was; forty hours he asks for. I do not know where he got the forty hours, but he put the forty hours in. Now, this oath was exhibited to you. You looked at it, and it was all erased. Whatever had been in it was scratched out in the material part, and it was written over again; and I find by the testimony Rerdell was the man who wrote the oath over again. Rerdell was the man who put the alterations in the oath of John Dorsey.

The next comes an order to change the address to the care of Rerdell. Then the oath was transmitted to the department on the 7th of May, 1879. Dorsey, of course, signs a letter transmitting that oath. Rerdell was on hand, and he saved Dorsey the trouble of writing or signing the letter. He wrote and signed it himself.

Then comes a lot of petitions filed on the 10th of May, 1879. These petitions ask for increase, and they are all in the same language—the same sort of petitions, all got up in the same language. These petitions were sent in the letter of Dorsey. Rerdell again writes Dorsey's name, and again writes a letter sending along the petitions. Then on the 23d of May, 1879, there were more petitions sent in. Dorsey's name is put to the letter, and again Rerdell writes Dorsey's name sending in these additional petitions. On the 3d of June, 1879, the petitions being in,

and the oath being in, and everything being ready, Brady makes his order :

From June 16, 1879, increase the service two trips per week, and allow the contractor \$3,136 per annum. Reduce the time from eighty-four to forty hours, and allow the contractor \$9,408 per annum additional.

Then on the 11th of November, 1879, in walks Stephen Dorsey, and files his subcontract. Then on the 6th of December, 1880, Stephen Dorsey's subcontract is withdrawn, and Rerdell signs John W. Dorsey's name to the letter withdrawing the subcontract.

Now the pay in this case was drawn first by Vaile, and then again it was drawn by Stephen W. Dorsey, and subsequently to that John W. Bosler drew it. The original pay on this route was \$1,568; it was increased by Brady and brought up to \$27,913.59. Now there was a subcontractor on the route, and what his pay was we were unable to ascertain.

Next, as to the productiveness of the route. In 1879, from every office on this route, the receipts were \$403.32. It was not worth while to figure down among the offices to ascertain whether there was anything in the intermediate ones. Four hundred and three dollars included everything. Then again in 1880 it was \$513.41. In 1881 it was \$789.12, and to get this magnificent sum of \$789.12, the Government paid \$27,913.59, and poor Dorsey lost money.

The next is the nineteenth and the last route. I am getting tired of going over them so much.

ROUTE 44140, EUGENE CITY TO BRIDGE CREEK.

This is 44140, Eugene City to Bridge Creek, in Oregon. It was two hundred and seven miles, one trip a week, one hundred and twenty-one hours. John M. Peck was the contractor, and his pay was \$2,468. P. J. Wycoff was the subcontractor on the route, but his subcontract has not appeared among the papers.

The record evidence in this case is: On the 22d of January, 1879, an oath of Peck was made for three trips and fifty hours. On the 21st of April, 1879, Brady makes an order :

Curtail the service to end at Mitchell, decreasing the distance 18 miles, and allow one month's extra pay.

The next is on the 5th of May, 1879, a letter of Peck to change the address to care of Rerdell. The next is on the 9th of May, 1879. Brady makes an order to change the address to the care of Rerdell. On the 23d of May, 1879, S. W. Dorsey writes a letter to Brady, inclosing petitions and letters. On the 24th of May, 1879, the day after, the oath of Peck was filed. On the same day there was a letter from Peck transmitting the oath. On the 26th of June, 1879, Brady made his order to increase the trips, and to reduce the time. On the 23d of October, 1879, there was a letter from Peck to Brady asking to have the subcontractor's (Wycoff) pay increased to \$7,400. On the 24th of October, 1879, there is an order to notify the auditor of the subcontractor's pay being increased. On the 5th of November, 1880, there is a warrant drawn in favor of J. W. Bosler for \$725. On the 15th of November, 1880, there is a letter of Peck to Brady calling attention to the affidavits filed and asking for a change of schedule. On the 20th of November, 1880, Brady makes an order to reduce the time from fifty to forty hours from April 1 to October 31. On the 15th of January, 1881, there is a warrant to

J. W. Bosler for \$889.75. On the 29th of March, 1881, there is another change of schedule.

That is the record testimony as it appears; and we will have to go back and analyze this case, the same as the others; and I think, when you listen to the facts in the case, you will consider that it is one of those remarkable routes that you meet with in the course of this trial.

The first, you know, is the subcontract of Wycoff. That we cannot find, but it is referred to all the way through. On the 22d of January, 1879, there is an oath made by Peck for three trips and fifty hours. The time was one hundred and twenty-one hours, but they want to bring it down to fifty hours. Then on the 16th of April, 1879—from the 22d of January up to the 16th of April—S. W. Dorsey writes a letter to Mr. Wilcox to get up petitions. On the 21st of April, 1879, Brady makes an order to curtail the service to end at Mitchell, taking off eighteen miles, and allowing a month's extra pay. On the 5th of May, 1879, the letter of Peck comes along to change the address to the care of Rerdell at box 706. Rerdell wrote that letter, and Rerdell signed Peck's name to it. On the 9th of May, 1879, Brady makes an order to change the address to the care of Rerdell, and I suppose that then Rerdell had charge of the route. On the 10th of May, 1879, there are two letters that are addressed to Stephen W. Dorsey from Springfield, Oregon. They are found on page 1521. Both of them are dated the 10th of May, 1879, at Springfield, Oregon:

S. W. DORSEY, U. S. S.

Whatever that means. Some people would interpret it to be United States Senate.

S. W. DORSEY, U. S. S.,
Washington City, D. C.:

DEAR SIR: An effort is being made to secure an increase of service on the mail route leading from Eugene City, via McKinzie and Ocheco, to Bridge Creek, Wasco County. The country through which this route passes both east and west of the Cascade range of mountains is rapidly filling up with settlers, and the mail facilities under the present contract is, in my opinion, entirely inadequate to the population. I would therefore most respectfully ask your assistance in securing such increase of service as prayed for in the petition.

Very respectfully, your ob'd't servant,

W. R. WALKER.

The next is a letter of the same date, directed to Hon. S. W. Dorsey, U. S. S., Washington, D. C.

DEAR SIR: Having learned of your willingness to assist in procuring mail facilities—

I do not know where he got his information, but he hit it right—

I take the liberty of addressing you and asking you to assist us in procuring an increased mail service on the route from Eugene to Bridge Creek, which is now only once a week, over a route that should have a daily mail service, and I hope you will favor us with your influence for that purpose.

Very respectfully,

B. F. FINN.

These two letters are addressed to S. W. Dorsey. Now, on the same day that these two letters were written, the same 10th of May—and I have shown that Stephen W. Dorsey put his contract on file on the 11th of November, calling for service from the 1st of April; therefore he, no doubt, was interested, and was willing to secure mail service; but on the same 10th day of May there is a petition produced, and it is signed by people who lived in Eugene City, and this petition is in the handwriting of Rerdell. It is found on page 1522. Now, we have two let-

ters and a petition. On the 23d of May, 1879, Stephen Dorsey writes to Brady, and the letter is here, and he incloses these two petitions. The letter is found at page 1522:

HON. THOMAS J. BRADY,
Second Assistant P. M. Gen'l:

SIR: I have the honor to transmit herewith letters addressed to me in relation to an increase of mail service on the route from Eugene City to Bridge Creek, Oregon, which please place on file in your department, and to request your early consideration of the same.

Very respectfully,

S. W. DORSEY.

Accompanying this letter was the letter written by Walker, and the letter written by Finn, and the petition that Rerdell had written and had signed. Those were the three inclosures in Stephen Dorsey's letter. Then on the next day the oath of Peck is put in. Now that oath is all written over, scratched out and changed. The oath was written by John R. Miner. The alterations were written by Rerdell. Miner signs the oath of Peck. He gets it ready and Rerdell fixes it up with the proper number of men and animals. Then on the same day comes a letter of Peck transmitting this oath, and this is found on page 1522. Mr. Rerdell wrote that letter. Let us read it:

WASHINGTON, D. C., May 24, 1879.

HON. THOMAS BRADY,
Second Asst. P. M. General:

SIR: I have the honor to transmit herewith my proposition for carrying the mail on route 41140 for three times a week and on a reduced schedule.

This route crosses two high ranges of mountains, and on a schedule of 60 hours the time will be equal to at least six miles an hour on an ordinary road.

He notifies Brady that the time will be six miles an hour on an ordinary road in sixty hours.

Hoping this will receive your favorable consideration, I am,
Very respectfully,

JOHN M. PECK.

It was written by Rerdell. Now, the statement is that sixty hours' time would be equal to six miles an hour on an ordinary road; it used to be one hundred and twenty-one hours. But they want it reduced to fifty hours, and that would put it a little beyond seven miles an hour—on an ordinary road a little beyond seven miles an hour. But on the 26th of June, 1879, Brady comes forward with his order:

From July 14, 1879, increase service two trips, and allow \$4,649.86 per annum additional. Reduce the time from one hundred and twenty-one to fifty hours, and allow \$14,436.10. Allow the subcontractor \$6,971.02.

In the very order that Brady makes to increase the number of trips and to reduce the time so as to go beyond seven miles an hour, he makes an order that notifies him that the subcontractor's pay was only \$6,971.02, less than half the amount allowed for expedition alone and showing that the contractor on this route was receiving \$14,060 over and above what the mail could be carried for. Talk about discretion and not knowing anything at all about it, and being deceived! Why, the very order that he made himself would convince him or any man whose mind had not been tortured, whose judgment had not been warped, whose soul had not been purchased, that he was allowing more than it was lawful and right and just and proper, when he knew that they had a clean, clear profit of \$14,000 on that order. And it all went for Stephen Dorsey's benefit.

Then, on the 23d of October, 1879, there is a letter sent from Peck,

and Rerdell wrote that letter and signed Peck's name to it; and they state that Brady made a mistake in his order. He did not allow the subcontractor enough. He allowed him \$6,971.02. Now, they ask Brady to correct that mistake, and it is corrected. The subcontractor is to get \$7,400. It was \$6,971, and he is to get \$7,400—a few hundred dollars increase.

The next is on the 24th of October, 1879. The auditor is notified by Brady that the proper price to pay the subcontractor is \$7,400. Again it is brought to his attention, and right after this begins a fine piece of financiering.

On the 15th of September, 1880, the subcontractor writes a letter to Rerdell, and he says:

M. C. RERDELL:

DEAR SIR: Yours, August 26, at hand; I will cheerfully aid you in trying to get deductions for quarter ending June 30, 1880, remitted, but it will take some time to get the necessary affidavits. I will forward them as soon as possible.

The notice from department ordering deductions, and your check for \$2,000, received in due time. The deduction of \$625 from my quarter's pay may have been very liberal on part of contractor, and I acknowledge that according to our contract you might have imposed a much greater deduction, which would have completely ruined me and made it impossible for me to continue the service longer. As it was, I was very much embarrassed, not being able to meet my obligations. After mature reflection I had concluded to give you notice of my determination to quit, for I cannot possibly carry it through the winter on present schedule without *failures*, which would subject me to deductions, which I could not stand; but your letter gives me hopes that last quarter's deduction may be remitted: therefore I withhold my notice of intention to quit until the result of your effort for *remittal* is reached. *If my part of it is not remitted, I shall certainly have to quit.* You will please make a note of this. I don't know whether the contractors can stand these deductions, but I know I *can't*, and my only remedy is to quit, of which I will give you the required notice.

Now, this letter was written to Rerdell. Judge Wilson read one half, and Mr. Bliss read the other half:

You think you can have the service increased to six trips a week, and ask if I could carry it. I could, and very much desire the increase, and think it could be possible to carry the increased service six times a week in 50 hours—

Remember he says in fifty hours—

even in winter, with but few failures, and in this connection I will call your attention to some of the difficulties under present schedule, departures being every forty-eight hours, and required time being *fifty hours through*.

The mail went out of the office in forty-eight hours, and he was to carry it in fifty hours, therefore he missed the connection:

If just the schedule time were used we would arrive at ends of line two hours after starting time, requiring double sets of carriers, and we can hardly arrange stopping places so as to swing on ends of line, thereby making it in forty-eight hours—

Here is one point, and here is another [illustrating on the table before him]. He did not want to build a little station there and a little station here, and run the mail in on schedule time there and run it in here, and let these fellows loaf around doing nothing. That is the way they used to do to make up schedule time—swing in on the ends. If it was fifty hours he could not go from that point to that point [indicating], he would miss the connections; and in order to get the mail bills straight, he would have to let this fellow run in to the starting point upon time, and let this one do the same, and let the body of the route take care of itself—

and if we could it would leave three of the six carriers idle half the time, which will not pay. By the *daily* arrangement this difficulty would be obviated and another great advantage would be in keeping our road open for horse travel the most of the way

across the mountains in winter. Therefore the increased service to six times a week is very desirable. If effected at all I should have notice of it as soon as possible in order that I may make necessary arrangements for winter.

Very respectfully, &c.,

A. S. POWERS.

Now the peculiarity about this letter is just this: He becomes very thankful to John M. Peck, who was the contractor, very thankful to M. C. Rerdell, that they only deducted from his pay on that quarter \$625, when they might have deducted more. That is the purport of this letter—that they could have taken off more than \$625, and he was thankful for it that they did not. Now I just want to show you where the business comes in. On the 5th of November, 1880—this was in October—there is a warrant drawn in favor of John W. Bosler, assignee, for \$725 of pay remitted for the quarter ending March 31, 1880. They got \$725 of it remitted, and the poor subcontractor was thankful because they only deducted six hundred and odd dollars from him. He never got it. On the 15th of November, 1880, ten days afterward, there is a letter sent from Peck to Brady, asking for the remission of fines for the quarter ending September 30, 1880. Rerdell wrote the letter and signed Peck's name. That is on pages 1525 and 1526:

M. C. Rerdell, box 706.]

WASHINGTON, D. C., Nov. 15th, 1880.

HON. THOMAS J. BRADY,

Second Ass't P. M. General:

SIR: I have the honor to inclose herewith affidavits of A. S. Powers and Wm. Gebhart, and a certificate of G. C. Renfrew, postmaster at McKinzie's Bridge, Oregon, on route 44140.

These affidavits, showing the almost insurmountable difficulties encountered in performing service over this route, and showing a depth of snow ranging from 10 to 50 feet, which continued up to about the middle of July, at which time the snows began to melt and form lakes, even more difficult to contend with than the snow.

Men were employed until the 12th of Aug. building bridges and shoveling snow-drifts, and it was only after the latter date that the roads had been put in such condition as to enable the mails to be carried at night.

These affidavits and statements show that every possible effort was made to carry the mail within the schedule time, and I would very respectfully ask that the deduction made from my pay for the quarter ending Sept, 30, 1880, be remitted.

Very respectfully,

J. M. PECK.

Then follows the affidavit of the subcontractor with a statement as to the snow, which there is no doubt about. That was Peck's letter written by Rerdell asking to have the deduction remitted.

You have seen how he had written to Powers asking him to get the affidavit ready and telling him he would try and have the deduction made for him. On the 15th of November, 1880, the same day that the request was put in for remission of deductions, there is another letter that Rerdell wrote and signed Peck's name to, and in this letter they called Brady's attention to the fact that affidavits were filed asking for a schedule of sixty hours from November to April and forty hours for the rest of the year. Now you know it had been made fifty hours; and here come in the affidavits stating that it is impossible to do it in the winter. So they propose a schedule of sixty hours in the winter and make it forty hours in the summer. They say "Don't take anything off our pay; but just divide it in that way. Make it sixty in winter and forty in summer. It don't make any difference to the people along the route. In the winter time they don't read their letters as regularly, and don't require them as regularly as they do in summer. Keep the pay up, and keep the old thing going at the old figures. Change the schedule and give us a living chance." Of course the postmasters on the route thought it was the order of the department that the mail must be rushed

through over seven miles an hour along that road at that rate. They put it as reasonable as they could—sixty hours in winter and forty in summer. On the 20th of November, 1880, Brady accommodates them, and makes the order: Reduce the running time from fifty to forty hours from April 1 to October 31, and increase it from fifty to sixty hours from November 1 to March 31, without change of pay. Then, on the 15th of January, 1881, there is a deduction for fines, and the warrant is drawn, and it is given to John W. Bosler, assignee, for \$889.75, remission of part of deductions for September. Now you know that Stephen Dorsey was there with his contract, and Bosler was his next best friend, and Bosler got this draft with the deduction of the pay, and instead of having Stephen Dorsey's subcontract on file, it ought to have been the contract of the man who was doing the work; but Dorsey's was there, and, of course, Brady was not supposed to know to whom the deductions were to go. They were paid to the man that the contractor named, and Peck, through Rerdell or Miner, ordered that the pay be given to Bosler, assignee. On the 23d of March, 1881, Rerdell writes another letter and he sends along \$275.61 deductions. On the 29th of March, 1881, Brady makes another order. He amends his first order about the change of schedule, and fixes it up to suit them better. He makes it sixty hours from November to March, and forty hours the balance of the year. On the 26th of April, 1881, Rerdell writes another letter to Mr. Powers about these remissions. It is found on page 1541:

M. C. Rerdell, agent. P. O. box 406.]

WASHINGTON, D. C., March 23rd, 1881.

Hon. A. S. POWERS:

DEAR SIR: Inclosed please find draft on U. S. Treasury for \$275.61, being amount of fines and deductions remitted from those imposed for quarter ending Dec. 31, 1880.

Now listen to his language:

This is the first remission we have succeeded in getting made. Please acknowledge receipt. We sent you some time ago your pay for that quarter as well as \$972, being amount heretofore deducted, which I hope has been duly received.

Very truly,

Now, you remember the language of the letter; the first remission he has been able to get from the department. Remember what Mr. Bosler received. When Rerdell wrote that letter he forgot that on the 5th of November, 1880, Bosler had drawn pay for the deductions; when he wrote that letter he either forgot it or willfully told a lie about it; for he knew that on the 15th of January, 1881, there was another set of deductions and that Bosler drew them. The whole thing amounts to simply this: that they deducted from the pay of the subcontractor and he kindly thanked them for not making it more, and collected from the Government and put it in their pockets and sent him \$275 and told him a willful and deliberate lie, which was that they had not received any more from the Government; it was the first that had come. Now, the subcontractor on this route was examined, and said in his testimony, "We never made the schedule time." The fact is that there were deductions from his pay every quarter, and the letters show that fact. It was impossible to make it. Let me tell you what he said. "The mail was carried on snow-shoes in the winter." I do not wonder that it was carried on snow-shoes in the winter. If Rerdell's statement to which he signed Peck's name was true, and the snow was fifty feet deep, I do not wonder that it was carried on snow-shoes. But that was not all. He says, "Part of the time we put it on our backs and carried it on foot." They carried the mail on their backs and carried it on snow-shoes, and the time was reduced from one hundred and twenty-one

hours to fifty hours in order to meet the requirement of the combination.

Vaile drew the pay, Mr. Bosler drew the pay, and Stephen W. Dorsey drew the pay. The original pay was \$2,468, and it was increased to \$21,460.89. They paid the subcontractor \$7,400 for carrying this mail, and they had a clear profit of \$14,060.89. No wonder they wanted the schedule kept in such a shape that it would be the old thing in reality, sixty hours in winter and forty hours in summer; and no wonder that when the schedule was made it could not be broken, even though it made no connection whatever. In order to make connection the proper time would have been forty-eight hours.

Next, let us see what the productiveness of this route was. For the year ending June 30, 1879, from every office, Eugene City being supplied by railroad, and Prineville supplied by railroad, the total receipts were \$1,735.85. If you throw off those two offices the receipts were exactly \$284.10. In 1880 the entire receipts were \$1,903.73, and throwing off the two offices named, the receipts on the route were \$194.49. In 1881 the total receipts were \$1,725.30, and throwing off the railroad offices, they were \$184.95. Every year the gross receipts of all the offices, as well as the receipts of the offices that were not supplied by railroad, were sinking down lower and lower; and yet Brady makes the order to change the schedule from sixty to forty hours without change of pay, without investigation, without seeing whether it was right and proper to keep the service on or not. He had within his own department under his entire control every fact and figure that would have informed him about this route. During the last year the receipts were \$184.95 for this mail route, and it cost the Government \$21,460.89 to gather in that little sum.

Now, gentlemen, I have got down to the end of the routes. It was a hard job to go over them, and a tedious matter, but it had to be done. You know we can never shirk a duty that is imposed upon us, especially when it is a public duty. I have shown you in each route just what took place. I will give you a few figures more. As long as we are at figures, we might as well stay at them. I do not want to bother you with going over the whole thing. We will confine ourselves to the months of April and May :

On the 15th of April, 1879, there were three routes attended to. I just want to show you how busy these men were on these particular days in taking care of their interest. I am omitting the days where they only had one route, and taking the days when they went at two or three or more together. As I said, on the 15th of April, 1879, they were at three routes doing something. On the 16th of April they had three more routes doing something with them. On the 21st of April they were at three more routes. On the 22d of April they cut themselves down to two routes. On the 26th of April there were five routes that demanded their attention in the department. Now, let us turn over to May. On the 6th of May, 1879, two routes demanded their attention. On the 7th of May three routes demanded their attention. On the 8th of May they were engaged in four of them. On the 9th of May they cut the four down to three. On the 10th of May there were three routes that they had to attend to. On the 15th of May three more routes demanded their attention. On the 20th of May three more came under their supervision. On the 23d of May they engaged in two routes. On the 24th of May they were at three routes.

I have taken these two months because they were busy months with them. I have not gone to June, because that is a month that is con

tained in the indictment. I have no doubt it will be so well talked into your mind that you will appreciate it all without my wearying you with it now.

I want to call your attention to specific individuals. You have seen how Brady made these orders; made them regardless of protest; regardless of right or justice, or knowledge brought home and laid at his door. You have seen how he has made these orders, and you have no explanation as to why they were made. You have seen Miner's hand, writing and signing other people's names and putting in oaths that were deliberate and false and willful and corrupt perjury. You have seen Rerdell change and alter oaths and petitions and fix them up to suit himself, and put them in the department in obedience to the wishes of those he was engaged with. You have seen that Vaile was the treasurer of this combination and took the cash, and did all that lay in his power to help it along even to the taking of a false oath. He of all men cannot say it was an estimate, for he has read law and he knew that an oath was not an estimate. [Turning to Mr. Turner.] I am not going to say anything about you, Mr. Turner, there is no use of your looking.

These are the people that were engaged in this transaction. John W. Dorsey performed his share. He talked, and he did the work, and he made the contracts, and he told Nephi Johnson that he had got his down nearer to pro rata than any other contract he had made since he had been out on the road. He was in it all the way through, and yet I have a sort of sympathy with John W. Dorsey. I cannot allow that sympathy to run away with my good judgment. There is a duty to be performed and it must be performed. I do not propose to imitate Rerdell and Miner and Vaile and disregard the oath that I took when I was first brought to the bar, and the oath I took in your honor's court when your honor kindly permitted me to practice here. You owe an obligation to the power above, and when you take an oath to perform a duty it means that if you violate that oath you perjure yourself. There is no escape from it. John Dorsey was the brother of Stephen Dorsey, and he was brought into this combination early, even as Peck's name was introduced into it, because somebody had to be used, and some name had to be given in order to get these contracts. John Dorsey does not look like a man who has rolled in wealth, but he looks like a quiet, meek man who followed the lead of his bright, smart brother. I do not want to speak as if I had no sympathy with these people, because we always sympathize with people who get into trouble, whether it is through misfortune, or whether it is gone into boldly and with determination. Because Stephen Dorsey happens to be the man he is, is no reason why we should do him injustice, and it is no reason why we should fail to carry out the strict behests of the law. When I first went into the case I felt, from his known standing, that it would be an impossibility for such a man to steep himself in crime. I felt a sympathy with Mr. Dorsey from the fact that he had held a high and honorable position in the Government of the United States. I say I sympathized with him, and I felt that I would be glad if he could bring before the jury and to my mind any evidence to show he was not a guilty man. I would be glad now if it could be done. But when I take the evidence, and when I analyze that evidence, and when I remember what has taken place in this court-room, the feeling of sympathy that I first possessed changes to one of indignation. When I find that Stephen Dorsey, taking care of himself, brings from the far West one of the brightest, keenest, strongest advocates he could find to attend to him alone, and when I remember that his poor brother is in equal danger of the penitentiary, the very thought

of that selfishness wipes out anything like sympathy with Stephen Dorsey. Were my brother on trial I would say, "As long as I have a dollar or a cent in my pocket it is yours. Get the best talent in the world. I will go to the penitentiary, but let you go free." Oh, yes; he brings Judge McSweeny, whose talent is known from one end of the land to the other, to talk for Stephen Dorsey. Who is to talk for poor John? I do not know. Judge McSweeny told you when he opened the case that he was here for Stephen Dorsey. Shame! Shame!! If I were Stephen Dorsey I would rise and say, "No! You are here for John Dorsey! Stephen Dorsey will take care of himself."

Well, when you analyze the testimony, and when you see where Stephen Dorsey comes into these routes, there is no getting away from the testimony. There is no ignoring the testimony. I will give them to you one after the other. In thirteen of these routes Stephen Dorsey has taken an active part, and has drawn the proceeds of the infamous crimes of other men. On route 38135, on route 41119, on route 38145, on route 38156, on route 46247, on route 38134, on route 38140, on route 38113, on route 35051, on route 30104, on route 40113, and on route 41140 Stephen Dorsey's name appears. Where is the explanation? If your sympathies went out towards him of the warmest and strongest kind, I ask you, having taken upon yourselves the obligation that you say is the most binding upon your conscience of any upon earth, can you, would you, is it possible for you to disregard this duty?

Of course all these questions will be answered by eight gentlemen of talent and learning. I presume that Judge Carpenter will open the ball. I do not know what the Judge's abilities are from hearing him speak, but his reputation is the brightest for plain common sense. They have put him in the lead because he has that plain common sense and will not indulge in any buncombe. That will come in at the tail end. [Laughter.]

Mr. WILSON. I suppose you refer to Mr. Merrick?

Mr. KER. No, sir. You say the defense are to close.

Mr. MCSWEENEY. Mr. Merrick is to close.

Mr. MERRICK. I guess you all know what he means.

Mr. HENKLE. We heard what he said.

Mr. KER. Then Judge Chandler will come with the beauty of oratory, with the use of words that are pleasing to the ear, sentences that are gentlemanly, law that is refined. I know when you hear him you will think you are in Paradise listening to an angel's whisper. I do not know where the rest come in, but I know that when General Henkle arises to explain this matter that he will be fortified by an ocean of books. He will give you authority upon authority to show you what the law is, and what it ought to be. But, General Henkle, do not forget the evidence.

Then I suppose the next in order will be Mr. Hine. I am only giving you my supposition about it. These are all old fellows, and I am the youngest in the crowd, and I do not know how they come. They generally take them according to age. I suppose Mr. Hine will come along and reason and argue with you in his persuasive way, and try to induce you to believe that Vaile testified to what he did not testify. You know Mr. Hine went away from the court and did not hear what took place subsequently, and he does not know anything about Vaile's testimony except what his client communicated to him in the secrecy of his office when he laid down his retaining fee. That is all that Mr. Hine remembers about it.

Then will come the gifted and the brilliant Colonel Totten, and he will shoot the arrows home to you, one after the other, and will give

you one piece of testimony and stick it together with another. He will put together pieces that do not belong there at all, and it will not make a particle of difference with him, for he will rattle right straight along. I was down at Atlantic City about the 4th of July, and I was sitting on a porch after being in the water, drinking a glass of champagne; and the colonel came along a couple of days afterwards when I got into court here and he said, "I saw you sitting on the porch drinking beer." If he treats the evidence in this case in that way, not distinguishing between champagne and beer, how is he going to get along? [Laughter.]

Mr. TOTTEN. You told me it was sarsaparilla.

Mr. KER. Did I?

Mr. TOTTEN. Yes, you did.

Mr. KER. If I remember right that was your excuse for not coming over. You said you drank nothing but sarsaparilla.

Then, again, last but not least, we have our friend Judge McSweeney. I will not say last, but he is coming towards the last. Judge McSweeney was brought here to materialize you, to bring you into a life that you do not possess. He is a semi-spiritualist, one of those people who possess a magnetism that nobody ever dreamed of. I heard of the judge years ago. He will get right up here where I am, and he will button his coat clean up, or he will bring a long linen duster, and he will put it on down to his feet, button it up, roll up his sleeves, look you right in the face, and make you either laugh or cry just as he wills it.

Then comes our friend Judge Wilson. He is a practical man. He has all this evidence at his finger ends and at his tongue's end. He will roll it out to you, and he will talk about what ought to be and what ought not to be. The judge has nothing superfluous about him. He is a right straight out lawyer, and he goes to the marrow of it. He will take everything I have said that he thinks would fit into his case, and he will twist it and turn it and try and see if he cannot put it in some other place. It will be like putting the lit end of a cigar where the other end ought to go. He will give you this testimony and he will try to twist it and turn it and shape it so that you cannot remember possibly what was testified to.

Now, gentlemen, when it comes to that point in the case do not forget that you have a great duty to perform. Do not let the ties of friendship interfere with you. Do not let the animosities of hate step in. Take the evidence as it is, and act as one man should act toward another. No matter what these people are, no matter what they have been, your duty is a plain and a solemn one. We have brought these charges. We have shown you the deeds. We have pointed out to you the acts. We have shown you that they were unlawful. We have called upon them, and again I call upon them, to prove their innocence. [Turning to counsel for defense.] If you have any testimony to offer, put it right on the stand. It is never too late. We do not want to convict an innocent man. If you have one thing to bring out in testimony that will answer what I have given you, bring it out. [Turning to the jury.] But, gentlemen, do not let the eloquence of counsel carry you away. When an assertion is made, when they point to a piece of evidence, get right straight up and say, "Where is that evidence?" Do not sit there quietly and allow these gentlemen to drown your intellect with an overflow of their eloquence. Stand right up, watch the facts of the case, and say to them, "Where is that proof?" That is what they have done with me. They have called for the page. You call for the page. Do not let them hoodwink you. Do not let Judge McSweeney go back to his home in Ohio, and stand down at the corner drug store, with his arms folded, and tell them how

he fooled a jury of twelve Washingtonians. He would do it in a minute. He would laugh at you. I say to you, do not permit him to do it. Make him give you a page. Make him point to the letter. Make him show you one piece of evidence after the other.

Now, gentlemen, there are strange facts in the history of life. Time works wonders. When you come to remember what a prophet Rerdell was, and John Dorsey and Miner, you cannot help but wish that the gift of prophesy were given to you. If the gift of prophesy had been given to you in the earlier stages of your life you might have used it. In alluding to that point, and remembering the changes that come over us in life, and the different situations that men are placed in, I cannot help recalling the difference between myself and some of you gentlemen who are on the jury. Who would have thought in the palmy days of 1861, before the first Bull Run was fought, that Mr. Doniphan, of the jury, and myself should have stood face to face in that fight, he on one side, and I on the other. Who would have thought, when Fredericksburg battle was going on, and the dead were covering the field, that I could have looked up to Mr. Doniphan on the heights of the hill and he could have looked down to me. If we had had the spirit of prophesy that Rerdell possessed, we would have met at the old stone wall, and we would have shaken hands, and talked of the time that was to come when he was to be on this jury, and I was to talk to him and ask him to convict. We cannot help recalling these things. And it is a mere evidence of the change that is going on in life. Stephen Dorsey comes from the Senate, from an honored position, and he stands to-day before you twelve men. John Dorsey comes from his humble and quiet home in Vermont, drawn by the influence of his brother, and he stands before you to-day on trial. Miner and Rerdell, who they are or what they are is immaterial. The evil acts that they have performed have stamped them with infamy and placed them beyond the pale, even of sympathy. Vaile, drawn in by the glitter of gold, has lent himself to the transaction. The whole of them formed a combination the equal of which was never known, the extent of which has filled the nation from one end to the other.

As I told you the other day the eyes of the people are fastened upon you. They look to you who have been selected to represent the people of the great United States. They look to me, and they look to the gentlemen with me, and say, "Do your duty; do your duty. Remember your oath and your obligation, made in the sight of Heaven, in the sight of Almighty God." Gentlemen, I know you will do your duty. I know you will so do your duty that your children after you may say that your name was blessed.

Mr. MERRICK. I think, may it please your honor, that my brother on the other side would prefer not to commence at this time to be interrupted after some twenty minutes.

The COURT. I can give him an hour.

Mr. MERRICK. As his opponent, I suggest that he be not required to go on. I speak also in my own behalf. I am not feeling very well and I would like to go to my farm and fix up my fences.

The COURT. I think we will go on for awhile.

Mr. MERRICK. Being on the opposite side I ask this courtesy for my brother.

The COURT. Yes, I know. As the court will not meet to-morrow and as so much time has been taken up already, I do not feel like losing any more.

Mr TOTTEN. I would like to suggest that it is always very difficult

for a gentleman to begin an address to the jury or the court after he has been sitting nearly all day. It has always seemed to me that it was nearly equal to lost time.

The COURT. The old lawyers used to sit from breakfast time until candle-light.

Mr. TOTTEN. We are young, your honor.

The COURT. You are, although the rest may not be.

Mr. TOTTEN. I think, if the court please, that it will not be a loss of time to let Mr. Carpenter off until Monday morning.

Mr. MCSWEENY. If the court please, brother Ingersoll has gone over to the seaside. He went off with the idea that there would be no opening on our side until his return. We had a pretty good assurance from brother Ker that he would about use this day. To our surprise he has abbreviated his remarks somewhat.

The COURT. I think he has somewhat.

Mr. KER. If it will be any accommodation I will get up and go on again, your honor. [Laughter.]

Mr. MCSWEENY. "Insatiate archer, will not one suffice?"

Mr. WILSON. Your honor, we have a sick juror, and I think, under all the circumstances, it will be well to adjourn.

The COURT. Well, it is not the first time I have been beaten in this case.

Mr. WILSON. We appreciate your honor's kindness. I really think we will make quite as much headway by adjourning.

The COURT. To morrow, of course, we do not sit, because I have an engagement in another court.

At this point (2 o'clock and 30 minutes p. m.) the court adjourned until Monday morning August 14, at 10 o'clock.

MONDAY, AUGUST 14, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. CARPENTER. May it please your honor, and gentlemen of the jury: I congratulate you and felicitate all the counsel in the case and myself that we are upon the final stage of this case so far as our duties are concerned. It is a case of so much importance, and there is so much testimony in this record, that I am sure the jury will bear with me patiently while I present to them the facts from our side of the case, as I understand them. It is our right to place before the jury the facts as they are developed in the testimony, and our deductions from them. In this case, gentlemen of the jury—one of such vast importance to my clients and to public justice—I do not fear to weary you as long as I discuss the questions before the court and the jury. I speak for lovely,

devoted, and heart-stricken wives; for innocent children; for a widow whose husband was taken from her through a painful and delusive disease, contracted in the service of his country; for her orphan children, the wards of the Republic; for sensitive, cultivated, honest men, who have been traduced throughout this country in a manner the equal of which we have never known. I am not here to ask this jury for mercy. My instructions from my clients are to ask this jury for justice; to say to this sea of slander with humanly omnipotent voice, "Thus far shalt thou go, and no farther. Here let your turbid and dark waters be stayed."

The learned counsel who addressed this jury in the opening of this argument made some very remarkable statements. One of them I shall allude to at this present time. He said that this was a remarkable case. I think so; and I think, perhaps one of the most remarkable features in it is that a counsel learned in the law spent the time of this court and this jury for three days arguing this case, and yet made no allusion to the charge in the indictment, except to say that it might be proved other than by absolute positive proof. There is not one single syllable in that whole argument tending to show that there was anything like a conspiracy in this case. Three days gone and not a scintilla even of argument to show that there is any such thing as conspiracy here. That is a remarkable state of affairs, and the fact was a remarkable one.

The learned counsel indulged in certain reflections that I was very much surprised and I was very much grieved to hear. He stated to you, gentlemen of the jury, that this case had been before the public, that there was not a hamlet throughout this whole broad land that had not heard, considered, and passed upon it. He told you that the public had made up its judgment, that its verdict was "Guilty," and he asked you to conform to it by bringing in a verdict of the same character. During a long experience in connection with my profession, most of which has been at the bar, I have never heard such a remark from counsel before. I have never heard counsel appeal to the outside pressure upon a jury. I had thought this was a temple of justice from which the outside world was shut out; that the juror came into the box with a mind like white paper, upon which nothing had been written in the case until the testimony was developed before him. I had supposed that your oath of office required you to decide this case according to the law and the evidence. For the first time in my legal experience I hear counsel tell the jury that that is not the style of making up a verdict; that public opinion demands the immolation of these victims upon the altar of its prejudice, and that you are to conform to that public opinion and enter the decree *pro forma* that has already been entered before. I was sorry to hear the remark. I have been raised in a school that taught me that the jury of the country was the palladium of liberty, that it was the refuge of the innocent, that it was the refuge of the oppressed; that a jury composed of the peers of the defendants would do justice upon the testimony elicited before them, without regard to what the people thought. In this connection, gentlemen of the jury, for the double purpose of showing to you what I consider to be the proper spirit in which this case should be investigated by you, and to reassure my feeble virtue, if the court please, I will refer to one of the great landmarks of our profession, a judge whose learning was so profound and who possessed such genius and such integrity and impartiality that though his decisions were pronounced more than a century ago they are still the beacon lights of the profession throughout the world. I

refer to that great judge, Lord Mansfield. The circumstances of the case that I am about to call to your attention, gentlemen of the jury, were that John Wilkes, esq., a member of Parliament, had made himself exceedingly obnoxious to the government in many ways, and finally wrote two papers, one entitled the *North Briton*, upon which he was indicted for libel, tried, and convicted. He fled to France, and fleeing from the realm he was outlawed by the English courts. This was a motion before Lord Mansfield to reverse that outlawry. I read it for another purpose—to show how, even in monarchical England, the great judges of the realm always lean to the liberty of the citizen, and that it was their effort to find reasons for the acquittal of men accused instead of to find reasons for their conviction. The day of Jeffries and his predecessors had passed when Lord Mansfield came upon the stage; and he and his successors threw a different light altogether upon all questions of this character. The question in this case, gentlemen, you would not have considered very important. When you see how his lordship decided it and what he says about it you might consider it was straining a point in favor of the liberty of the subject. Says his lordship:

From the precedents we have seen it appears that a series of judgments have required a technical form of words in the description of the county court at which an outlaw is exacted; that after the words “at my county court” should be added the name of the county, and after the word “held” should be added “for the county of” [naming it]. Whereas here the sheriff says “at my county court” without adding “of Middlesex,” and he says, “held at the house,” &c., without adding the words “for the county of Middlesex” after the word “held.”

There is no reason for requiring these words; there is sufficient certainty without them. It is impossible to doubt, upon this record, but that the county court at which the defendant was exacted, was the court of and held for the county of Middlesex. But this is a criminal case, highly penal. Outlaws have had the benefit of this exception for a great length of time. Can we refuse it to the defendant? We cannot, though I am clearly of opinion “there was not a color originally to hold these words to be necessary.” The objection to the blunder between the peace “of the now” and “the late king,” after conviction, has not much more solidity in it, yet the House of Lords thought themselves bound by precedents; and so must we, had the flaw been discovered before judgment. I cannot say “that it does not appear upon this record, that the court was of and held for the county of Middlesex,” because I am clearly of opinion “that, most manifestly, it does;” but I can say that a series of authorities, unimpeached and uncontradicted from the 7th of James I, as to one expression, and from the 18th of Charles II, as to the other, have said “such words are formally necessary.” I can say that such authority, though begun without law, reason or common sense, ought to avail the defendant. It would be dangerous to say that an exception allowed so long, should now be overruled. The exception certainly would not have prevailed, had it been at first; but, before the third of Queen Anne, there being no opposition after a writ of error was granted, the court considered the crown as consenting to the reversal upon any pretense, how slight soever, though that is not the case now. The necessity of the form of words must not be canvassed, since it has been so often adjudged necessary. The officers of the crown are in fault for not attending to the form prescribed and copying the precedent of the *King vs. Bell*.

There can be no mischief or uncertainty arise from this determination, because it being once known “what form of words is necessary” it is easy to follow it. But great suspicion and uncertainty must follow from this court’s allowing a formal exception one day and disallowing it in another.

I beg to be understood that I ground my opinion singly upon the authority of the cases adjudged, which, as they are on the favorable side, in a criminal case highly penal, I think ought not to be departed from, and, therefore, I am bound to say that, for want of these technical words, the outlawry ought to be reversed.

His lordship proceeds to say further:

It is fit to take some notice of the various terrors hung out.

You will see, gentlemen of the jury, that this case, tried in 1770, is very much like the case at bar. It will show you how judicial history repeats itself as well as other history, and it will show you how a great judge met an occasion of this kind, and how different were the senti-

ments of that judge from those expressed by the learned counsel in his argument.

It is fit to take some notice of the various terrors hung out. The numerous crowds which have attended and now attend in and about the hall, out of all reach of hearing what passes in court; and the tumults which, in other places, have shamefully insulted all order and government, audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion.

Give me leave to take the opportunity of this great and respectable audience to let the whole world know all such attempts are vain. Unless we have been able to find an error which will bear us out to reverse the outlawry, it must be affirmed. The constitution does not allow reasons of state to influence our judgments; God forbid it should. We must not regard political consequences, how formidable soever they may be; if rebellion was the certain consequence, we are bound to say, "*Fiat justitia, ruat cælum.*" The constitution trusts the king with reasons of state and policy; he may stop prosecutions; he may pardon offenses; it is his to judge whether the law or the criminal should yield. We have no election. None of us encouraged or approved the commission of either of the crimes of which the defendant is convicted; none of us had any hand in his being prosecuted. As to myself, I took no part in another place in the addresses for that prosecution. We did not advise or assist the defendant to fly from justice. It was his own act, and he must take the consequences. None of us have been consulted or had anything to do with the present prosecution. It is not in our power to stop it; it was not in our power to bring it on. We cannot pardon. We are to say what we take the law to be; if we do not speak our real opinions, we prevaricate with God and our own consciences.

I pass over many anonymous letters I have received. Those in print are public, and some of them have been brought judicially before the court. Whoever the writers are, they take the wrong way. I will do my duty unawed. What am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me. I trust that my temper of mind, and the color and conduct of my life, have given me a suit of armor against these arrows. If, during this king's reign, I have ever supported his government, and assisted his measures, I have done it without any other reward than the consciousness of what I thought right. If I have ever opposed, I have done it upon the points themselves, without mixing in party or faction, and without any collateral views. I honor the king, and respect the people, but many things acquired by the favor of either are, in my account, objects not worth ambition. I wish popularity, but it is that popularity which follows, not that which is run after. It is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong upon this occasion to gain the huzzas of thousands or the daily praise of all the papers which come from the press; I will not avoid doing what I think is right though it should draw upon me the whole artillery of libelers; all that falsehood and malice can invent or the credulity of a deluded populace can swallow.

That, gentlemen, is my idea of what a judge should be. It is my idea of the principles upon which a jury should act. They are to decide for themselves upon the testimony adduced here, and the law given them by his honor. I need not have gone so far, gentlemen, to have illustrated the fact of an independent judiciary. It is within the memory of most of us, or of some of us, and clearly within my own, that upon an occasion of great excitement, when an eminent, a patriotic, a noble man, the Chief Magistrate of this Union, had been stricken down by the hand of an assassin, and the whole country was wild with excitement and madness, a judge of this court in this place, meeting bayonets on one side and the denunciations of the whole press of the country upon the other, granted to an unfortunate victim of that event the great writ of right to bring her before him. It is such examples that I would have you to imitate rather than the theory of my friend who preceded me that you are to give your judgment upon public opinion.

The gentleman says this is a very remarkable case; and I think so for more reasons than he has given. It is remarkable in this: that the ordinary law officer of the Government has abdicated his position and his duty to make way for my learned friends, the special counsel in

this case. This, so far as I know, is without a precedent in the annals of the country. I have known of no other district attorney abdicating his position in favor of any man. It is remarkable in this further: that the Attorney-General of the United States, contrary to the practice since this Government was formed, and setting the first bad example of that sort in the history of the country, has himself been before the court, and is to argue this case to the jury. There is no example for it so far as I know, and there ought to be no example for it. Is it not enough in this Capital of the Nation to have the Government represented by its proper officers? I do not mean to say that there would have been the slightest impropriety in employing my learned friends to assist the ordinary officer of the Government. I have myself been engaged in this way at different times, and do not question its propriety. But I do question the propriety of the law officer of the Government abdicating his authority and turning it over to special counsel who are not and cannot be under the legal restraints that the district attorney is under. Gentlemen of the jury, the theory of the law is that every man is innocent until he is proved to be guilty. That innocence surrounds him like an atmosphere. It is imperative upon his honor upon the bench, it is imperative upon the legal officer that conducts the prosecution as much as it is upon the jury itself to protect the citizen. In some sense the district attorney is the counsel for the prisoner, and in an important sense his honor is the counsel for every prisoner. And yet, here the Government abdicates its proper position and turns it over to special counsel, supplemented by the whole power of the Department of Justice. Has not the Government power enough under ordinary circumstances and with ordinary means? Why this excessive exercise of power? Why establish this precedent for the first time in more than a hundred years of the national existence?

In what I have said, or may say, in regard to the Attorney-General and to counsel for defense, I intend no personal disrespect. I have none but the kindest feelings for them. It is my right, however, and situated as I am, it is my duty to notice this departure from the ordinary procedure of a court of justice in this case.

The case is remarkable further in this: the Attorney-General has twice appeared in this court, and his utterances upon those occasions were remarkable. They fell upon me like a thunder clap in a clear sky. I was astonished to hear them. The first speech or the first remark that I allude to was made before the jury was impaneled, but most of the jury were in court and heard the remark. It was in the regular proceedings in this case. The Attorney-General said, "I am the mouth of the Government to urge that this case be heard and determined." Gentlemen of the jury, what does that import? That citizens brought to the bar charged with a crime are to be weighted down, not only by the brilliant abilities of the Attorney-General and the other counsel in the cause, not only by the inexhaustible means of a Government whose revenues are more than a million dollars a day, but by the whole powers of the Government brought to bear upon them to crush them. The Government consists, as I understand it, of the President and the various departments. Can it be possible that the Attorney-General intended to say to this court that the President of the United States had instructed him in regard to this prosecution? Can it be possible that the Chief Magistrate of the United States, presiding over the destiny of fifty millions of people, whose duty it is to protect all, and to execute the laws so far as they come within his purview, is to come into this court, through the Attorney-General, and proclaim that he is pursu-

ing these defendants? Is it possible that a President of the United States can stoop from his lofty and proud position, the highest position upon the habitable globe, because a position in which he is placed by the voice of fifty millions of freemen, is it possible that he should bend down from his august state to attempt to crush a poor defendant arraigned at the bar of justice in a criminal court? If you can conceive that to be possible, can you conceive that he could have selected one of these defendants, his friend, his familiar, his acquaintance, one with whom, upon terms of intimacy and kindness and hospitality he had lived for years; one with whom he was associated in political life for years; one for whom he bore his testimony in the most public and marked manner, scarcely a month before his own accession to power as the Vice-President, as an honest and efficient, a capable and a good man? Can it be possible that he would leave that high place and put the whole weight of his authority to crush such a man as that? Gentlemen, it beggars human credulity. It is not so. I have no authority to speak for the President of the United States; but as Chester A. Arthur is a man, and as I am a man, in the name of a common humanity, I indignantly deny it. The Attorney-General could not have meant so much. He could have meant no more than that he was the mouth of the Department of Justice. He could not have meant that the President was in a conspiracy contrary to law, to decency, and to humanity, to crush defendants arraigned in this court.

On the 11th day of February, 1881, there was the most remarkable convocation of gentlemen that, perhaps, has ever occurred in the United States, in the city of New York, at Delmonico's.

Mr. MERRICK. Is there any evidence of this before the jury, your honor?

Mr. CARPENTER. This is a part of the political history of the country, sir.

Mr. MERRICK. A dinner party?

Mr. CARPENTER. Yes, sir; it is a part of the political history of the country.

Mr. MERRICK. With all respect to my learned brother, I rise to suggest to the court the propriety of arresting his remarks as to this matter.

Mr. CARPENTER. The door was certainly opened wide enough by Mr. Ker. The gentleman (Mr. Merrick) had better have been here and arrested his associate before he undertook to arrest me.

The COURT. The remarks that were made by Mr. Ker, to which you allude, were not objected to by counsel, or the court would have stopped them. I mean the remarks referring to Mr. McKay.

Mr. CARPENTER. No, sir; he talked about Senator Dorsey, who he was, where he was, where he had been, and what he had done. Am I not to reply to it?

The COURT. I do not think that you can refer to any meeting at Delmonico's, or proceeding in connection with gentlemen there. They do not constitute any part of the history of this country.

Mr. CARPENTER. They do not?

The COURT. No, sir.

Mr. CARPENTER. The then Vice-President, and now President, made a speech there that is very pertinent to this issue.

The COURT. Well, sir, it is no part of the history of this country, any more than the meetings are that take place in all the cities upon other occasions. We have no evidence upon that subject in this case, and as your observations are objected to, I shall have to sustain the objection.

Mr. CARPENTER. Well, sir, I always bow to the decisions of the court.

The COURT. There is matter enough in this case, undoubtedly, on the evidence, to tax the strength of all parties concerned in the trial, without going into the history of public meetings, and dinners, or anywhere else. I must sustain the objection, sir.

Mr. CARPENTER. The court decides that I cannot reply to the remarks of Mr. Ker, in regard to my client, although his remarks were not sustained by the evidence. There is no particular evidence in regard to it, and there may be none in regard to what I say, but is he to go on and denounce my clients and abuse them, and I not to make any reply to it?

The COURT. You can reply so far as your reply is based upon the evidence in the case. If Mr. Ker at any period of his remarks wandered out of the evidence, it would have been proper for your side to have objected, and the court would have sustained the objection, but I do not remember now that there was any serious departure from the evidence on the part of Mr. Ker, except on one occasion, in one part of his speech, and that, I thought, was rather in the character of a personal explanation on his part, which was irregular to be sure, but it was no more irregular than all personal explanations. They do not belong to the proceedings in the case, and I really think that we had better adhere to the evidence, because there is matter enough in that.

Mr. CARPENTER. If your honor please, I think your honor is quite right. I do not think Mr. Ker ever wandered out of the evidence, because I do not think he ever wandered into it.

The COURT. It seems to me that that observation is rather broad.

Mr. CARPENTER. I think I will take that back. When he did wander into it he just stated it.

Mr. KER. Your honor, I deserve a great deal of credit for getting away with eight of them.

Mr. CARPENTER. You haven't got away yet.

Mr. KER. I thought I had.

Mr. CARPENTER. Mr. Ker announced in his remarks that shortly after this case was over we would be going up to the White House for a pardon, and I say to the gentleman in the language of Holy Writ, "Let not him that putteth on his armor boast, but him that taketh it off." Nobody is convicted in this case yet. Do not boast until you have the victory that you have demanded.

Well, gentlemen, this case is remarkable in another particular. I am not going to allude to what I was speaking of just now, your honor. That is settled. As I said a moment ago, the defendants in all cases are presumed to be innocent, and that is the presumption that the counsel for the prosecution are bound to take in prosecuting a case, until the testimony is in at least. Now, how has this prosecution been conducted? Before one single word of testimony was adduced before the jury, before a witness was sworn, ay, before a juror was impaneled, my distinguished friend and his associate never let an opportunity pass to denounce these defendants as thieves, as plunderers. They spoke of robbers' dens and robbers' caves. They have assumed that epithets were to take the place of facts. From one end of this trial to the other there has been one stream of vituperation and abuse against these men, and that is what they call even-handed justice. That proved the assertion of Mr. Ker that there is no anxiety whatever to convict these defendants unless justice compels it to be done.

Now, upon that subject let me show how much justice there is in a

portion of this case. We are indicted here for two routes, namely, the route from Saguache, Colorado, to Lake City, Colorado, and from Ouray, Colorado, to Los Pinos, Colorado, upon neither of which did we ever put a horse or a man, or carry the mail for a moment. Every dollar of the payments was made to the subcontractor, Mr. Sanderson, who took the contract off our hands long before the time that the contract service began. Every dollar was paid to him, and when I stated that fact to Mr. Bliss, he reminded me that the indictment charged that the money was paid to Sanderson for the use and benefit of John R. Miner and all these defendants, and said he was going to prove it. Well, has he done it? What scintilla of proof have you that we ever got a dollar of that money? Not a word. It is false. We never did. And stranger still, we have heard from Mr. Ker and Mr. Bliss and Mr. Merrick pæans of praise of this honest administration that succeeded the thieves, as they call that of which Brady was a part. Two of the routes in this indictment, the one from Julian to Colton, the other from Redding to Alturas, upon which they have introduced proof upon which they are trying to send us to the penitentiary were expedited by Brady, additional trips put on by Brady, and when James came into office he continued them, and the contractors were paid for expedition and additional trips to the very end of the contract term. While this honest administration was paying us the money upon a contract that was right and just, they are trying to send us to the penitentiary for it. That is fairness with a vengeance. Yes, make a note of it. Show me when that contract from Julian to Colton or from Redding to Alturas ever was discontinued by the Postmaster-General. As a matter of fact it never was, and is running on the same schedule time on both routes to-day under the new advertisement. The records of the Post-Office Department show that. And yet they talk about a fair prosecution.

Well, another thing that this prosecution is very peculiar about: Their method of handling witnesses. They bring a witness upon the stand and if he testifies to suit them, all right, he is a good fellow. If he does not up they spring in chorus, "Your Honor, we want to cross-examine this witness, he has disappointed our expectations." They brought Boone upon the stand, a man clothed from head to foot in indictments, two of them being for subornation of perjury, and when they put him upon the stand they certify to his credibility; and he testified, and when he wouldn't testify what they wanted him to, and when he would not go outside and criminate those that were innocent, my friend Mr. Merrick says: "Hold on, your honor, I want to cross-examine him; he has disappointed my expectations." They brought a man all the way from Bismarck, a man by the name of Ketcham, who was not named so very badly, so far as they are concerned, and when he did not testify as they expected him they said "Oh, he has been with the other side; we want to cross-examine him." And yet Mr. Ker's tender soul bleeds at the idea of convicting us unless we are guilty.

There is another peculiarity in regard to this prosecution. The whole newspaper press of this country with two exceptions, or with a few exceptions, and the whole with two exceptions so far as any advocacy of the defendants in this cause is concerned, has teemed with abuse from the beginning of this trial until to-day and is still teeming with it. An evening paper published in this city every evening paraded at the head of one of its columns something in regard to the star-route thieves. The New York press teemed with it. The press of the great cities of the East and the North and the West teemed with it. These publications were detrimental and injurious to the

liberties of seven men, and yet these gentlemen representing this mighty Government never thought it at all important to notice them unless indeed they commended them for their conduct; and when two newspapers of this city undertook to write articles in favor of the defense, lo and behold, the gentleman gets up and files them in the court and calls special attention to them. I want it understood now, although in some sense of course I represent all these defendants, that I take no stock in the publications of those two newspapers in regard to those questions. I considered them then, and I regard them now, as disrespectful to this court, as ill-timed, injudicious, and wrong. Having said that in regard to these papers, I say on the other hand that the liberty of seven men is of as much importance as the feelings of any court, and I say that the public press, teeming with these taunts and denunciations, this slander and calumny, is a thousand times more guilty than the publisher and the editor of the papers that I have spoken of and reprehended. But you hear no complaint about that. In short, gentlemen, this trial seems to have been conducted from the first upon the principles of intimidation, upon the principle of denunciation, vituperation, and abuse. Everybody who has not held up his hands and shouted for the prosecution is denounced, while everybody who has stood by the prosecution is a saint, a patriot, and a hero. That is about the English of it.

Now, gentlemen, I said to you that Mr. Ker, in his speech of three days, did not once attempt to show that there had been any conspiracy in this case. I do not think he used the word but once. He told us how it might be proved, but he did not pretend to say that there is any such thing here, and the learned counsel who sits at my left, Mr. Merrick, unless he has changed his opinion very much in a short time is, I presume, entirely in accord with his associate. In an interview with a leading evening paper not very long ago, I saw it stated that the gentleman said, "No; no conspiracy had been proved yet."

Mr. MERRICK. Is that interview in evidence?

Mr. CARPENTER. It is in one of the newspapers.

Mr. MERRICK. I object, your honor.

The COURT. The objection is sustained. You cannot go into that.

Mr. CARPENTER. Gentlemen, I am sorry for my friends on the other side. They have traveled all over creation. I bow to the decision of the court in the matter. But you see how they tremble and kick when you get at them.

Mr. MERRICK. I cannot reply.

Mr. CARPENTER. Yes, you can reply.

The COURT. These publications are not in evidence in the case.

Mr. CARPENTER. I have stopped, sir, upon the admonition of the court. I have no desire to trespass upon its rules in the slightest degree. Without speaking of the newspaper articles, from all that I have seen in this court, from the numerous side-bar speeches made to the jury by the learned counsel and his associates, from the whole course of the proceedings, I take the purpose of the prosecution from the proof, not from the newspapers, to be in plain English about this: If they can throw a great deal of mud upon us, and throw a great deal of sand in the eyes of the jury, they expect to get a verdict; otherwise not. [To Mr. Merrick.] You might as well have let me gone through with it.

Mr. MERRICK. I have no objection to the remark. I think it is very clever.

Mr. CARPENTER. Yes, and I think it is very true. Its cleverness consists in its truth.

Gentlemen, the counsel for the prosecution asks who John W. Dorsey is? Well, he is a man not known to fortune or to fame. He has not, like his less fortunate younger brother, been engaged in public affairs. He is a plain, hardworking, honest man. His celebrity is to be found in his home. There he is king, his wife is queen, his children loving and devoted subjects. He is an honest, quiet, Christian gentleman. Look at him as he sits in this court, and as he has sat here since this prosecution began, and while the vials of wrath have been poured out upon his devoted head, as I have looked over upon his benign countenance, it seemed to me as though it shone with the spirit of the Divine Master upon that other cross, "Father, forgive them." This honest, humble man who discharges the varied duties of life with conscientious regard, who sustains all the relations of life admirably and affectionately and fully, although he is not known to fame, and although his fortunes have been hard, if this is not all of life, if there is another and a better world, the sweet spirits who have known him here will hover over him in this his time of trouble and affliction, and whisper in your hearts, "Touch not the Lord's anointed."

Who is Stephen W. Dorsey? He wants to know. He says he knows something about him. I know something about him that the gentleman has not told. Leaving his *alma mater* at Oberlin, Ohio, a boy of nineteen, he rushed into the service of his country with a gun on his shoulder. He held every office from corporal up to colonel, and behaved himself gallantly throughout that entire conflict. On his return from the war he went into business at various times, and prosperous business, and the gentleman said something about his loaning his valuable services to the State of Arkansas. Allow me to tell the gentleman that he received every vote in that legislature for Senator, after a contest of three weeks, except those of three men; and allow me to tell the gentleman, also, that when he did come to the Senate of the United States he neither disgraced Arkansas nor the Union. The gentleman does not know quite so much about that matter as I do when he attempts to tell a jury of the District of Columbia who Stephen W. Dorsey is. He was in that august body for six years. He was upon the Committee on the District of Columbia for the whole time, and he was chairman of that committee for four years, and to his energy, his broad views, his devotion to the interest of this District she owes more than to anybody else the reputation she has, and justly has, of being the most beautiful city in the world, with a solitary exception. That is who Stephen W. Dorsey is. I do not represent especially the other gentlemen defendants, and of course their own special counsel will speak of them.

Mr. Ker was very much distressed about poor John Dorsey. He said that Mr. McSweeney was the special counsel of S. W. Dorsey, and one of the crimes that he laid at the door of poor John Dorsey was that he was left without counsel. Mr. Ingersoll and myself, in our own humble way, will try to represent poor John Dorsey, and he will have to put up with that.

Now, gentlemen, there is considerable misunderstanding in regard to this starr-out business in this country, and I am not quite certain that all the jury understand it. Star routes are all routes that are let to carry the mail without some specific mode of conveyance; where a man may carry it on horseback, in a wagon, in a coach, or on foot, or in any other way he pleases so he gets it there. And there is some misapprehension in regard to expedition and additional trips. That practice is almost as old as the Government. You would suppose, to hear the counsel speak of the matter, that we had invented, in our

combination and conspiracy with Mr. Brady, the whole star-route system; that it was a thing got up especially by us to cheat the Government. Why, gentlemen, the first act passed upon the subject, I believe, is as old as 1825, and three years after that Mr. John Quincy Adams was defeated for the Presidency because of the extravagance of his administration, and the extravagance consisted in spending \$14,000,000 for the whole Government. Now we spend \$20,000,000 for rivers and harbors in a year, and do not think it is at all a good day for rivers and harbors either. That law has been upon the statute book ever since. Trips have been added and time reduced from that day until this. And then you would suppose at least that we were the only parties connected with it now. Not the least of it. The Kings, the Salisburys, and others are running routes a thousand times more than we have run. They have not touched them, and they ought not to have been touched. I do not assume that these men have done wrong. I do not assume that the Government has neglected its duty, but we are an infinitesimal portion of the star-route contract system, and an infinitesimal portion of its expedition and additional trips. This very record shows what? Why, Sanderson was a star-route contractor. He had two of our routes; routes that were originally struck off to us, and in an indictment that was found in this court a short time before the one that you are now trying, would you believe it, that same J. L. Sanderson was charged with being just as black a conspirator as we; charged to have been a party to every one of these rascally things, charged to have been a party to every one of these swindling attempts; charged to have been as deep in the mud as they now say we are in the mire. And in this very indictment they put two of these routes. There is no mistake about it. One of these routes is the one where they run twenty miles over the same track a daily and a weekly mail and made such a fuss about it. That is Sanderson's route. They knew it was his route. They knew he was the contractor. They knew he had done the work and yet, God bless you, he is not in this indictment. I do not complain of it. I say they did right in the plenitude of their justice. They concluded to do justice to one man while they hounded seven others to death if they could. I admit that it was a praiseworthy act to leave Sanderson out. There is nothing against him upon these routes any more than there is against us. They did well to leave him out. It was justice to one man at least.

Now, gentlemen, what are we trying? Well, negatively, we are not trying anybody for false papers with a view to defraud the Government. That is an offense against law, but it is not this offense. We are not trying anybody for getting up false petitions with a view to defrauding the Government. That is an offense against law, if you please, but it is not this offense. We are not trying General Brady for extortion. That is an offense against law, but it is not the one charged in the indictment. You are not trying General Brady for bribery. That is a crime for which, if committed, he might be indicted and punished. But this indictment does not happen to be for that offense. What is the case you are trying? You are not even trying a conspiracy. You are trying *the* conspiracy charged in this indictment, an interminable indictment that the proof introduced by the prosecution absolutely disproves. I expect to show before I conclude, upon their own record evidence, a witness that, although it may not testify as the learned gentleman wishes or expects, he cannot cross-examine. I expect to show upon that testimony that the charge in this indictment is utterly untrue. We are trying the conspiracy charged in

the indictment. The offense is conspiracy. The overt act is but an adjunct, but extraneous matter necessarily connected in some sense. But the crime is conspiracy. The charge is that all these defendants, on the 23d day of May, or any time I grant from the 20th of May, 1879, until the time of the finding of the indictment, met together in a common purpose, with a common intent, and agreed upon the common means by which and through which they would defraud the United States.

Gentlemen of the jury, I do not intend to advance any proposition to this jury that I do not believe, whether of testimony or law, and I say to my friends who have been so prompt in interrupting me upon one or two occasions that I will be greatly obliged to them if they will correct me in any statement of mine of the testimony in which they think I am in error.

I do not contend that it was necessary for those persons to have been in the same room—to have been in the same town—but I do contend that before you can find them guilty under this indictment there must be indubitable, irrefragable proof that the minds of these parties came together for this common purpose and this common object, within the time since the 30th of May, 1879. There must have been a concurrence, there must have been concerted action. I deny the proposition of Mr. Ker, that it may be done without writing and without a word. I never heard of a man being convicted by nods, or anything of that sort. But supposing that all to be true, for the sake of the argument, I ask this jury to lay their hands on their hearts and tell me what proof there is that ever, at any time, anywhere, for any purpose, these defendants ever came together for concerted action. Why, it is urged, because we sent petitions on these different routes, because we got letters, because we got communications, and all that sort of thing. Why, gentlemen, Saulsberry, and Kerns, and Parker, and everybody else did the same thing. Would not the proof be just as much against them as against us? Gentlemen, if it proves anything, it proves too much: that the common means used by all contractors for bettering their contracts proves a conspiracy of them all over the Union. They do not pretend that. Take up the testimony in regard to any man and read it from the beginning to the end, and then take it up in regard to any other man in this indictment and show me where one solitary scintilla of evidence brings these parties into concert and accord. It is not in this record; not a syllable of it. Rerdell is not indicted for writing a letter. He is indicted for being in this conspiracy and coming into this agreement. Miner is not indicted for signing other people's names or for writing letters to the department. What concert of action has there been proved even between those two men? The Government disproved the concert of action between Miner and Rerdell. They proved by a clerk from the post-office that they had different boxes in the post-office, that their mail went into different boxes. They proved by another clerk in the post-office that although he frequently saw them there upon their business, they did not speak to each other when they were there. Who has proved that Brady ever wrote a letter or spoke one word to any one of these defendants from the 20th of May, 1879, until this hour, except Harvey M. Vaile, and Harvey M. Vaile testified to it himself. Who has proved that Brady ever wrote a line to any one of them, or had the slightest communication with them other than the official communications that passed between them? Where is the proof? It is not in existence. There is proof of the very unfriendliness of the parties at that time, that Dorsey and Vaile themselves were at daggers'

points, and that Miner and Dorsey also were. Where is the proof of the combination? I tell you their proof rebuts it. They have proved the negative, that it did not exist. The proof is that at the time they charge, and for a period before and subsequent to it these parties were scattered all over the country; that Miner was in Dakota, that Vaile was in Missouri, that Stephen W. Dorsey was in New Mexico, and [that John W. Dorsey was in Vermont, and that Rerdell and Brady were the only parties in town to conspire. They were scattered all over this broad country, and there is no proof whatever of any concerted action; and yet my friends have the sublime audacity to pretend that this is a conspiracy proved.

Well, Peck is out. My friend let him out. Peck was a good man, my friend says. He was sorry the dead soldier's name was in this indictment; Peck never did anything wrong, he says; never; there is not an iota of proof, says the gentleman, that Peck ever did the slightest wrong about these contracts. And yet upon all these routes that were worst expedited, according to their statement, Mr. Peck made affidavits. Oh, no, the gentleman says; he did not. Did he not, indeed? If the court please, I shall assume in this argument to the jury, unless I am otherwise instructed by the court, that when the Government puts a witness upon the stand and proves a given state of facts by him in regard to documentary testimony or testimony partially documentary, and they make no suggestion that they have been surprised or that the witness has deceived them, and at the time make no complaint in regard to it, they are not permitted as a matter of law to contradict it afterwards. I assume, gentlemen, that legal proposition. How monstrous it would be for the Government to prove one thing by one of their own witnesses and without the slightest pretense that he was biased or corrupted or had perjured himself, bring other proof and disprove that statement. Now, there is another specimen of the fairness of the Government in this case in regard to the affidavits of Peck. They brought Mr. Taylor, a gentleman of high position and character, all the way from New Mexico and they proved by him on that stand the execution before him by Peck of seven affidavits, all of which except one have been put in the record of this case or introduced and read to the jury. I do not know but that one has also. I refer to the affidavit on the route from Ehrenburgh to Mineral Park. I do not think they put that in. I am not certain. Mr. Taylor swore that those affidavits were taken before him, that Mr. Peck lived in his neighborhood and knew him well, and that he executed them as a notary public. Now, there was an affidavit of Mr. Peck's that they had in their possession, mark you, an affidavit that Peck made for additional trips and increased expedition on route 41119, from Toquerville to Adairville. They brought a witness three thousand miles and showed him all these affidavits except that one and that one they never did show him. They did not put it in evidence. Why? After awhile they brought in Mr. Blois, this wonderful expert in chirography, who testified that that was Miner's signature and not Peck's. Now, gentlemen, does it strike you as a reasonable thing if they believed that affidavit was forged, when they had Mr. Taylor on the stand and the affidavit in their possession, that they would not of all other men in the world prove it by him? Do you believe if they had thought it a forged affidavit that they would not have proved that fact by Taylor instead of waiting to prove it second-hand by Blois? It is incredible, gentlemen. There was the source of proof when Taylor stood upon the stand. He could have disproved it. He knew Colonel Peck well. He was his neighbor and his friend. They could have disproved it by him. But no; they waited

and undertook to prove by Blois, after Taylor had gone back to New Mexico, that that was Miner's writing. I think Blois did say that it was, and the next day he said he did not know whose it was. If he had said that first and last and all the time, my impression is he would have been about right. I think the record will show that three of these very affidavits that they proved by him they proved the execution of by Taylor himself. Three of these very affidavits Blois swears to be in the handwriting of Miner. He swears to some of them, but I am not certain about the number.

Mr. WILSON. Taylor knew Peck and Peck came before him and signed the affidavits.

Mr. CARPENTER. That is just what I have stated to the jury. [To the court.] Your honor, is it proper for me to submit these affidavits to the jury?

The COURT. Oh, yes; they have already been exhibited to the jury.

Mr. CARPENTER. They have, but not in this connection. The point I am making is that having introduced Mr. Taylor as to all the rest of the papers they did not introduce him in regard to this one and I want the jury to see whether it is not the same signature. [The affidavits referred to were here submitted to the jury.] There is Peck's signature, [referring to signature on one of the affidavits] admitted and proven to have been written by Miner.

Gentlemen, I now propose to call your attention to some of the inaccuracies of Mr. Ker in his argument of this case so far as his statements of the testimony are concerned. I do not for a moment intend to impute to Mr. Ker anything like intentional misrepresentation. When I say that, and when I say that I have no feeling other than of kindness toward him, I am then in candor compelled to add that I have never known of so gross a misstatement of testimony in any case that I have ever heard argued in a court of justice, unintentional I grant, but misstatement still. Take for instance page 2360. Mr. Ker says:

On the 17th of April, 1880, the Postmaster-General ordered this service reduced one trip. On the 19th of August, 1880, Brady sends to John Dorsey and writes a letter in care of Rerdell that \$1,845, having been deducted from their pay from the quarter ending March 31, 1880, had been remitted. It was so important for Brady to inform Dorsey and Rerdell that this remission had taken place, that in the midst of his official duties and great press of business he sits down and writes a personal letter telling them that this remission has been made. Now, gentlemen, this fine of \$1,845 had been taken off of Steineger's pay. I want to show you another extremely honest transaction. When the money had been deducted from Steineger he was unable to carry the mail. I am speaking from the record. You will find it all recorded on pages 1857 and 1858. Steineger had failed to carry the mail and they had fined him \$1,845, and he wrote to Rerdell and to Dorsey that if he lost this money he could not carry it. They turned round and sent him \$1,129.02 to help him to carry the mail, giving him the impression and the idea that they were so liberal that although he had agreed to be responsible for the fines, yet they were going to advance it out of their own pocket and give him \$1,100. They kept that, and, as Steineger did not know anything about it, they filed that letter of Steineger in the department, showing that Steineger had been paid, and the whole thing was certified to the auditor, and the \$1,845 was drawn by these contractors and kept by them. Now, take off the \$1,100 that they had to give Steineger, and it leaves them a net profit of \$715.98 that they put in their pocket, and poor Steineger never heard a word about it until he got here to Washington. He thought he was under obligation to them, and was willing to remember them in his prayers for their liberality in giving him \$1,100, when they had deliberately robbed him of the other \$700 that they had put in their pockets and kept from him.

Now, gentlemen, by turning to the table, you will find that instead of all that story being true, the fact to be that the money was remitted; that \$1,100 was repaid to the contractor, that he had advanced to Steineger, and a warrant for that precise amount for the remainder of the remission, as the record shows, was sent to Steineger himself. He says

Steineger never knew of it until he came here. The record shows Steineger never was here. It was proved by their own witness on the stand that he was not here. He is the subcontractor that the witness on the stand said was at Durango, Colorado. If there is any dispute about it I will find it in the record. I do not care about taking time to do so, but it is here. A witness on the stand, upon cross-examination by Judge Wilson, said, in reply to the question, Where is Steineger? that he had a livery stable, or was in some kind of business in Durango, Colorado, and that was his address; that he was not here at all. The record does not show that he was ever on the stand, and the witness, Postmaster Trew, told where his residence was, and said on the stand that he had not been here. Now, sir, what about the accuracy of those two statements that my clients ever robbed this poor subcontractor of \$700, and that Steineger did not know it until he came here? Steineger never was here. They paid him every cent.

Mr. KER. Why do you not read page 1857?

Mr. CARPENTER. Show me 1857. There is no such thing as that. I have said all that.

Mr. KER. Not that way. Read what I show you.

Mr. CARPENTER. What Mr. Ker wants me to read is this:

POST-OFFICE DEPARTMENT,
OFFICE OF THE SECOND ASSISTANT P. M. GENERAL,
DIVISION OF INSPECTION,
Washington, D. C., August 19, 1880.

SIR: You are respectfully informed that \$1,845 of the deduction made from your pay as contractor on route 38156, Silverton to Parrott City, Colorado, for the quarter ending March 31st, 1880, has been remitted.

The reductions were about \$1,900.

One hundred and thirteen dollars and five cents of the deduction is retained because of certain failures at Parrott City to arrive and depart, of which you were duly notified.

Respectfully,

THOMAS J. BRADY,
Second Assistant Postmaster-General.

That is not the point. I admit we were notified. He says we stole the money. I say the money was paid.

Mr. KER. Go on and read the rest of it. Do not read half and then stop.

Mr. CARPENTER. I say there is no truth in that statement. Not one particle of it. I cannot read all this whole book. Here is the record. It would have been well if the gentleman had read a little of it before he talked so much. Then I should not have had to take so much time for correction.

Mr. KER. I did not ask anybody to help me out. I read it all myself.

Mr. CARPENTER. The record shows that this very warrant was sent by the department to Steineger.

Mr. KER. On page 1858 is a letter from Steineger himself acknowledging the receipt of \$1,100, and there is Rerdell's letter to him telling him that he had paid him the \$1,100, and they filed that in the department as their receipt for the \$1,100, in full acquittance, and the record shows that they drew \$1,900, less \$100, kept back for some purpose.

Mr. CARPENTER. And the record further shows that seven hundred and fifty-eight dollars and some odd cents was sent in a warrant to Steineger himself by the department.

Mr. KER. Find that record, please.

Mr. CARPENTER. I have found it.

Mr. KER. Let us see it.

Mr. CARPENTER. [To Mr. Wilson.] Is there such a warrant there?

Mr. WILSON. Yes, sir.

Mr. CARPENTER. I will come back to that, gentlemen. It will take too much time to hunt it up now, but I have been over the record and I know it is there, and I know the record says that every dollar was paid to Steineger except the \$1,100 that had already been advanced him, and that was paid back to us. I know the record says so, and Mr. Trew proved that Steineger was not here at all; that he was in Durango, Colorado.

Well, Mr. Ker says that they cheated Powers out of all the fines and deductions except \$275. But, before passing to that point, I will read from page 968 of the record:

Q. Do you know where these carriers are that were on this route in the winter time?

The WITNESS. At what time?

Mr. WILSON. Well, take the winter of 1879-1880.

A. Since Steineger had charge of it. I know where he is.

Q. Where is he?—A. His post-office address is Durango, Colorado, I believe.

Q. Where does he live?—A. He stops at Durango and Silverton, both.

Q. Do you know where he is now?—A. He can be reached at Durango.

I hope that is satisfactory. Mr. Ker said he was here.

Mr. KER. I say so again.

Mr. CARPENTER. The gentleman says now that Steineger was here.

Mr. KER. This is the second indictment. What are you talking about? There were two of them.

Mr. CARPENTER. I am talking about your speech and that record. Those are the two things I am talking about—two things as wide apart as any two that I ever knew of in my life. They are just about as near together as the North and the South poles.

Mr. KER. I will admit it was not on this case. We had all out of him that was worth bringing.

Mr. CARPENTER. Yes; and there were a great many others that did not pay transportation when you got them here. They did not fulfill your expectations, as my friend says.

Now, on page 2418, Mr. Ker says:

Remember what Mr. Bosler received. When Mr. Rerdell wrote that letter—

To Powers—

he forgot that on the 5th of November, 1880, Bosler had drawn pay for the deductions; when he wrote that letter he either forgot it or willfully told a lie about it; for he knew that on the 15th of January there was another set of deductions, and that Bosler drew them. The whole thing amounts to simply this: that they deducted from the pay of the subcontractor and he kindly thanked them for not making it more, and collected from the Government and put it in their pockets and sent him \$275, and told him a willful and deliberate lie, which was that they had not received any more from the Government; it was the first that had come. Now, the subcontractor on this route was examined, and said in his testimony, "We never made the schedule time."

Here is the witness on the stand:

By Mr. WILSON:

Q. The contractor paid you your first quarter's pay notwithstanding the failures, did he not?—A. Yes, sir.

Q. In full?—A. In full.

Q. How was it with the next quarter?—A. I think there was some deductions on that quarter.

Q. How much did he pay you?—A. At the time I think there was six hundred and some odd dollars deductions from my pay.

Q. The deductions of the first quarter were more than your pay, were they not?—
A. In the first quarter I think they were—by the report.

Q. And yet he paid you the full price?—A. Yes, sir; I can answer that question definitely if you desire it.

Q. I want to know just exactly how it was. If you have got a memorandum of it just tell the jury so, that we shall know the exact truth about it?—A. [Referring to memorandum.] I was paid on the second quarter \$2,000 at that time.

Q. What time was that?—A. That was the second quarter of 1880.

Q. What were the deductions that quarter?—A. The deductions were \$2,773.43.

The witness says he was paid in full notwithstanding these deductions. The truth is that instead of cheating him out of any deductions we paid all of them ourselves. The only deductions that Powers ever paid was one-half of the deductions of the two last quarters that he run for us as subcontractor. We paid all these enormous deductions for him up to that time, and the court, in speaking of the testimony, commended us for it; said it was liberal and fair, and these deductions amounted to several thousands; and yet Mr. Ker tells this jury the only one Mr. Powers ever got was \$275.

Mr. DICKSON. [The foreman.] What route was that?

Mr. CARPENTER. Route 44140, Eugene City to Bridge-Creek. I have read from the testimony of the witness himself that he was paid every dollar of the first two quarters, and the two last quarters the contractors divided the fines and deductions with him, although his contract provided that he should pay the fines and deductions himself.

Now gentlemen, just here comes in this beautiful theory of the Government in regard to fines and deductions. They insist, and it has been strenuously insisted all through this trial, that we got a big contract, got large expeditions, additional trips, and then we go and make a subcontract with a poor fellow for a small price and then we make him stand all the fines and deductions. Now, gentlemen, you are business men. I need not tell you that that is too impossible a theory to be true. You know very well if the subcontractors cannot live they will not carry the mails, and you know very well if the fines and deductions are more than the contract price that they cannot live, and you know again that every subcontract that has been introduced in proof here contains a provision that upon sixty or ninety days' notice the subcontractor may throw up his subcontract, and they were throwing them up all the time all over the country because they undertook to run these mail routes with less stock and less men than they could be run with. That is why.

How does their theory work in regard to the subcontractors paying all these deductions and fines in regard to the route from Mineral Park to Pioche? We carried that mail two years. Our pay in round numbers for that two years was \$50,000, and the fines and deductions upon it were between thirty-four and thirty-five thousand dollars, leaving us about \$15,000 for carrying that mail on expedited time with increased trips for two years. That was a money making business to be sure. What good did a subcontractor do there? In one quarter the fines and deductions upon that route were \$15,500, \$6,000 more than the whole pay per quarter, and they went throughout the land broadcast on our routes and on Vaile's, and laid their hands on everything they could get hold of until they recouped the \$15,500. It is all stuff about the subcontractor paying. Of course that is his contract, but he has got to make a living or he won't carry the mail, and the moment he lays it down we have got to put it on. Our contract is with the Government and we have to fulfill it. If we do not fulfill it they will let it to somebody who will fulfill it, and if we willfully fail to keep a mail contract we would be liable to punishment. We might be

brought to the bar of this court and indicted and sent to the penitentiary, for it is the law of the land.

I have not near done with these contradictions in the testimony, and I hope my friends will thoroughly understand I impute no wrong motive to the gentleman, but the record discloses that he is utterly mistaken as to the facts, and I cannot pass over that on account of any delicacy of feeling whatever. I am not like some of the counsel for the Government, who have been all through this trial imputing wrong motives to everybody but themselves. I have no doubt the gentleman was mistaken but he was fearfully mistaken.

Now, another of the specimens of the fairness of the Government in this case and of its brilliant manner in proving the allegations of the indictment, is that there are various means that are charged in this indictment through and by which these alleged conspirators were to cheat the Government, and two of them are stated as follows:

And by means of the said Thomas J. Brady then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to refuse to make deductions from the pay of the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, for failures of them, the said John W. Dorsey, John R. Miner, and John M. Peck, to perform the said service of carrying and transporting the said mails on and over the said post-routes in accordance with the said contracts and agreements as aforesaid.

Now then, gentlemen of the jury, two of the charges in this indictment, two of the means by which these conspirators were to defraud the Government are stated to be that Brady refused to make deductions from the pay of these parties for failure to perform the service, and that he refused to impose fines for willful failure to perform the service. Now, gentlemen, what does this record show? It shows in all the cases they introduced in proof that they bristle all over with fines and deductions, unremitted until this date. On this same route, from Mineral Park to Pioche, thirty-four thousand and odd dollars were the fines and deductions, and not a dollar of it has been remitted from that day to this, as this record shows. In other words, they charged that Brady refused to make deductions, and they proved by every page upon which a table of payments is found in their record that he did make deductions. They allege that he refused to impose fines, and they prove by every table that he did impose fines. His honor suggested at the time that it was not Brady who imposed the fines. It was just as much Brady who imposed the fines as it was Brady who expedited the contracts. It was just as much Brady who made the order for deductions as it was Brady who made the order for increase.

The Second Assistant Postmaster-General's office consists of the contract department and the inspection department. These papers came to him for expedition, for additional trips, in the jackets that you have seen, made up by the subordinate officers of the department. Upon those he acts. He grants additional trips and increases of service, or refuses. It is just so in regard to fines and deductions. They come to the inspection office. That office is under his control and management. The subordinate officers there make up the record, and that record is made from the reports of the postmasters upon the route. They make the deductions and impose the fines upon that record and other testimony, and it goes to Brady and he signs that order as he did the others. In the same sense that he expedited, he fined. In the same sense that he made additional trips, he made deductions. That is the testimony; and, gentlemen, in passing it is but enough to say that if you could believe the scheme of this indictment and the theory of this prosecution, that

whole department must have been honeycombed indeed with corruption, because it must have embraced the inspection department and the auditor's department as well. It is true the auditor says he has no control over this expedition. But if a route was expedited in a manner that he thought was outrageous he could say, "I do not think that is right, and I cannot issue the warrant," and an appeal lies from him to the comptroller, and the contractor would have gone up to the comptroller and there would have been a fight about it. So those two sub-departments must have been in this combination, if any such existed.

Mr. MERRICK. That is not the law as I understand it.

Mr. CARPENTER. Well, sir, I would like to be corrected. That is as I understand it.

The COURT. We have the evidence of the experts in the department as to the methods of doing business and the division of business between those two branches. It is a matter for you to discuss on the facts.

Mr. CARPENTER. Yes, sir. The evidence of the experts I am not talking about. I am talking about the rules of the department and the law as it has been brought in and read to this jury; that the inspection division is under the control of the Second Assistant Postmaster-General. He is head of that office as he is of the contract office.

The COURT. Undoubtedly; so far you are right.

Mr. CARPENTER. He signs every order for deductions and he signs every order for fines.

Mr. MERRICK. I spoke of the auditor's office as to which Mr. Carpenter said that if the auditor disapproved of the expedition he could refuse to grant the warrant, and then there would be an appeal to the comptroller. The auditor has no supervision of the matter whatever.

Mr. CARPENTER. He has no supervision, but he can refuse to do it.

Mr. MERRICK. He cannot refuse.

The COURT. In the performance of his functions, he has no right to charge the head of the other department with violation of his duties.

Mr. CARPENTER. Very well.

The COURT. He has no supervision over him, except as to the auditing of the account.

Mr. CARPENTER. Now, I will dispose of this question in regard to the warrants. On page 1857 of the record you will find this:

Warrant No. 10488, dated September 8th, 1880, for \$715.98, to the order of Frederick Steineger, subcontractor. Endorsed, Frederick Steineger, subcontractor.

Then on the other page is this letter from John W. Dorsey:

WASHINGTON, D. C., August 23, 1880.

Hon. J. M. MCGREW,
Sixth Auditor U. S. Treasury:

SIR: I have the honor to acknowledge the receipt of information from the office of the Second Assistant P. M. General, that \$1,845 of the deduction made from my pay on route No. 38156, from Silverton to Parrott City, Colorado, for the quarter ending March 31, 1880, has been remitted.

Mr. Frederick Steineger is subcontractor on said route, and has his contract on file. On the 21st of May, 1880, I advanced Mr. Steineger the sum of \$1,129.02 for service on said route for said quarter, with the express expectation that said deduction would eventually be remitted. (See Exhibit 2.) By letter dated June 5, 1880, Mr. Steineger acknowledges the receipt of the draft for \$1,129.02. (See Exhibit 3.)

I therefore respectfully ask that of the amount remitted the sum of \$1,129.02 be paid me, and that the balance of said remission be sent to said subcontractor.

And here is the warrant that was sent to him that he executed. I hope my friend will take that back.

Mr. KER. Have you read it all the way through?

Mr. CARPENTER. Yes; I have read it all the way through. If there is any more you may read it if you want.

Now, gentlemen of the jury, the evidence having shown to you conclusively the fact that these fines and deductions are as much an official duty of the Second Assistant Postmaster-General as expedition and additional trips, I think it is proper to call your attention to the evidence in this case in regard to these fines and deductions. I will not weary your patience this time by going over them. I will say this in regard to them, that, upon nearly all of these routes, yes, upon all of them, I know of no exception where there have been fines and deductions. On the route from White River to Rawlins the fines and deductions were \$17,500 during the time that we run that route. On the route from Pueblo to Rosita they were over \$2,000, and so on. Take our routes together and the fines and deductions run from ten—never less than ten upon any route that I remember—to fifty and sometimes to one hundred and fifty per cent. of our pay. Now that is the sort of a partner, gentlemen, that I would not want. Is it credible that after you have a corrupt agreement with an officer of the Government, and he has expedited a route not necessary for the public service, as this indictment charges, and fraudulently and corruptly expedited it, and got the money in his pocket for expediting it, that he would dare to turn in and fine the contractor twice, almost three times as much as his pay, and take \$17,500 out of him by one order?

Mr. HENKLE. Judge Carpenter, you are in error about the deductions on the White River and Rawlins route. It is \$7,567.52 instead of \$17,000.

Mr. CARPENTER. I am much obliged. On what route is that \$17,000 deduction? I correct my statement, then—\$7,500. There is another route where it is \$17,500. Is it credible, gentlemen, that a malefactor, with my money in his pocket for expediting the route, paid an enormous sum in hand, would dare to ruin me afterwards by cutting it down in that way? and these fines and deductions began before the service began.

There is a great deal of talk that we did not put on service at the time. But is there any pretense that the Government ever paid us for a day's service before we commenced it? Is there any pretense anywhere that upon any route in this indictment the Government ever paid one dollar until the service began? Not a particle.

Mr. HENKLE. The route that you refer to is Eugene City to Bridge Creek, route 44140, and the deductions are \$17,755.90.

Mr. CARPENTER. Out of a total pay of how much, forty-five or forty-eight thousand dollars?

Mr. HENKLE. Forty-eight thousand one hundred and seventy-nine dollars and nineteen cents.

Mr. CARPENTER. The whole pay \$48,000, and the fines \$17,000. Gentlemen of the jury, is it credible that any man on this earth in a guilty partnership with the contractors, would do a thing of that sort? And yet it is all over every single table, upon every one of these routes. My friend Mr. Ker stated that the service on the route from The Dalles to Baker City did not commence until January.

Mr. TOTTEN. Bismarck to Tongue River.

Mr. CARPENTER. Oh, he had January on the brain.

Mr. HENKLE. He said on scarcely any of them.

Mr. CARPENTER. Now, the fact is, gentlemen, that the testimony of

Fisk, who was a witness here, was that the service was put on on the 5th day of September.

Mr. KER. That is exactly what I told the jury.

Mr. MERRICK. What route is that?

Mr. CARPENTER. The Dalles to Baker City.

Mr. KER. Route 44155.

Mr. CARPENTER. Now, we will see what he said about it. I cannot lay my hand on it. I will go on with something else.

Mr. MERRICK. You say he misrepresented that. If there are any misrepresentations let us run them down.

Mr. CARPENTER. Oh, I cannot get through with them before the recess.

Mr. MERRICK. Let us run them all down. I do not think he made any.

Mr. CARPENTER. The jury will be the judge between thee and me upon that subject.

Mr. MERRICK. I want to get it fairly before them.

Mr. CARPENTER. So do I.

Then Fisk commenced to carry the mail from Canyon City to Baker City. He says, "I carried that mail for Miner, Peck & Co." That was on the 5th of September. On the 18th of September Peck's oath was signed. You will remember he says that it takes so many men and animals on the present schedule. There was no present schedule at all. There was no service being performed on the route. There was only a mail being carried from Canyon City to Baker City that had started a few days before that.

I do not know what all that means. That was Canyon City to Baker City. The Dalles to Baker City was the route. I do not know what he means by Canyon City to Baker City. I say the proof most conclusively shows that the service was put on both ends of the route. Run from Baker City as far as South Fork, I think, then from The Dalles to this point, where the two mails met each other.

Mr. KER. Where is that?

Mr. CARPENTER. It is in this record.

Mr. MERRICK. Let us have it.

Mr. CARPENTER. It is more tedious for you, gentlemen of the jury, than it is for me. I must not be blamed for it, because in opening the case for the defendants I am compelled by the court and by the practice to open our whole case, to show them every error so that they may reply to it if they can. I am compelled to be tedious sorely against my will.

Question. Where do you live?—Answer. Camp Watson.

Q. Oregon?—A. Yes, sir.

Q. Have you had anything to do with carrying the mails on route 44155?—A. Yes, sir.

Q. What did you have to do with it?—A. I carried the mail from The Dalles to Canyon.

Q. When did you commence?—A. The first part of September. I don't remember that it was the first of the month exactly. I think it was between the first and fifth of September, 1878.

Q. Did you go all the way from The Dalles to Canyon? Did you drive the whole way?—A. Not at first I did not. At first I drove from The Dalles to South Fork.

Q. And afterwards did you drive to Canyon?—A. Yes, sir.

Another witness for the Government testified that he commenced at Baker City on the 5th day of September and carried that mail through Canyon City to South Fork where he met the mail from The Dalles, and if this record does not prove that I will sit down and never open my mouth again in a court of justice.

Mr. HENKLE. It is in Fisk's testimony, at page 709. You have read it.

Mr. CARPENTER. No, I read Cowne's testimony who began at The Dalles.

Mr. MERRICK. If you refer to Mr. Ker's speech you will find a correct statement.

Mr. CARPENTER. This is it:

JOHN M. FISK sworn and examined.

By **Mr. Bliss**:

Question. Where do you reside?—Answer. Canyon City, Oregon.

Q. How long have you resided there?—A. Fifteen years.

Q. What is your business?—A. My business at present is farming.

Q. Have you had anything to do with mail route 44155?—A. Yes, sir.

Q. What did you have to do with it?—A. I was employed as carrier on a portion of the route.

Q. What portion of the route?—A. From Canyon City to Baker City.

Q. Do you know how far that is?—A. I don't know as it has been measured. There have been varying statements. Every person has his own idea.

Q. Well, about?—A. I should judge about ninety miles.

Q. When were you employed on that route first?—A. I commenced there the 5th of September, 1878.

Q. Under whom?

The WITNESS. Do you mean the firm?

Mr. Bliss. Yes.

A. A man by the name of Moore first employed me.

Q. Why do you say first employed you? Were you afterwards employed by somebody else?—A. I was kept there by other parties.

Q. Who were they?—A. Mr. Williamson.

Q. Who was Mr. Williamson?—A. A gentleman who came out there as an agent, I believe.

Q. Do you know for whom?—A. He represented he was for Miner, Peck & Co.

Mr. HENKLE. [Submitting printed record to Mr. Carpenter.] Here is a receipt from Hailey acknowledging the receipt of the money from Peck and for carrying the mail on temporary service from the 1st of July to August 16, 1878.

Mr. MERRICK. What has that to do with this?

Mr. CARPENTER. It has a good deal to do with it. I have shown you, gentlemen, by this testimony, instead of Mr. Ker's statement being the accurate one, that this service was commenced on both ends of the line and carried through from The Dalles to Baker City on the 5th day of September, 1878. There were Indian troubles in the country, and it is true we did not get the service on at the time the contract provided. There was temporary service put on. You remember Mrs. Wilson, the postmistress of The Dalles, was here and testified as to the temporary service, and there is proof in this record that we paid for this temporary service. Here it is:

1,788.04.

Received, Washington, D. C., November 18th, 1878, of John M. Peck, one thousand seven hundred and eighty-eight ⁰⁴/₁₀₀ dollars in full payment for temporary service on route No. 44155, from The Dalles to Baker City, from July 1st, 1878, to August 16th, 1878 inclusive.

\$1,788.04.

913.04. Paid previously.

\$875.

JOHN HAILEY,
By M. SALISBURY.

So the temporary service was put on by the postmasters upon the route and that service was paid for. That receipt was filed in the department, and we drew the money because we had paid it to them. So much for Mr. Ker's statement that it only ran from Baker City to Canyon.

Now, Mr. Ker says somewhere, I think, that one-half of it never **was** run at all. I have an impression of that sort. I will look that up **after** recess. I think he said half of the route was not run at all, that we **run** on one end of it. I do not remember about that. I do not ask that **any-**thing be taken for granted.

Mr. Ker says that the first time that Mr. Boone ever met Senator Dorsey he met him in the post-office, and that Senator Dorsey asked him to come to his house, and that he went to his house and visited him, and said Mr. Ker, "There he found Miner, there he found Rer-dell, and there he found a man whom they introduced to him as Peck, though it turned out afterwards not to be Peck at all." Now is there any testimony of that sort in this case? Is there any such idea in it, except the wild chimera of the gentleman's brain? Did Boone testify to anything of that kind? He said he went to Senator Dorsey's house, it is true. He found nobody there but Senator Dorsey. Miner was in Sandusky City, John Dorsey was away, Peck was in New Mexico. That was the meeting at which Senator Dorsey told Boone that his brother and his brother-in-law having determined to go into this bidding upon the mail contracts he wanted him, Boone, to make the proper preparations for them to make those bids and secure those contracts. Is not that the testimony? Boone nowhere says that Peck pretended to be there. He nowhere says Rerdell or Miner were there. There is no such syllable of testimony. [To Mr. Ker, who had said something in an undertone.] You will do better by getting up here and showing from the record that he does say so. I say he does not say so anywhere. I cannot prove from the record what is not in it. All that I can do is to state that it is not in the record. I cannot read from the record to show what is not in it. I say then, that what Boone did testify to was that when he visited Senator Dorsey at that time Senator Dorsey asked him to aid his brother and brother-in-law and his friend Miner in preparing to make these bids, and that those parties were not in the city, not in the District of Columbia, no one of them. Miner came here some time about the 5th of December, I think the proof is, afterwards for the first time and Dorsey not until January. I will not be accurate about those dates, but it was long after this interview. There is another statement that I will trouble the gentleman to find. I can turn very easily to where he said it. If he will only find me the proof now where Boone said it, I will be wrong and he will be right.

At this point (12 o'clock and 30 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. KER. Before the court took a recess Judge Carpenter asked me to point him out a page. It began on 1423 where the first question was:

Q. You met Mr. S. W. Dorsey, in the department in November, 1877?—A. Yes, sir.

Then ensued a long argument which was carried over to page 1440. On that page the question is:

Q. You said that you went to the house of Mr. S. W. Dorsey in this city at a certain time in 1877. What time was it?—A. Some time in the month of November, 1877.

Q. How came you to go there?—A. I went there at his request. He asked me to call and see him.

Then comes another argument, and further, on page 1445:

Q. Was not Mr. Miner staying with ex-Senator Dorsey?—A. He was when he first

came here, I believe, about a week or ten days. At least I don't know whether he staid there or not, but I found him there at the house.

Q. Whom did you meet at Mr. Dorsey's house when you were filling up the blanks?—

A. I don't recollect anybody when I was filling them up, outside of Mr. Miner. I think they were all filled up when Mr. John W. Dorsey came to Washington.

Q. Was Mr. Peck here?—A. Mr. Peck was supposed to be here when he swore to the papers before me as notary public.

Q. What do you mean by that—that some one was presented to you as Mr. Peck?—

A. I could not say about that. Mr. Peck appeared at my house when the papers were sworn to. I had nobody to introduce him to me.

Q. How did he make himself known?—A. By a letter from Mr. Miner, and a letter previous to that from Mr. Miner stating that Mr. Peck would be there at a certain time to swear to them.

Then it runs along to page 1451 after recess.

Q. I think you stated that you took some acknowledgments of Mr. Peck?—A. Yes, sir.

Q. Have you any reason to believe that Mr. Peck was not here at that time?

Mr. HENKLE. I object.

Then ensued a colloquy between the court and counsel as to the form of the question. Then the question was:

Q. Do you know whether or not the person who appeared before you and represented himself under Miner's letter, and was represented, by that letter as Mr. Peck, was in fact Mr. Peck?—A. I am satisfied it was not Mr. Peck.

Q. In making these proposals at the house of Mr. S. W. Dorsey, was Mr. Peck there?—A. No, sir; I never saw him there.

By the COURT:

Q. You say you never saw him?—A. I say when the acknowledgment was taken some person appeared before me and represented Mr. Peck. I had never seen Mr. Peck, though, at Mr. Dorsey's house.

Q. Did you know that he was not Mr. Peck?—A. I did not know it at the time.

Then there was a spat between counsel. Then comes the following question by the court:

Q. How are you satisfied?—A. Simply from the fact that Senator Dorsey said—Mr. INGERSOLL. [Interposing.] Stop now.

The COURT. Never mind.

Q. You say you did not know Peck?—A. I never met the gentleman but once, and I would not recognize him. That was some four or five years before, and I did not know him when he came the second time; at least I would not have known it was the same person. He appeared at my house and brought the papers, and came and got them and took them away and signed them and brought them back in the evening, and then acknowledged them. The only information I had that it was Mr. Peck was a letter from Mr. Miner stating that Mr. Peck would call; and in the Congressional investigation it was found that Mr. Peck was not here at that time. That is my knowledge as far as Mr. Peck is concerned.

By Mr. TOTTEN:

Q. That is all you know about it?—A. That is all I know about it; I don't know of my own knowledge that it was not Mr. Peck, only from what was brought out in the investigation. He could not have been here at the time.

Then, on page 1453:

Q. Was there any paper with Mr. Peck's name that you recollect of at the house that was so impaired that another had to be made out and signed?—A. Yes, sir; I recollect a case of that kind.

Q. Was another paper made out?—A. Another paper was brought back with Mr. Peck's signature on it.

Q. Who took it out of the room?—A. Mr. Miner.

Q. Who brought it back?—A. Mr. Miner.

Mr. CARPENTER. May it please your honor, and gentlemen of the jury, that does not meet the question I was discussing when we adjourned at recess. I will read what the gentleman said, and then I will read what the record says. All this that he has been reading to the jury is in regard to an interview a long time subsequent to the one which he

spoke of in this part of his address, and a long time subsequent to the time that Mr. Boone says he first went to Senator Dorsey's house. I read from page 2317 from the speech of the gentleman:

Now let us go a little further back. Let us take the testimony of Boone. Boone says that he was in the Post-Office Department, and he saw Stephen W. Dorsey, and Stephen W. Dorsey invited him to his house. Boone went to Dorsey's house. Went to Dorsey's room, and there Boone met with Miner, there Boone met with Rerdell, and there Boone met a man that was introduced to him as John M. Peck.

Now he has just read to you himself from Boone's testimony that he never saw Peck at Dorsey's house in his life. This is the way he corrects me.

Mr. KER. That is a play upon words.

Mr. CARPENTER. No; it is not a play upon words. You stated that the first time Mr. Boone went to Dorsey's house these parties were all there. The record states that no one of them was there, and I will proceed to show it.

Mr. KER. I said he met them there.

Mr. CARPENTER. But he did not. He said quite the reverse.

Mr. KER. I read where he says he did.

Mr. CARPENTER. I read from page 1422:

Q. Did you know Peck?—A. Well, to the best of my recollection and belief, I met the gentleman when I was in the department, but was only introduced to him, and would not know him again if I should see him.

Now, from page 1443:

Q. What occurred between you and Mr. Dorsey that night and what was said at his house?—A. I cannot recollect the first part of the conversation; only just the business, because that is prominent in my mind.

Q. Go on with the business. That is all I want!—A. He handed me a letter from his brother-in-law, Mr. Peck, in which he was requested to find somebody that would be able to assist in this business.

Q. No matter about any writing that was given to you. Go on and state what was said between you and Mr. Dorsey. What was the business?—A. The arrangement was to put in the bids on the next letting, July 1, 1878, on behalf of his brother-in-law and brother, and he wanted some person to take hold and handle the business.

Q. Who else besides his brother-in-law and brother?—A. I could not say positively whether Mr. Miner's name was mentioned. He either mentioned his name or a friend of his from Sandusky, Ohio.

Q. What were you to do, and what was to be your relation to the transaction?—A. The thing to be done was to get up the information to bid upon; the necessary blanks and papers pending their coming to Washington. My business was to procure the necessary information and papers to make the bids or to get ready to make the bids by the time John W. Dorsey and Mr. Peck would come to Washington.

Q. Was anything said of Mr. Miner's coming to Washington?—A. I could not say whether his name was mentioned, or a friend of his; a personal friend.

Q. A friend who was to be interested in those bids?

A. There was to be nobody that I understood outside of the parties I spoke of.

Q. You and John W. Dorsey and Peck?—A. And Mr. Miner.

Q. Or one of his friends?—A. Or Mr. Dorsey's friend. The arrangement made was not made until they came here. It was only to prepare the necessary blanks and papers pending their coming, because the time was getting short, and it was necessary to get the information to bid upon. Nothing was said about any interest at all until after they came here, and then there was a partnership entered into.

Q. You were there at Mr. S. W. Dorsey's request?—A. Yes, sir.

Q. What did you do in pursuance of what occurred that night; generally, not specifically?—A. The first thing I did I got up a circular to send out to every postmaster on the route asking for information as to the distance from his office to the next office, the character of the road, whether it was a toll road, the price of grain, whether a vehicle could be driven over it the whole year round, so as to provide against snow routes or boggy land; and those were all sent out, some four or five thousand of them. While they were coming in Mr. John W. Dorsey and Mr. Miner came to Washington. He got here about the 5th of December. [Referring to a paper.] I have here one of the notes sent out with the circulars.

Now, on page 1452:

Q. In making these proposals at the house of Mr. S. W. Dorsey, was Mr. Peck there?
—A. No, sir; I never saw him there.

By the COURT:

Q. You say you never saw him?—A. I say when the acknowledgment was taken the person appeared before me and represented Mr. Peck. I had never seen Mr. Peck, though, at Mr. Dorsey's house.

He says distinctly he never saw him at Senator Dorsey's house. Then, again:

Q. You say you did not know Peck?—A. I never met the gentleman but once, and I would not recognize him. That was some four or five years before, and I did not know him when he came the second time; at least I would not have known it was the same person. He appeared at my house and brought the papers, and came and got them and took them away and signed them and brought them back in the evening, and then acknowledged them. The only information I had that it was Mr. Peck, was a letter from Mr. Miner stating that Mr. Peck would call; and in the Congressional investigation it was found that Mr. Peck was not here at that time.

All that Mr. Ker has read relates to a subsequent period from the time that they were making the bids. Mr. Ker distinctly states that it was the first time that Mr. Boone was at Dorsey's house that he met all these parties. Boone says he did not. There is the statement and here is the record. Now, again, on page 1453:

Q. Then Mr. Rerdell was one of the gentlemen, was he?—A. He was Mr. Dorsey's clerk, at the time. I couldn't say positively whether he did any work upon them; but if my memory serves me right, the last day he did some work on those proposals.

Q. What did he do on them?—A. Filled in the jurats, &c.

Now, gentlemen, so much for the statement of the counsel, and so much for the statement of the witness. The counsel has mixed this matter up as he did The Dalles and Baker City route with the Canyon City and Bridge Creek route. He has got it all mixed up just as he had in that case. It is a bazaar. There is no index. It is piled in head over heels and nobody knows which is which. He has taken one portion of this testimony and fixed it in with another portion. I say the testimony is that at this first interview the object of Senator Dorsey, as proved, was to show Boone a letter that he had received from his brother-in-law, and that he wanted to go into this business, and wanted him to get some competent person to assist him, and Senator Dorsey sent for Mr. Boone and asked him to come to his house with that view.

The gentleman says the testimony shows that Bosler was Dorsey. In one respect I am very glad to hear that, because he goes on to say that Bosler is a very honest fellow; he comes from his country, Pennsylvania, and he is a good, honest, straight man; so if Bosler is Dorsey the jury ought to take him at his word and say that Dorsey has done nothing wrong in this case. The proof shows that Mr. Bosler was interested in these same routes with Mr. Dorsey, that he managed the business after he became interested, and that Mr. Dorsey did not. The proof has failed equally to show in the case of Dorsey as in the case of Bosler one solitary criminal act performed by either of these parties in connection with this route near or remote. I challenge the prosecution to lay their hands upon the testimony that shows that either of these men has done any wrong in reference to the whole transaction. Oh, but they say we got up petitions. His honor said we had a right to get up petitions. They say we got letters up for increase of speed and additional trips. His honor has told you and your common sense tells you that we had a right to do that. That is not what they charge in the indictment. They do not charge that we manufactured public opinion, or got up petitions

that were honest or wrote letters that were honest. The charge in the indictment is that we wrote false letters; that we procured false and fraudulent petitions; that we sent fraudulent communications to the department. What proof is there of that throughout this whole case? I shall come to these exceptional points in regard to the interlineations or writing into the petitions later on. I will call special attention to one instance now. On the route from Kearney to Kent there is a petition, and it is claimed that the words "Schedule thirteen hours" were written into the petition after it had been signed and forwarded to Washington. That was the claim of the prosecution. Where is the proof of it? It is true Senator Saunders says he did not put it in and does not know whether it was in or not. They have never been able to find any man to prove who did put it in. If what they claim is true, they were running over this route in twelve hours, and it is not a very remarkable stretch of imagination to suppose that some one of these petitioners, or some person there interested in the matter, finding that there was no prayer in the petition for expedition, should insert thirteen hours, when the gentlemen say, at that very time, they were running it in twelve. They introduced Mr. Blois upon the stand and proved a great many things by him. They made proof of a great many instances where they said Miner had written a letter, or where they said Miner had written a name, and a great many instances where they said Rerdell had written letters and names, and there were some petitions as to which he said in his judgment Rerdell had made interlineations. But did he state that anybody on earth had written this particular interlineation? Is there a particle of proof in this case that Miner or Rerdell, or any other defendant here, put those words, "Schedule thirteen hours" into that petition? There is no such proof. I challenge them to produce it. I have looked over all the papers and I find that A was untouched by any witness on the stand. They never asked the question, and so there is no fraud in that case.

Now he says, on page 2378, in speaking of the route from Trinidad to Madison:

Now, then, let us see who did draw the pay. The record shows that Mr. Vaile got the warrants and the drafts. The record shows that Stephen W. Dorsey got some of the warrants and the drafts. The record shows that Bosler was about and got his share of them. Then, again, Mr. Rerdell put in and got a warrant and drew the pay. On every draft that was drawn Rerdell's beautiful name appears as a witness.

There he says that Rerdell got some of the pay. On page 1073, gentlemen of the jury, is the auditor's report, and a statement of these warrants and drafts, who drew them, and to whom they were paid.

The first three were paid to Mr. Vaile, the next four were paid to S. W. Dorsey, and two of them were indorsed to Middleton & Co. All the other payments were to J. W. Bosler, assignee. There is not a payment to Rerdell in them all. He never had a warrant, and never drew a dollar on the route.

Mr. KER. Look at page 1110 in regard to Trinidad and Madison. There they are all set out.

Mr. MERRICK. Is there a Rerdell warrant there?

Mr. KER. Yes, sir.

Mr. MERRICK. Read it.

Mr. CARPENTER. Show any warrant to Rerdell if you can find it.

Mr. KER. [Reading:]

Warrant No. 11328, dated October 26, 1880. Pay J. W. Bosler, assignee of John R. Miner, \$3,861.77. Also warrant 11329, dated October 26, 1880. Pay to John R. Miner \$76.76. The first is indorsed by J. W. Bosler, and the second is indorsed: Pay

S. W. Dorsey, or order. John R. Miner. Pay M. C. Rerdell, on order. S. W. Dorsey. And then M. C. Rerdell.

You will find a number of them there.

Mr. CARPENTER. That has nothing to do with it. The warrants were drawn payable to the order of these parties. If they chose to transfer them to the foreman of the jury, or to me, or to anybody else, that is another thing. There is the pay in that table.

Mr. MERRICK. Warrants had to be drawn to the contractor, who assigned them. That is the way Rerdell got his share.

Mr. CARPENTER. Rerdell did not get a dollar. There is no such proof.

Mr. KER. Here is the proof.

Mr. CARPENTER. Rerdell was the clerk of S. W. Dorsey. He might have assigned warrants to him in payment for his labor. That is nothing if he did. The warrants were all made payable to the parties I have named.

Mr. MERRICK. They were assigned to him.

Mr. CARPENTER. That has nothing to do with it. The impression made here and the statement made is, that he got one of these warrants. I say he did not. They were issued to one of these other parties, but we will not quarrel about that. There are so many fish in this sea that it is not worth while quarreling about this sucker.

On page 2404 he says Rerdell wrote in an erased petition on route 40104:

On the 20th day of December there is a petition filed for an increase of three trips and sixty hours. This petition originally did not call for anything of the kind. Mr. Rerdell erased that petition, and Mr. Rerdell wrote in that petition the words, "Three trips on a schedule of sixty hours, instead of eighty-four hours." It was eighty-four. These are the words Rerdell wrote in that petition in his own handwriting. You will find it on page 1845.

Mr. KER. It is 11 P.

Mr. CARPENTER. I read from the testimony of Mr. Vaile:

Q. You spoke of Rerdell having a subcontract on the White River route at the time he was out there. Can you tell whether or not he surrendered that immediately after getting there and looking over the ground?—A. I cannot tell whether he did or not.

Q. The record will show that, I presume?—A. I presume so. I don't know.

Q. Did he have anything to do with route 40104 in December, 1878, as far as you know?—A. Not to my knowledge.

So it seems that Rerdell had nothing whatever to do with that. These petitions that he says were altered by Rerdell were filed in December, 1878.

Mr. Ker makes a great point about the antedating of the order adding Pagosa Springs; while on page 813 of this record it shows that the order was made after the distance circular was received. Another charge that he makes, on page 2360, is that Rerdell signed Dorsey's name. That is true, and there is no effort to imitate it. There has never been any denial of it; and not only Mr. French, but another one of the experts from the department says that the agents of these several contractors in the West were in the habit of signing the names of their principals to papers in the ordinary business transacted with the Post-Office Department. Aside from the powers of attorney introduced, it was the custom of the department to recognize the known agents of the contractors in the ordinary details of the transaction of the business of the departments.

Mr. Ker says that route 38134 was discontinued July 31, 1880. The fact is it was discontinued just one year afterwards, July 1, 1881.

Mr. KER. I said 1881.

Mr. CARPENTER. I will just see for curiosity.

Mr. KER. There are a number of misprints there.

Mr. MERRICK. It does not make any difference whether he said 1880 or 1881.

Mr. CARPENTER. Yes, it does make considerable difference; especially as he says he did not say it.

Mr. MERRICK. He can refer to his original notes probably.

Mr. CARPENTER. Very well. We will see. I will read from page 2375:

Mr. Rerdell signs this subcontract as the attorney for Miner. On the 8th of May, 1880, the postmaster at Greenwood informs the department of the failure of the contractor. Even then Hansom did not go on with his contract. I suppose he considered it amusement. On the 31st of July, the entire route was discontinued as useless.

Mr. KER. There were two routes discontinued on the same day.

Mr. CARPENTER. Mr. Vaile stated, and he made a point about it, that during the latter part of July, 1878, at the time Mr. Vaile and Mr. Miner met, and Mr. Miner asked him to see Mr. Brady in regard to an extension of time upon these contracts, he went to Mr. Brady and told him what they had said to him, and that if it was true, he did not know that they could get the service on quicker in any other way. Mr. Ker makes a point of saying that Vaile went with Miner. There is no such proof:

He went with Miner to see General Brady. It was to coax Brady to give Miner an extension of time. Miner was not able to put on the service. He could not put the service on, and Vaile wanted to coax Brady to give Miner this grace. They went together to see Brady.

On page 2208 Mr. Vaile says:

I went to General Brady, as a friendly act for Miner, to get an extension of the time, and to put on this service from the 15th or 16th of August until the 1st day of September.

Mr. Ker says that the proof is, they went together. There is no proof upon the subject except Vaile's testimony, and he said he went alone.

Now in regard to this spoiled proposal that Mr. Ker spoke of, that Mr. Boone says Mr. Miner took out and then brought back another one. Mr. Ker makes a great point of it. He says when Mr. Boone took it out it was not signed, and when he came back it was signed, and Miner committed the whole forgery himself. The testimony of Mr. Boone is that he supposes he went and brought one of those proposals that had been executed in blank long before, that it was the custom to execute them in blank, and several hundred of these proposals had been executed in blank, and he supposes or presumed that he might have gone for one of them. All this story of Miner's carrying it out unsigned and bringing it back signed and committing the forgery disappears as an idle tale. There is no such proof. Mr. Ker makes a point, and the counsel for the prosecution dwelt upon it at great length in the examination of the witness French, that the mail was carried from Kearney to Loup City in thirteen hours, although the schedule time was thirteen hours and it was expedited to thirteen hours while it was still being carried in twelve hours. Well, gentlemen, what is there in that point, anyway? What does it amount to? The contract is made to carry the mail a given distance between two places upon a given time. Through that western country mines are opening and towns are springing up and these mail contractors have mail coaches. They are compelled to carry passengers. They do that for their own profit, and they have to run their passenger coaches more than seven miles and a half an hour to get any passengers. What is the difference to the Government if it takes more men and more

animals whether it was being run on that time or not? And, again, a great deal has been said in other cases about the same thing; that they were running faster than the schedule time according to the expedition. What difference is that to the department? If it takes a greater number of men and animals, and we have used the men and animals we needed to use, what is the difference if they were running before time or not? It is the same thing for the Government. The Government gets what it contracts to get and the contractor pays what he agrees to pay, namely, the service in a given time.

But there is a great deal of humbug about this route, Kearney to Kent. I do not know of any route in this whole case that there is more humbug about. Now this route was advertised to run from Kearney to Prairie Centre, and from there to Sweetwater, and from there to Cedarville, and from there to Loup City. They have made a great point about Fitzalon being put on this route, and they say it was already on the route. It is very true it was on the route as they run the mail, but it was not on the route as advertised by the department. The route advertised was one route and they run another. They had no right to run the other, if you please. Fitzalon was put on, and properly enough put on, because then, according to the advertised route, the mail would run from Kearney to Prairie Centre, and from Prairie Centre, after the addition of Fitzalon, to Fitzalon, and from Fitzalon to Cedarville, and from there to Loup City, and according to the advertisement by the department, and the contract entered into between the department and these contractors, that was the way the route was to be run, and yet a great row is made because the department put on and added seven or eight miles for this town of Fitzalon because the contractor chose to run that way and keep it from the department. French testified that there was no road to go over that way. In the conditions of all these contracts it is provided the contractor must look out for that. It makes no difference whether there is a road or not. If there is no road he has to make one, if there is no bridge he has to make one, if there are any obstructions he has to take them out of the way. His business is to carry the mail, to reach his destination on schedule time. To illustrate this point, how was it as to Bismarck and Tongue River? The road was infested with Indians from one end of the route to the other. Was there any road there? The contractor had to make a road, had to make his stations, had to build his bridges, in a word, it was his business to see how he would get from Bismarck to Tongue River, and not the Government's. A road could have been made upon this route from Prairie Centre to Cedarville, and afterwards, when Fitzalon was added, from Fitzalon to Cedarville. But it was more convenient to these gentleman and they could run on the route with less stock the other way, and because the subcontractor did that that is made against us a crime for which it is insisted we ought to go to the penitentiary. I allude to that now upon this point. I shall have more to say about it before I get through.

In regard to this petition upon this route, where they claimed the words "Schedule thirteen hours" were inserted, they introduced a distinguished gentleman, Senator Saunders, as a witness, and he testified that, to the best of his recollection, he received that petition in Washington from a gentleman residing in Kearney. So it is in proof that after the petition left the hands of French, that some other person interested in the route had charge of the petition. Now, gentlemen, in every case of circumstantial testimony the circumstances proved, in order to fix guilt on the defendant, must be clear and conclusive. They must pre-

clude any reasonable idea that any other person could have done the act that the defendant is charged with doing. I ask you if it is very remarkable that a gentleman living in Kearney having charge of this petition, or it being handed over to him for transmission to Saunders, and seeing in the body of it that there was no recommendation for expedition, and knowing that a coach was running at this very time, or a buckboard, from Kearney to Loup City in twelve hours, is it impossible, or at all improbable, that, consulting with the people in Kearney who had signed this petition, he should have inserted that, and with their permission? At all events, there is no proof that any defendant in this case ever inserted it—not a syllable or a scintilla. On page 2328 of this record Mr. Ker says, in regard to the route from Pueblo to Greenhorn:

But did Brady stop to ask that? Oh, no; §328 to the contractor. Now, then, in August, 1878, that order was made. In October the contract of E. M. Ames was made. Gentlemen, it has been testified to here that there was a man named E. M. Ames; that he had an actual and veritable existence; that he was not a myth. I know now who E. M. Ames is. He is the fascinating John R. Miner.

That is what Mr. Ker says. Now, I will try to find what Mr. Sears, a witness for the prosecution, said upon the subject. The charge made by Mr. Ker is that Miner has not only committed forgeries in several instances both of the letters and of the names of men and in the alteration of petitions and all that sort of thing, but that he falsely personated a mythical person. Now, let us see what the record is:

George Sears sworn and examined.

You recollect he was the postmaster at Greenhorn.

Q. Did you know a Mr. Ames, who had a subcontract on that route?—A. Yes, sir.

Q. Did you know him when he was performing the service?—A. Yes, sir.

Q. What was the schedule at that time; how much time?

Mr. TOTTEN. That is a matter of record here.

Q. [Continuing.] When was it he was performing the service; do you know?—A. He was performing the service in 1878.

Q. Down to what time, do you know?—A. I don't recollect the date.

Q. Do you remember whether he ever performed service after it was made three trips a week?—A. I think not.

Do you know how many carriers and animals he used?—A. Mr. Ames had two animals. Some of the time he would use one and let the other run out, and then he would change.

Q. Do you mean that he himself drove?—A. Yes, sir.

There is Mr. Ker, and there is the record, gentlemen. Do you not think, gentlemen of the jury, that it is rather a serious matter when the counsel for the Government, who is compelled by every principle of humanity, law, and justice to treat every defendant with absolute fairness, stands up here against the record of his own witnesses and charges one of the defendants in this case with falsely personating another person, whom he says had no existence whatever except as John R. Miner? I do.

Mr. KER. Do you mean to say that he did not sign that contract and the letter withdrawing it?

Mr. CARPENTER. I have read the record to the jury. They will determine whether my statement is true or yours. You were not interrupted during, I think, the most outrageous speech I ever heard for a prosecution, and I do not want you to correct me unless you have something to say.

Mr. KER. The counsel said he would be glad if we would correct him. From this out, I shall make no correction. I did it at his own invitation.

Mr. CARPENTER. It is no correction.

Mr. KER. I say your statement is not the way he testified; that on page 1468 the witness says he signed that contract.

Mr. CARPENTER. I say that Mr. Ker said that Miner was Ames, and that no such person as Ames existed.

Mr. KER. I did not say that.

Mr. CARPENTER. Well, that is the record. I cannot help it. Besides the usual accuracy of the stenographer, I must be permitted to believe my own ears. I heard you say it, and all the counsel heard you say it. You said he was a myth, and that the fascinating John R. Miner was Ames.

Mr. KER. You cannot find any such words as those.

Mr. CARPENTER. Can't I?

Mr. KER. No, sir; I said he was a man of flesh and blood—the man who signed the contract was Miner.

Mr. CARPENTER. On page 2339 of the record he says Miner got a warrant and drew the money on route 41119. On page 640 of the record is a statement of the warrants or drafts drawn in payment upon this route. It is the route from Toquerville to Adairville. The two first are paid to Peck, the third is paid to Vaile, the fourth is paid to S. W. Dorsey, the fifth to S. W. Dorsey, the sixth and seventh to S. W. Dorsey, and the six following ones to J. W. Bosler, and the seventh to Rerdell. There was not a dollar paid to Miner on the route. Miner had no interest in the route.

Mr. KER. Do you want to be correct?

Mr. CARPENTER. Yes; I want to be corrected.

Mr. KER. [Submitting page of printed record to Mr. Carpenter.] Look at that.

Mr. CARPENTER. Which is it?

Mr. KER. Here it is. [Indicating.]

Mr. CARPENTER. How am I corrected? Your record shows that Peck drew the money, and Miner receipted for it as his attorney. How does that prove that Miner got it?

Mr. HENKLE. It is a receipt for the warrant.

Mr. CARPENTER. It is simply a receipt for the warrant. It does not show even that he got the money.

I offer the receipt dated Washington, November 23, 1878, for warrant No. 12620.

Received the above-mentioned warrant November 20, 1878.

JOHN M. PECK, *Contractor*.
M.

It is a simple receipt for the warrant. He could not get a dollar of the money. He received the warrant and sent it to Peck. How does that prove that Miner got the money, pray tell me?

Mr. KER. You want to read the whole of it.

Mr. CARPENTER. Oh, well, I can't read the whole of it.

Mr. KER. Do you want me to?

Mr. CARPENTER. No, I do not want you to. I have read enough to show that the statement that Miner got this money has not a shadow of foundation in this testimony here.

Mr. KER. Read the whole of it.

Mr. CARPENTER. You remind me very much of a fellow arguing a case before a justice of the peace. A man cited the 19th volume of New York Reports. Says this fellow, "Why didn't you bring the other eighteen volumes of this report?" You want me to read all the testimony in this case. No, I thank you; I am human.

Mr. KER. I want you to read Miner's receipt, that is all.

Mr. CARPENTER. There is not a particle of proof in this case that

Miner ever did get a dollar on this route, or any other route. The proof is that Vaile collected the money on his routes, and the proof is certainly that Miner did not collect it upon the others. This is route 44155, from The Dalles to Baker City. He says:

You will remember he says that it takes so many men and animals on the present schedule. There was no present schedule at all. There was no service performed on the route. There was only a mail being carried from Canyon City to Baker City that had started a few days before that. This oath was signed by John R. Miner. He wrote Peck's name to it.

That is the statement of the oath for the expedition, that it was signed by John R. Miner and he wrote Peck's name to it.

By Mr. MERRICK:

Question. [Submitting a paper.] Look at the paper now shown you marked 50 A, and also 14 D, purporting to be a statement by John M. Peck to Thomas J. Brady of the number of men and animals necessary on route 44155, accompanied by his oath, and state in whose handwriting is the body of the paper and in whose handwriting the signature and whether the writing of the body is in two hands or in the same hand.

This is the testimony of Mr. Blois.

Answer. The writing in the body is that of Mr. Miner.

Q. All of it?—A. I do not think the name of John M. Peck is in Mr. Miner's handwriting.

Q. Do you know in whose handwriting it is?—A. I do not.

Now here is Mr. Ker's broad statement that this oath was signed by John R. Miner and he wrote Peck's name to it, with his own witness saying that it is not Miner's handwriting and he does not know whose it is. I would like to see how he will get out of that.

Mr. KER. If you will read on page 2225 you will find that Vaile identified it.

Mr. HENKLE. Vaile did not say it was Mr. Miner's signature.

Mr. KER. Look at page 2225.

Mr. HENKLE. But Vaile did not say Miner wrote the signature. He said the body of the paper was in Miner's handwriting.

Mr. KER. Let us see what he says.

Mr. HENKLE. [To Mr. Carpenter.] Look at the bottom of the page. His attention was called to the signature. He says that he thinks the paper was in Miner's handwriting.

Mr. CARPENTER. [Reading:]

Q. Well, now, let us go on a little further. We have got it up some \$8,288 with \$4,144 added, and eighteen thousand six hundred and odd dollars added. Before I go on, however, here is something interesting. [Submitting a paper to witness.] Whose writing is that? Do you know?—A. No, sir; I do not.

Q. You never saw it before?—A. I think that is Miner's writing.

Q. You think it is?—A. Yes, sir.

Mr. MERRICK. That is the oath of the number of men and animals required to carry the mail on route 44155, from The Dalles to Baker City. Dated September 18, 1878, and signed John M. Peck.

What Mr. Vaile said when the paper was handed to him was as to the body of the writing; that he did not know, but he thought it was Miner's handwriting. He never said the signature was in Miner's handwriting, and Blois says expressly it is not.

Mr. WILSON. You will find it in the record somewhere where he said he did not know whose signature it was.

Mr. CARPENTER. Vaile did not say anything about the signature. He was talking about the body of the paper. But that is just about as much fairness as we have a right to expect from this prosecution. Thank God for the institution of an American jury that understands its

business and knows its duty, no matter how the prosecution is carried on.

Mr. MERRICK. Now look on page 2230.

Mr. CARPENTER. Well, sir, what do you find there?

Mr. MERRICK. [Reading:]

Q. Signature and all?—A. I think it is. I am not positive about that.

Mr. CARPENTER. Who says that?

Mr. MERRICK. Vaile. [Continuing to read:]

Q. Whose writing is it?—A. I think Mr. Miner's.

Q. And you know nothing about it?—A. I may have known at that time.

Mr. HENKLE. That is another paper.

Mr. MERRICK. Yes; it is another paper; pardon me.

Mr. CARPENTER. It is not an oath.

Mr. MERRICK. It is another paper, I see.

Mr. CARPENTER. Now, on page 2343:

Well, now let us go back. Miner signs Peck's name. Let us see how well he calculated. On the present schedule it is eight men and ten animals. That is eighteen. If you expedite it to seventy-two hours, it is twenty-six men and sixty-six animals—ninety-two. They are to get the difference between eighteen and ninety-two.

Mr. HENKLE. Judge, allow me to read for you now upon the subject of the signature to that affidavit. Mr. Vaile says this on his re-examination by Hine.

Q. You spoke of the affidavit of Mr. Peck on The Dalles route, or some route, having been signed by Miner. Did you mean that the signatures——

A. [Interrupting.] Oh, I did not say by Miner.

Q. You said that paper was drawn by Miner?—A. The body of it.

Q. Did you mean the body of the affidavit was in the handwriting of Miner?—A. The body of it.

Q. Not the signature?—A. I do not know anything about that.

Mr. CARPENTER. Thank you. On page 2397 Mr. Ker says:

Then Mr. Pennell said, "We went on building, and kept on building, and there was no mail put on there until January."

This is the route from Bismarck to Tongue River, No. 35051.

When he left in January, there was no mail on.

That is what Mr. Ker says. Now let us see what the record says:

Q. Had you ever anything to do with the mail route from Bismarck to Fort Keogh, No. 35051?—A. Yes, sir.

Q. What was your first connection with that route?—A. Buying stock, building the ranches, and locating the road.

Q. When did that commence?—A. The first mail started from Bismarck, July 1, 1878.

That will do. Mr. Ker says that this witness says when he left there in January no mail was put on then. Now he left in October, and the witness swears that he left the employment of these parties in October and went to carrying freight to Deadwood, and he swears that that mail was put on there the 1st day of July. It was a weekly mail running from Bismarck to Tongue River. And there is not a particle of testimony in this whole case to contradict it, and yet we are met here with that statement, with that record before the gentleman, that from July until January, six months, we never put service on the route according to the contract, whereas in point of fact, the proof is, as I have read to you, that we did put service on the route the day that we ought to have put it on, the 1st day of July, 1878.

Mr. MERRICK. Do you assert that as the evidence?

Mr. MERRICK. All right, sir, I will not correct you now.

Mr. CARPENTER. You may correct it if you can.

Mr. WILSON. He says the mail started at that time, and the question is asked—

Was it kept up continuously after that?—A. Yes, sir.

Mr. CARPENTER. What page?

Mr. WILSON. 1222.

Mr. CARPENTER. The only excuse that these gentlemen can have to get out of this testimony must be that they didn't cross-examine the witness.

Mr. MERRICK. I will show that Cowne's statement is entirely correct.

Mr. CARPENTER. Then you will show your own witness to be an unmitigated liar.

Mr. MERRICK. No, sir; I will show it by your testimony.

Mr. CARPENTER. You do not know what you are taking about.

Mr. MERRICK. I do, perfectly well.

Mr. CARPENTER. Now, gentlemen, there are more of these things, and I shall have occasion hereafter to still further consider them. But I am tired of that sort of detail, that I am not very well fitted for, and I am sure I am testing the patience of the jury, and I will proceed to the discussion of some other questions that I hope may be more interesting for the remainder of the afternoon.

Upon what does any pretense of a case rest according to the testimony here? I imagine it must be upon the testimony of Mr. Walsh. I see no other vestige of evidence. It is the only scintilla of testimony that in any way impugns the official conduct of General Brady. I propose to discuss that testimony in a twofold aspect. I shall not imitate the bad example of my friends on the other side and use hard names. I have no disposition to denounce the witness. A man of fine personal presence, fine physical power, a man of most decided and acute intellect, I do not feel like denouncing him nor abusing him, nor shall I do it. I can only feel as was said upon another occasion of another person, and under other circumstances, that he possessed talents of an order that, if they had been differently developed, if his time had been well employed in other directions, he would have been taught honor, virtue, sense, and raised himself from his present fate to govern men and guide the state.

What is that testimony, gentlemen? He says that he had an interview with General Brady on the 28th of December, 1880, in reference to the monetary transactions between them. In the first instance I propose to show what this testimony amounts to if it is true. I am not going over the whole testimony. He says that he loaned Brady money; that Brady had from time to time executed his notes to him for that money, and that he went to see General Brady and told him that he was not in as good circumstances as he had been; that he had had heavy losses and he wanted a settlement; that Brady told him "I owe you nothing; I have given you a valuable contract and you know the rule of this office—my rule—that where routes are expedited or trips increased, I get 20 per cent. of the expedition; you know it or should have known it from the Price and Peterson drafts; you know that is my rule." Well, now, admitting for the sake of the argument, that Brady told Walsh that and that Brady told the truth when he did say so to Walsh, does it prove, or tend to prove, this conspiracy? Does it not rather disprove this conspiracy? If it was Brady's rule and all the contractors assented to it as was stated Brady told him, what was there to conspire about? It was simply to walk up to the

captain's office and settle. It was extortion, a crime under the law of the land, but in no conceivable sense a conspiracy. If Walsh told the truth, and Brady told the truth, and it was a fact, the Government have mistaken their remedy. Their indictment should have been for extortion, and General Brady should have been put on trial for that. There is in that statement, if it be true, no proof of conspiracy. On the contrary, the conspiracy is absolutely disproved by the statement. If it was Brady's rule to compel contractors to pay him, if he stood there with a moral club in his hand to knock down every contractor and make him deliver 20 per cent. of the expedition, then I say that is not conspiracy. I say it is extortion, and if that fact be true, it disproves the charge of this indictment as clearly as any proof under heaven can disprove it. What is the answer to that? Is there any? The gentleman who opened this case, according to the practice in such cases, was to open the whole case, and from the beginning to the end of it he never argued for one moment that there had been a conspiracy, that there was a particle of proof of a conspiracy, and I suppose I might have finished my argument where I began, for as he introduced no such topic in his argument I was not compelled to reply to it. He certainly did not and there is no proof, if this is the only proof, that any such thing ever existed. Do gentlemen suppose that this jury will find no difference between the crime of extortion and conspiracy? Extortion is where an officer of the law without law and without right compels parties having business before him to pay him for the performance of certain official duties. That is not conspiracy, nor is the victim to such a process a conspirator. At most in any conceivable aspect of it it would be bribery. Conspiracy is not bribery. It is very different. It takes two men, to be sure, where bribery exists—one man to bribe and another man to receive the bribe; but it is a very different offense from conspiracy. Do the gentlemen expect that they can indict a man for high treason and convict him of murder? That you can indict a man for highway robbery and convict him of larceny? That you can indict a man for burglary and convict him of arson? These are all offenses against the law, but this is not the remedy that the Government has pursued. This is not the charge they have made. The limitation of this indictment is the law of this case. It is conspiracy or it is nothing. I might admit, for the sake of argument, that we had gotten up on the routes we owned false and fraudulent petitions, upon every one of them, and sent them on to the Postmaster-General. I might admit that we had made false oaths upon every solitary route, and sent them in for expedition; and I might admit that Vaile and Miner had done the same thing upon every one of their routes; and then you would be no nearer proving conspiracy than you are now. It is an offense to get up such papers for such purposes, but it is not this offense. To prove this offense there must be combination, concert of action, agreement, and conspiracy upon these various subjects named in the indictment.

But, gentlemen of the jury, is it true? Did such a conversation ever take place? The man was on the stand as a witness. You saw him, physically a powerful man. He looked as game as a chicken-cock. The proof was that he had been in the Confederate Army for four years; and although I was not in that army I saw a great many people that were in it, quite as many as I wanted to, and I found them quite as game as I wanted to find them. He presented himself on the stand, a man that would weigh about two hundred pounds, in the middle of life, just in his prime and bloom, a man of courage, of determination, of power, and of

force. He goes to see General Brady. General Brady owes him \$30,000 in round numbers. He has the notes in his pocket. He takes them out and lays them down with what he calls the data, I suppose the addition. While they are talking about this thing, and according to his testimony, very early in the conversation, Brady begins to show that he don't think he owes Walsh anything. Walsh tells him when he comes there that the reason he has come is that he has had heavy losses, he is pressed, he is not as prosperous as he was, and he wants a settlement, that is, he wants money. Early in the conversation Brady begins to show him in the most unmistakable way that he is not going to give him any money. The notes were lying on the table and Brady picks them up and puts them in his pocket. Walsh says, "What do you mean by that? Explain." Brady says, "I mean to settle this thing. My orders have paid you for this money. These notes were matters of form. I do not intend you shall bother me any more with them." I am not repeating the testimony verbatim, but simply the idea. He puts these notes in his pocket then, and Walsh goes on to argue the matter with him. He says, "If I ought to pay you at all, 20 per cent. is an enormous sum. The business will not justify it; it is too much, if I have to pay you at all." But he finally concludes to go away and leaves him in that amicable Christian way. Now, gentlemen, is there a man on that jury who believes that a man with desperate fortunes, trained to blood and carnage in war for four years, would allow another man to steal \$30,000 in notes from him in his presence and tell him that it was payment, and that a man whose fortunes were sinking, and who needs money, would not have sprung at him and caught him by the throat as a Bengal tiger would spring upon him? Gentlemen, it is inconceivable. No such thing ever could have taken place, according to the current of human action and the character of human nature. And that is not all. He went away and never told anybody about it. He brought two suits and never mentioned it. His lips were never opened upon the subject to Mr. Hine, his counsel here, or to Mr. Grandin, his counsel in New York. He had them bring suit and never told them that Brady had taken the notes; never told them a word of the interview. When did he first repeat it? What Omnipotent power was it that unlocked his lips and made him spread that secret broadcast over the land? That little magician Woodward did the business. The inspector of the Post-Office Department found his way to the heart of this man and overcame his scruples; and to Woodward he unburdened his wrongs and the crime of Brady. The deeds of the righteous are generally followed by reward, and the good deed of stating all this to Woodward was followed by the most outrageous remissions of fines and deductions upon his routes. That was the magician that opened his mouth. That was the magic that caused him to tell the whole story; never until then did he do it.

Now, gentlemen, is that a credible story? Must there not have been some strong incentive for Walsh to have kept this story to himself, from his lawyer and from his bosom friends, and never to have whispered it until he whispered it to the ready listening ear of Woodward? Oh, well, there was a powerful motive. The witness states it upon the stand. What was it? To avoid scandal? Oh, yes; to avoid scandal. Well, gentlemen, when he came upon the stand he seemed to have gotten over that disease. It did not seem to afflict him any longer. "No pent-up Utica contracted his powers" of scandal upon the stand. He did not confine himself to the small game of a Second Assistant Postmaster-General. He reached his hand out to the august body of the Senate

of the United States and attempted to drag a Senator down in his testimony. He reached his hand out to the Congress of the United States and talked of the corruption of the Post-Office Committee, before which he had been examined, and the subcommittee of the Post-Office Committee were implicated inferentially by his testimony. A beautiful creature to avoid scandal! He took in the Senate, he took in the House, and he took in the Second Assistant Postmaster-General, and like Alexander, I suppose, wept because there were not other political worlds to conquer while he was telling his story. Gentlemen, in the language of the street, that lacks the requisite thickness. No man can believe such a story, least of all my eloquent and acute friend who is to argue this case hereafter. He cannot believe it, except as a prosecuting officer. I would not do his intellect, for which I have an admiration, the gross injustice of supposing for a moment that he would ever have entertained it or given it the slightest credence. What an improbable, ridiculous story all this is. The only motive for keeping it from the public was scandal. When he comes here, scandal is his whole theme. Well, gentlemen, the fact is in evidence that the gentleman had told that story and some more I suppose, to a grand jury, who of course were roundly abused by the newspapers of the country because they did not find a bill of indictment according to Walsh's testimony. That grand jury evidently did not believe Walsh.

Mr. MERRICK. What evidence is there about that grand jury before this jury?

Mr. CARPENTER. Did he not state he had been examined before the grand jury? Is it not in proof?

Mr. MERRICK. He was before the grand jury, but there is no proof as to his being examined, or as to what he testified to.

Mr. CARPENTER. Not as to what he testified to, nor have I said anything.

Mr. MERRICK. You said they did not believe him.

Mr. CARPENTER. I said that whatever he said they did not believe him, nor do I. I am forced to this conclusion against my will, for he is a good-looking fellow, and has a great many good qualities, I have no doubt; and I am sorry he is here.

Mr. MERRICK. I say they did believe him.

Mr. CARPENTER. They did not find any bill.

Mr. MERRICK. There was a bill against Brady already upon that matter, but there was a failure to connect the other man.

Mr. CARPENTER. If I had wanted any proof that they did not find the bill after examining Walsh, I would have found it in the countenance of my friend when the grand jury came in. That was record enough for me.

Mr. MERRICK. I don't believe I was in court.

Mr. CARPENTER. Oh, yes, you were; and you looked as if you had lost every friend that you had upon earth, and you had no money to bury them. And just here I want to do my friend and the other counsel for the prosecution justice, which is what they do not mete out to us.

Mr. MERRICK. We are going to give you justice.

Mr. CARPENTER. I hope you are. I hope you are going to turn over a new leaf. I shall be glad to see some signs of repentance in you. If you are going to give us justice, now I shall be very much obliged to you, even at this late day.

When the Government did not seem to be proceeding quite so well with this trial, before they struck upon this lovely witness, Walsh, the

newspapers that had been abusing us all the time, that they had been fed with so much raw meat that they must bite somebody, turned to give them a share or two and charged that they were in collusion with us. They never were. They have fought us honestly, bitterly, and viciously from the beginning, and the circumstance that I discussed a moment ago, about the grand jury coming in and the sorrowful face my friend exhibited is one proof of the fact that their hearts are in the work. If this jury fails to convict these parties it will not be their fault; they have done their duty, their whole duty, and more than their duty, a thousand times in the case. They have left nothing undone that I know of either in the shape of intimidation, persuasion, or testimony that they could lay their hands upon.

Now, gentlemen of the jury, is Walsh's story a creditable story, take it in all its different lights? Can any man believe that a man failing, needing money, will stand by and see himself robbed and not assault the robber, not cry for help, not have him arrested, not tell his dearest friend, and give no better reason than that Mr. Walsh gave, that he wanted to avoid scandal? Upon that testimony, if true, disproving their indictment, rests their whole case; ay, more than their case. It is proclaimed that the Government has staked upon it as well as the prosecution. A fine foundation for a government, a miserable sandy foundation for a prosecution. Gentlemen, I leave that topic for the time, and do not expect to refer to it again, except incidentally. I am not the especial counsel for General Brady, and I only discuss this question as it has a bearing upon the whole case. His counsel will go into other facts that disprove this testimony. I do not feel called upon to do so.

I now pass to the testimony of Mr. Boone. He was brought her under very unfavorable circumstances so far as he was concerned. I do not propose to contradict Mr. Boone, and I do not propose by innuendo to say that he did not tell the truth. I think, under all the circumstances of his case, with six indictments pending here against him, that he exhibited remarkable heroism and courage. The great point was to prove by Mr. Boone, and my friend struggled for it, and he angled for it as Izaak Walton would have angled for a trout in a brook, that at the time S. W. Dorsey was in the Senate he had an interest in these contracts. Mr. Boone was the man who had prepared the circulars and sent them out previous to making the bids. He had helped to prepare the bids and the whole thing in regard to these contracts that were made to go into effect July 1, 1878. He knew all the transaction, and with the thumb-screws of six indictments upon him, they could not make him swear that Stephen W. Dorsey had a cent of interest in the transaction. He swore he had not. Albert E. Boone may do what he pleases the rest of his life, but I will ever have a respect for the man who could not be made to lie even upon the rack. I do not mean to insinuate that the counsel wanted to make him lie; but it was the theory of the prosecution stated here in the opening and reiterated a hundred times, no occasion left unoccupied to state it, that S. W. Dorsey had an interest in these contracts all the time; and here was a man that did have an interest in them, and that knew all about them, and with this tremendous pressure put upon him by the Government he swore that Dorsey had no interest in them; that Peck and John W. Dorsey and Mneir and himself were the only parties who had any interest in those contracts. What else does Boone swear to? Does he swear that those bids were put in upon routes where the service was insufficient and the time was slow in order to get expedition and make money? He swears

right the reverse. He disproves that charge of the prosecution. What else does he prove? He proves that these contracts were fair, open, honest contracts, that there was nothing wrong in them from the beginning to the end. That is their witness, loaded with chains, and yet he dared to tell the truth. Whatever fortune may have done for that man, and however much he may have been scarred in his contact with life, there is something of the hero in him when he would thus testify with such temptation on the one hand and such fearful penalties on the other. He testifies, and in that testimony he corroborates Mr. Vaile fully, that he went out of that organization or company in 1878. That is their own testimony. Vaile testifies to it to be sure, but it is their testimony that that copartnership was dissolved in August, 1878, and he went out of it and Vaile came into it. Now, gentlemen, up to that time where is the conspiracy? Where is the proof that these parties bid alone on infrequent service and slow time? The fact may be so. It is quite likely it is so. I need not tell this jury, who are men of business, that it takes more capital to carry the mail on a route where the time is fast and where the trips are frequent than it does where the time is slow and the trips are infrequent. They had not very much money, that is in proof, too. Boone had to go out because they had not money even to stock the routes they got. They were astonished at getting the number of routes they did. They got one hundred and thirty-four routes. They got more than they could handle. They required money, and in order to get that money Boone went out and Vaile got into this copartnership. Where is there one scintilla of proof, up to the time I am now speaking of, that any such thing as a conspiracy existed between any of these parties? It is not in the record. It has not been produced. It is a chimera evolved from the fertile imagination of the counsel for the prosecution, and has no existence anywhere else upon the habitable globe.

Mr. MERRICK. If your honor please, Mr. Carpenter is now about to pass to a new topic, and I call your attention to the fact that the hour for adjournment has about arrived.

The COURT. We will adjourn until to-morrow morning.

At this point (2 o'clock and 57 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

TUESDAY, AUGUST 15, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. CARPENTER. [Resuming.] If the court please, and gentlemen of the jury, I shall proceed now to lay before you in as compact form as I can the evidence upon each of these routes authorizing the additional trips ordered by the department, and the expedition of time. Before I commence upon that subject I desire to say one word in regard to the law and the contract made between the department and the contractor. We have heard a great deal during this trial in regard to the extravagance of the payment for additional trips and increase of expedition. There has been no end of the complaint in regard to giving us, for instance, fifteen or twenty thousand dollars, when it was in evidence by a subcontract on file in the department that the subcontractor was not getting more than one-half or two-thirds as much as the contractor was.

Now, gentlemen, the law fixes the rate of pay for additional trips, and it fixes the rate for increase. There has been some misunderstanding about these terms. The law uses the term additional trips when more trips are put on a route, and it uses the term increase when the time is shortened, and in the various petitions that have been filed and introduced in evidence, I suppose nineteen out of twenty of them ask for increase, and that means, according to the law, shortening of time, and not trips at all. Whenever more trips are put upon a route, that is termed by the law and in the contract additional trips. Now, this contract provides for it, and the law fully authorizes it. The contract is in evidence, spread at large upon this record, and was read to this jury by Mr. Bliss. The law provides that when additional trips are ordered by the Postmaster-General the pay for those trips shall be pro rata. That is to say, if \$1,000 is paid for one trip a week, and two additional trips are added, the pay is \$3,000. The Postmaster-General has no discretion in the matter. The contract fixes the price. It is a pro rata price according to the trips, and just so if the trips are decreased, the pay is decreased in the same proportion, and the law provides, and this contract provides, that in case the route is expedited, and the number of men and animals is increased in consequence of that expedition, the pay shall be pro rata. That is the contract under which every one of these routes, and every route in the United States, is run. So the Postmaster-General had no choice upon that subject. If he expedited the route at all it was pro rata according to the number of men and animals, if the proof before him showed it was necessary, in excess of the number of men and animals upon a slower time. Undoubtedly the Government, like anybody else, may make a contract for less if the contractor will submit to it, and in cases where he did make such a proposition—in some of these cases—the expedition was for less. But the Government have no right to complain, and it is disingenuous on the part of the counsel for the Government to pretend in every one of these cases that the Government should have got this carried at the lowest possible rate. The contractor was the person to receive the expedition. He was the only person who could do it, and his contract provided that the pay should be pro rata for the additional trips. So much for that objection.

Again. It has been said, gentlemen, and insisted upon, that there was great extravagance in regard to these routes; that these routes in the West were immensely extravagant; that there was a great deal more paid than we ought to have had, and when we undertook to introduce proof to show that they were not extravagant, to show the price of hay and grain and labor, to show that the routes as let were not extravagant in price, the gentlemen objected, and his honor sustained them and put us in this position. They charge us with being extravagant. We offered to prove that we were not. They said we should not, and the court sustained their position. I know it looks extravagant to see a route expedited as some of these routes were, but, gentlemen, if you think for a moment, there is nothing extravagant about it.

Now, let us take an illustration that is close at home. I want to go to Baltimore by horse and buggy, and I have a whole day to go in.—It is forty miles. I can take a good horse and jog along and get there at night. But suppose I want to go there in four hours by that same conveyance. How many horses does it take me then? I go in one day with myself and one horse and a buggy, or I can ride it on horseback. But if I want to go in four hours by the same conveyance it requires three additional men and seven additional horses. It is forty miles.

You have a pair of horses and you drive them ten miles an hour, and you have to have the next pair ready to hitch in in making that sort of time. You can make ten miles with two horses, twenty with four, thirty with six, and forty with eight. You have to have three men at the middle station to take care of your horses. There it is, a plain illustration right at home.

But it is said that so much speed is unnecessary. Gentlemen, this is getting to be a fast country, and the West is the fastest part of it. They do not put up with anything slow there, and if anybody wants to go slow, he had better not go to the West.

I propose to take up these routes and go through them, giving in some cases a brief history from the proof and the geographical section of the country, and to go through it succinctly and as rapidly as I can. I will take first

ROUTE 38145, OJO CALIENTE TO ANIMAS CITY.

This route has been the subject of the most severe animadversions. A letter of Senator Dorsey's was introduced here in regard to Brady increasing the route from Garland to Santa Fé, and I want to read the letter:

UNITED STATES SENATE CHAMBER,
Washington, D. C., June 10, 1878.

HON. T. J. BRADY,

Second Assistant Postmaster-General:

SIR: In consequence of the extension of the Denver and Rio Grande Railroad, it will become necessary to increase the mail service from the terminus of that railroad south of Fort Garland, Colorado, to Santa Fé, New Mexico, to 7 times a week with fast schedule. This will give the people of New Mexico and Arizona their mail ten or 12 hours quicker than they get it now.

I write this to call attention to the fact that the route from Fort Garland by Taos to Santa Fé is on the east side of the Rio Grande River, which, for upwards of 100 miles, cuts through an enormously deep and impassable cañon. The railroad runs on the west side of the river, and there is and can be no connection between the line of railroad and the Fort Garland and Santa Fé mail route. The route which connects with the railroad is the Garland, Conejos and Ojo Caliente route. This is the one to be increased, and to which I call your special attention, and ask that you examine your maps before action is taken.

The route from Garland via Taos cannot be moved to the west side of the Rio Grande, as it supplies a number of local offices, including Taos, and as there is another route already in operation connecting directly with the railroad which should be increased.

I send you a diagram received from parties in Santa Fé.

Very respectfully,

S. W. DORSEY.

Now, gentlemen, to give an understanding of the physical structure of that country, I wish to point out that the mail for New Mexico, and especially to Santa Fé and the Lower Rio Grande, went via Trinidad down to Las Vegas on the east side of the mountain to Santa Fé, a distance of two hundred and thirty-six miles. The Rio Grande Railway crossed to the west side of the mountains at La Veta Pass and to the west of the Rio Grande River at Alamosa. That reduced the distance from two hundred and thirty-six miles to about one hundred and twenty miles. The civil and military officers of the Territory and a large number of citizens wrote to Senator Dorsey urging him to get a daily mail route established from the end of the Rio Grande Railroad to Santa Fé, by which means the business men of Santa Fé and the government officials could leave that city in the morning at 5 o'clock and catch the train the same evening. In consequence of these applications, and from

his personal knowledge of the facts in regard to the country, Senator Dorsey wrote a letter to the Post-Office Department, which I have already read.

His brother, John W. Dorsey, had a large proportion of this route proposed to be so increased, but instead, however, of increasing the route of John W. Dorsey in consequence of the letter written by Senator Dorsey, General Brady discontinued that part of John W. Dorsey's route between Garland and Ojo Caliente, and established a new route, which was let to Barlow & Sanderson, who run a daily line of stages there until the railway was completed to the mouth of the Chama River. Now, the route from Ojo Caliente to Parrott City, as the petitions and letters and witness called here by the Government show, became very important on account of the wonderful development of the mining interests in that region. It was expedited and made three trips a week instead of one. It has been shown here in evidence that even on three trips a week the mail was so enormous that at times it took several horses to carry it. It has also been shown that over the line of this mail route the Denver and Rio Grand Railway has been constructed.

A city has sprung up on the line of the route known as Durango, where there was not a soul living when the route was established, which now has a large population and business, and the whole country from one end of the route to the other is teeming with industry and progress. I did not suppose that any reasonable man would question the importance of a daily mail over a route which was afterwards taken up for the construction of a railway at an enormous expense. If the mail had not been needed no railway would have been built. If the people were not there their capitalists would not spend enormous sums to build a railroad into a wilderness.

Now, gentlemen, the next proof that has been introduced in this case upon this subject is a letter by the United States district attorney for the district of New Mexico:

SANTA FÉ, NEW MEXICO, April 24, 1879.

Hon. T. J. BRADY,

Second Assistant Postmaster-General:

SIR: I respectfully beg to call your attention to the fact that Southwestern Colorado and Northwestern New Mexico have a large population which is being rapidly augmented by immigration into the mining districts of that country, and that in consequence of its rapid settlement, important towns are springing up along the Animas, San Juan, and other rivers which drain that prosperous section. Among these points are the important towns of Pierra Amarilla, Animas City, and the new and important military post known as Fort Lewis, at Pagosa Springs. Our only means of communication with these points is by the weekly and tedious service supplied from your department, between Ojo Caliente, in this Territory, and Parrott City, Colorado, unless we avail ourselves of the circuitous postal service supplied from Alamosa to Pagosa, which is impracticably roundabout. It would greatly promote needed rapid communication between this city and Southwestern Colorado if the Ojo Caliente and Parrott City mail route could be increased to a daily, with *fast time*. The establishment of such a valuable service on said route would not only meet the urgent demands of the civil and military departments of the government in Colorado and New Mexico, but would also facilitate local commercial development along said route.

Should you find it possible to increase the service, as now suggested on the route named, you would, by ordering such increase as early as possible, greatly accommodate the government and State and Territorial business of this section and of Colorado.

Hoping that you may be able to early supply the rapid service here suggested, I remain,

Very respectfully,

SIDNEY M. BARNES,
United States Attorney for District of New Mexico.

The next is a letter dated April 24, 1879, with the official direction, and is as follows :

SIR : I beg to transmit herewith a petition signed by the most prominent citizens of New Mexico, including the chief military as well as civil officers of that Territory, urging an increase of mails on the route named in the petition. As I am personally familiar with the facts stated, and know the necessity for this additional service, I simply write this to add my testimony to theirs.

Yours, truly,

S. W. DORSEY.

Now, gentlemen of the jury, this letter has been commented upon ; and what does this letter prove ? That Brady and Dorsey were conspirators ? That Dorsey was writing letters to Brady, sending him petitions from other people, and personally hurting this service when he was a private citizen and when he was interested in this route, indicating in any way any interest of his—does it show that he and Brady were conspiring, or does it show what the simple fact was, that he got the service he had and put in the proof that he was entitled to it.

Now, on page 815 :

Hon. T. J. BRADY,

Second Assistant Postmaster-General :

The undersigned, citizens of Santa Fé and vicinity, most earnestly recommend that the mail service on the route from Ojo Caliente to Parrott City be increased to a daily, and the speed increased to four miles an hour.

Northwestern New Mexico and the southern part of Colorado are exclusively supplied by this route, and the country now has a large population which is being rapidly added to by immigration. This route will be of great service to the people of that section, and indirectly of the whole business community of this Territory and Colorado.

We urgently ask that this increase be ordered at once, and will humbly pray, &c.

That is signed by two sheets of petitioners who give their names and their business.

You will recollect, gentlemen of the jury, that there has been a great deal of talk. This is the route upon which Anthony Joseph was the subcontractor. There has been a great deal of talk that the route could not be run in fifty hours. The route was one hundred and eighty-one miles long, I think. I do not recollect the exact distance, but somewhere from one hundred and seventy to one hundred and eighty miles long. There has been a great deal of talk and a great deal of comment to show that this route could not be run in fifty hours. Now, if it had been two hundred miles long, with a schedule of four miles an hour, it would have been exactly fifty hours schedule. The schedule made here was a fraction more than three and a half miles an hour. Now, here are all these prominent citizens living in Santa Fé, and having business upon this route, urging it, and asking that the speed be increased to four miles an hour.

On page 816 :

SANTA FÉ, NEW MEXICO,
April 18, 1879.

Hon. T. J. BRADY.

Second Assistant P. M. General, Washington, D. C. :

SIR : I signed a petition to-day asking an increase of service on the mail route from Ojo Caliente, N. M., to Parrott City, Colorado.

In addition to the reasons given in said petition, I desire to call your attention to the following facts and causes why the service should be increased to daily :

An appropriation has been made of \$30,000 for the purpose of building a military post at Pagosa Springs, Colorado (Fort Lewis), and is now even a post of considerable consequence ; its importance will be increased in the near future. This post of Fort Lewis is a part of this military district, with headquarters at Santa Fé. At present it

takes two weeks, usually three, to communicate and receive answer, when with a daily mail, with speed increased, it should take but four days. The commanding general, Edward Hatch, and chief quartermaster, Major Dana, signed the petition very cheerfully, having been annoyed so long by the vexatious delays of slow mails in important communications.

One result of the establishing of a permanent post at Fort Lewis has been to cause a large increase of population in its vicinity, and the necessity for rapid communication has increased with equal rapidity.

Very respectfully, your obedient serv't,

ED. WEBSTER.

On page 817 :

HEADQUARTERS, DISTRICT OF NEW MEXICO,
Santa Fé, N. M., April 17th, 1879.

MY DEAR GENERAL: I shall be thankful for a daily line to Pagosa. There are large settlements west of the new Fort Lewis, which it will benefit greatly. If the petition going from here will have any influence, it has signers enough to insure it.

Yours, truly,

EDWARD HATCH.

General S. W. DORSEY,
Washington, D. C.

On the same page :

SECRETARY'S OFFICE, TERRITORY OF NEW MEXICO,
Santa Fé, N. M., April 15th, 1879.

The honorable the POSTMASTER-GENERAL:

SIR: In view of the rapid and increasing settlement of Northwestern New Mexico, and Southwestern Colorado, with important mineral and agricultural interests developed and developing, I heartily concur in the efforts being made to establish daily mail service between Ojo Caliente, New Mexico, via Pagosa Springs, to Parrott City, Colorado.

I have the honor to be, very respectfully,

W. G. RITCH.

Here is a letter from a man in Colorado who knows more about it than any man in it—the Hon. J. B. Chaffee, who represented that State so long in the United States Senate, and with so much ability:

NEW YORK, *April 14th, 1879.*

Hon. D. M. KEY,
Postmaster-General, Washington, D. C.:

DEAR SIR: Some time during the winter I indorsed several petitions asking for increase of mail service from Parrott City to Ojo Caliente to three times a week, and with a faster schedule.

I learn this increase has not yet been made, and I write again to urge you to make the order for it.

Hoping that you will consider this at once,

I am, truly, yours,

J. B. CHAFFEE.

On the same page a petition :

To the Hon. D. M. KEY,
Postmaster-General :

SIR: We, the undersigned, citizens of Ojo Caliente, N. M., and vicinity, supplied by mail route No. 38145, from Ojo Caliente to Parrott City, Col., would respectfully represent that the service as now carried, viz, one time a week, is entirely inadequate to our wants in that behalf; that the country through which this route now runs is already thickly settled besides; and increasing immigration is steadily pouring into the country, and that the mail now is nearly always delayed, particularly third-class matter, in consequence of its great bulk and weight.

We would, therefore, very respectfully but most urgently request and petition you to have service on this route increased to at least three trips a week and on a shorter schedule; and we would ever pray.

Respectfully,

Signed by the citizens of that place. On the same page a letter from a distinguished jurist in that State:

COLORADO SPRINGS, COL., *April 16th*, 1879.

Hon. POSTMASTER-GENERAL,
Washington, D. C.:

SIR: In view of the rapidly developing condition of Southwestern Colorado, I would respectfully request your attention to the subject of increasing the service on the route from Parrott City via Pagosa Springs, Colorado, to Ojo Caliente, N. M. This country is filling up very rapidly, and daily service is really due those people, and I respectfully suggest a daily mail on the routes named.

Respectfully,

THOMAS M. BOWEN,
Judge 4th District.

And on these numerous petitions that were sent forward there was this indorsement:

We respectfully recommend the increase of service herein prayed for.

H. M. TELLER.
N. P. HILL.

Now, then, gentlemen, this is the route about which perhaps more has been said than any other out of all the routes in this indictment. This is the route upon which Jesus Hernandez, the postmaster, made so many complaints, and said that the mail could not be carried in that time. This is the route where there was a complaint that there were no bridges, and they had to go higher up the river to cross when there was a freshet, notwithstanding the provisions of the postal laws and postal regulations that want of bridges and communications of that sort have nothing to do with it. The contractor looks out for that. And this is the route upon which Mr. Anthony Joseph was here upon the stand for a long time and testified that the mail could not be carried. Why? Because he only ran part of the time. He did not run in the night at all, and he did not have horses enough to run at any time. He was fined, and fined repeatedly, because he did not have sufficient horses to carry the mail, and because he would not carry it at night.

Now, gentlemen, the route could have been carried in that time. These citizens who petition for this route, these men who write these letters, who are to be believed in the case, say that it could. Is it to be said that such men as Chaffee and Teller and Hill—I do not mention them because of their official positions, but I mention them specifically because this jury knows who those men are—and such other men as General Hatch, and the men that signed these petitions, the business men of that community, are not to be believed. Which is the best proof of the time in which that mail could be carried? This testimony—for it is testimony, and it is in this case as testimony—or the statement of a disappointed contractor?

Mr. WILSON: Subcontractor.

Mr. CARPENTER. Yes; subcontractor. And that is the trouble with nearly all the witnesses that have been here. They took a subcontract. They did not put men and horses on the route to run the mail in the time prescribed by the regulation. They were fined. They lost money because they did not perform the service adequately. They were angry about it, and then they come here and testify that the mail could not have been carried over the route anyway. The records of the department show that it has been carried over the route from the time that Joseph gave it up, or from the time that Jaramilla gave it up until this contract expired. There was no trouble when Barlow & Sander-

son got hold of the contract. When they became the subcontractors on the route there was no trouble about the mail being carried. Tell me you cannot carry the mail one hundred and fifty miles about three and a half miles an hour. The thing is preposterous and ridiculous. To be sure you would not be able to do it with one man and one horse. You have to have horses and stations enough to do it, and then there is no trouble about it. Who were the men who signed these requests, these postmasters and the subcontractor Joseph? Why, they are Mexicans, in with Joseph. He wanted a longer schedule; he wanted easier time and to get the same pay, and these fellows were trying to help him. How are they to be believed instead of men of the highest character and of the highest position in this country, men of integrity and truth, that any man on that jury would take their simple statement, whether they were on oath or not, as true in regard to any fact to which they might testify? Are these men to be believed or are the men to be believed who come here and make such a bad face because in point of fact they failed to perform a service that they had contracted to perform?

ROUTE 40104, PIOCHE TO MINERAL PARK.

The next route, gentlemen, to which I will call your attention is route 40104, Pioche to Mineral Park. This is another one of the best abused routes in the whole concern.

Pioche is in Southern Nevada, directly north of Mineral Park in Arizona, and this line is the only connecting route between Utah, Nevada, the Union and Central Pacific Railroad and the Southern Pacific Railroad. Coming from the Central on the north to Pioche there were two daily lines of mail, coming from the Southern Pacific on the south, or from the Fort Worth and Fort Yuma stage line, there were two mails, one daily and one tri-weekly, to Mineral Park. The route between Pioche to Mineral Park stood between these daily lines from the north and the south, it was the middle link, and was increased for the purpose, and for the sole purpose, to make a harmonious daily line from the Central to the Southern Pacific Railroad down through the heart of Nevada and Arizona. Referring to the map introduced in evidence you will see the the post routes coming into Pioche from the north and those coming into Mineral Park from the south make this route important and necessary.

Now, another feature of the Pioche route. A great deal has been said in the evidence, or pretended evidence, and the newspapers, about the enormous profits made by the contractor on this route. The subcontractor, Mr. Jennings, failed to carry the service on the time ordered by the department, and the contractors consequently were fined—as I stated to you yesterday, gentlemen, I say again to you in this connection—\$34,191.80, the whole pay during the time that these fines were imposed and deductions made—for there were both fines and deductions—was only \$50,000, leaving it at about \$15,000 for carrying that mail over that route for two years. These fines and deductions still remain upon the books of the Post-Office Department unremitted. When the Second Assistant Postmaster-General ascertained that this service was not being carried upon schedule time he reduced it to one trip a week without one month's extra pay. That is another capital specimen of proof tending to show that we were in partnership with General Brady. He was so much vexed that this service was not better performed by the subcontractor that he reduced the service on the route to one trip a week without giving us a month's extra pay. In that case he made an illegal order. He had no right to refuse us the month's extra pay. That month's extra

pay is allowed on every contract where a route is discontinued or where the number of trips is reduced or where the schedule time is increased. It is the law of the land. When you make a contract with the Government to carry the mail from the 1st of July, you make it, for instance, in March, and you prepare to carry the mail. Under the terms of the contract the Postmaster-General may cut off your whole service, which may be a loss to you of thousands of dollars, and all you can get is one month's extra pay. You are entitled to it whether the service has been put on or not. It is in your contract. From the date when your contract is signed, any alteration of that contract by shortening a route, by abolishing trips or by decreasing expedition gives you a right to one month's extra pay by the law. The Supreme Court has so decided. They decided it in a case of great hardship where a man had lost a great deal of money. The Supreme Court said that was the contract and the extra pay was liquidated damages, and he had the right to that extra pay from the moment the contract was signed. General Brady did not allow it to us, and that is the only illegal order that I know of that has been proved in these whole proceedings and that was against us, against one of his co-conspirators, as the gentlemen for the prosecution choose to term us. A fine partner, to discontinue trips and not even pay us what the law gives us.

This route was afterward increased to three trips a week. The expedition, and two additional trips—you will please bear this in mind, gentlemen of the jury—was made months before Senator Dorsey had anything to do with this route, and before it was turned over to him. This expedition was made on the third day of December, 1878, and Senator Dorsey's connection with the route did not commence until the 13th of April, 1879. It was increased upon petition, and upon letters, and upon the urgent request of the people living along the line of the route to connect these two great lines of railway, one running to the north and the other running to the south. He had nothing to do with this increase, and never got a letter or a petition for the increase. The route was subsequently transferred to Monroe Salisbury, who had the connecting routes, and Dorsey never had anything to do with it afterwards. No complaint has been made against Mr. Salisbury in regard to this or any other of his numerous expedited routes.

I will now show you, gentlemen of the jury, how the additional trips came to be put on, and how the route came to be expedited long before we had anything to do with it. I read from pages 1305 and 1306:

PRESCOTT, A. T., Oct. 21st, 1878.

HON. THOS. BRADY,
Second Asst. P. M. General, Washington, D. C.:

SIR: I would respectfully recommend that the service on the United States mail route No. 40104, from Mineral Park, Arizona Territory, to Pioche, Nevada, be increased from one time a week to twice a week, so as to give increased mail facilities to the citizens supplied with mail on this route, and I hereby indorse any application of the citizens for increased mail service on this route.

I am, very respectfully, yours, &c.,

H. S. STEVENS,
Delegate.

HON. THOS. BRADY,
Second Asst. P. M. General, Washington, D. C.:

SIR: I would respectfully recommend that the service on route 40104, from Mineral Park, Arizona Territory, to Pioche, Nevada, be expedited, so as the running time shall be 60 hours in lieu of 84 hours, the present running time; and would hereby indorse any petition of the citizens on said route for expediting the service on said route.

I am, very respectfully, yours, &c.,

H. S. STEVENS,
Delegate.

Here is a letter from a gentleman that we all know something about, a pioneer in the West, a man who has been prominent in civil and in military positions in the country. He was the governor of Arizona at that time:

TERRITORY OF ARIZONA,
EXECUTIVE DEPARTMENT,
Prescott, Arizona, October 21st, 1878.

Hon. General KEY,
Postmaster-General:

SIR: I learn that an application is about being made to increase the service on the mail route between Mineral Park, in this Territory, and Pioche, Nevada, from once to twice a week, and that it is considered also very desirable to reduce the present running time from 85 to 60 hours.

The increased facilities asked for would be very beneficial to our people in that section, and are very much needed by them, and I earnestly recommend this change to the favorable consideration of the department.

I use this occasion to thank you for the advantages conferred on this place by the recent improvement on the route to Santa Fé.

J. C. FRÉMONT,
Governor, &c.

Now I read from page 1307:

Hon. THOS. J. BRADY,
Second Asst. P. M. General:

SIR: The Utah Southern Railroad will in a short time be completed to Frisco. From that point to Pioche, Nevada, there is already established daily mail service, which will be rapidly taken up by our advancing railroad. From Pioche to Prescott there is running a tri-weekly mail service on slow schedule. It is important that emigrants and capital from the East should have a more direct line of intercourse with the richly developing Territory of Arizona than the present circuitous route by California and Southern Pacific Railroad. I therefore respectfully ask that the service between Pioche and Prescott be increased to a daily, thus giving us a continuous daily service from the U. P. R. R. to Southern P. R. R. at Maricopa Wells.

It is superfluous to add that the States and Territories yielding the precious metals would to-day be half a wilderness, except for the intercommunication established by the P. O. Department.

Respectfully,

SIDNEY DILLON,
Pres't U. P.

The States and Territories that are furnishing the precious metals that have kept this country from bankruptcy, says this gentleman, a prominent business man, president of a great corporation, would be half a wilderness but for the communications established by the Post-Office Department. Is not that statement worth a thousand witnesses who come here to grumble because they got fined as subcontractors, or did not get money enough under their contracts?

Gentlemen, I am not reading this testimony to show that General Brady was justified in making these orders. There is not a man on that jury, or in the world, who had heard or read of this case, that does not believe the evidence before him fully justified him in making them. My point is to show that when such witnesses say a route is necessary, when they say it is for the public good, when they say the public service requires it, and when they say the local business requires it, that it justifies us in asking for additional trips and for increase of expedition; although, in that particular case, we did not ask for it. It was done before we had any interest in the route. But, if we had procured it, there are communications from those men, there is testimony from the foremost men in that region of country, stating that it was required for the public service and for private industries; and I mention it to show that we were justified in asking it. Is there any

man on that jury who will say that we were not justified in asking for additional trips and an increase of expedition when such men as Governor Frémont, and such men as Sidney Dillon say it was necessary? Must all the rest of the world be false and some particular witnesses upon this stand be truthful? If you had received those letters, and if you were an officer, would you have had any doubt upon the subject? Can you blame us? Is it a crime for a man if he has a contract to make it a better one, provided he does not use illegal means to do it? These gentlemen talk as if this thing of carrying the mail was a mere matter of patriotism. If it was put upon that ground you would never get a letter. Does anybody suppose that these mail contractors take their enormous risks without expecting to make money? Does anybody take a contract with the Government without expecting to make money? For that matter, does any man take a contract with anybody else without expecting to make money? A man puts in his labor, his time, his talent, and his capital. Do these gentlemen expect him to throw in his labor, his time, and his talent and simply get his capital back? It has been testified here, furthermore, gentlemen, that most of the routes are let to these large contractors, who sublet a large quantity of them. The Government gets its mails carried cheaper that way. There has recently been a provision introduced into the law by which nobody can bid on a route unless he agrees to carry it himself. There is to be no subcontracting about it. By next year you will see that Congress will repeal that law. They will find out that the postal service will cost about as much again as it does now. I say if we had a contract from a given point to a given point, and the public service needed it, and the people wanted it, it was right for us to ask for additional trips, and that the time be expedited. In other words, I announce in the hearing of the gentlemen, without the slightest trepidation, that we had a right to make as good a contract with the Government as we could by legal and honest means. It is all bosh, gentlemen, about cheating the Government in this matter.

NO. 38156, FROM SILVERTON TO PARROTT CITY.

The next route which I will call to your attention is number 38156, from Silverton to Parrott City. This route is in Colorado, passing along the Animas River north and south. During a large part of the year this is the only means of communication open. Silverton is one of the most important mining towns in Colorado, and it is connected at Animas City with a route from Ojo Caliente to Animas City, which supplies a large population, including Silverton. Within the last year the Denver and Rio Grande Railroad has constructed its line immediately over this route. In consequence of that road having been built, this route has been discontinued. That fact alone is a sufficient answer to all the talk about the extravagance of putting on such mail service. If there were but five letters a day passing over a line in the western country, are not the people to whom those letters are addressed as much entitled to get them swiftly and frequently as the gentlemen sitting in their parlors in New York and Boston in their slippers and dressing-gowns are to have their mail laid on their tables several times every day?

Now, gentlemen, there is another thing connected with this question. There has been a good deal of testimony in regard to some of these routes to the effect that there were but few letters passing over them. Gentlemen, one letter in that country represents more in a business point of view than fifty do in the East. That is a country where, as I

shall show you before I conclude, the precious metals come in large quantities. Very few men own mines, and those mines furnish an immense quantity of gold and silver bullion, and one letter of one of the men who is superintending a mine represents more wealth and more business than one hundred letters in the East. As I have said, suppose there were but twenty men, and they had left their homes in the East and gone out into the western country, with all its privations and all its dangers. They go there to open up these mines of wealth, to supply the treasury of this country, and to prevent the country from becoming bankrupt, as it would inevitably have been but for the discovery of the precious metals in these Western States. And forsooth, because there are but few of them, they must not have letters, or if they have them they must have them only once in two or three weeks, and be forever getting them. No, gentlemen, the man who takes his life and his fortune in his hand and goes into this western country is entitled to as good treatment, to as rapid mails, to as much consideration from the Post-Office Department as men in Washington or New York. I scorn and condemn this whole humbug of productiveness. At most it is one of the circumstances and only one. The Postmaster-General by law is directed to consider productiveness and other circumstances. Productiveness is one circumstance, and the other circumstances are to be considered by him, too; and these gentlemen have no right to sit here getting their mails half a dozen times a day and then tell the miner in the far West and the business man in the far West that because there is a small population where he is, it does not matter when he gets his mail. Upon that very subject of productiveness, although I do not think it cuts much figure in the case, and I do not intend to admit that it is anything more than one circumstance, I will call the attention of the learned counsel for the prosecution to a fact that is disclosed by the report to Congress of the Postmaster-General in 1879, and that little fact is that the city of Denver and the city of Leadville paid more money into the Post-Office Department than the whole State of West Virginia, more than the whole State of Florida, and more than half as much as the whole State of Georgia. What does that prove? Denver is the entrepot to all this region of country. It is the capital of the State, and it is the commercial capital of the whole country running up into Wyoming, running down into Colorado, and running off to New Mexico. If you look to productiveness alone those two offices give more than the States I have referred to. Nor is that all, gentlemen of the jury. You would suppose from the manner in which the gentlemen speak of it that they were very much concerned because the mails did not pay, and the newspapers are very much concerned for the same reason. They consider the star routes as the sole cause why the mail is not self-sustaining. I will tell you why the mail is not self-sustaining. You have only to look at the laws of Congress. You have only to look at the statistics in regard to newspapers. The mails are not self-sustaining because the law allows a newspaper proprietor to mail his newspapers to subscribers for precisely one-quarter of what is charged you when you mail the same matter. It charges him two cents a pound for his newspapers and it charges you eight cents a pound. This very difference between what the law requires to be paid by the private citizen and the publisher takes \$20,000,000 a year out of the pocket of the Post-Office Department; and yet these people, who have all the benefits of the law, are hounding us every day with their vilification and abuse. The same is true and about in the same proportion in regard to the lower grades of mail matter, merchandise, and everything of that sort that you send by the pound through the mails. It is not the letters, gentle-

men; the letters are self-sustaining now. It is this second class and lower grade matter that make the Post-Office Department require additional appropriations every year to support it. Still it does not require as much as some other departments. What reason is there why the Post-Office Department should pay any more than that the War Department or the Navy Department should pay their way? Mr. Blackburn testified the other day that an appropriation had been made for the Post-Office Department for the year 1878 of \$5,900,000, and he said it was all that the estimate was for the service. Afterwards, in this case that was before the subcommittee of which he was chairman, they made another appropriation of \$1,100,000, making a total of \$7,000,000. Now, gentlemen, that was the entire cost to the Government of the Post-Office Department for that year. All the rest it paid itself. That very year the War Department cost this Government \$40,600,000 and did not pay a cent. That very year the Navy Department cost the Government \$15,000,000, and, as the history of that department shows, did nothing under heaven that was of the slightest use to this country, protected no citizen in any foreign port, protected no one on earth; only paid the proper salaries to the honorable Secretary of the Navy and the subordinate officers and persons connected with its administration. There was \$15,000,000, and here is a great outcry against paying \$7,000,000 for the Post-Office Department. Why, the appropriation for the Indians was as much as it was for the Post-Office Department. The appropriation for pensions that year was \$50,000,000, and this year it is \$100,000,000. What does that pay back to the Government? I am not complaining about pensions. I say there is no more honest debt to pay. There is no more sacred debt to pay than pensions to soldiers who have incurred disease, or to the heirs of those who lost their lives in the service of the country. Why should they harp forever upon the fact that the Post-Office Department does not pay? Sir, what does pay under the Government? But we do pay. We not only pay in the precious metals that I shall refer to hereafter, but we pay in this: We buy our hay, our grain, our hats, our boots, our shoes, our clothing, and our blankets, upon which the manufacturer makes a profit of 90 per cent., the tariff on them amounting to a prohibition—these woolen blankets that the miners are all compelled to have—we buy them from the East and we pay well for them.

On the same route of which I have been speaking is the following letter to be found, on page 952:

Hon. T. J. BRADY,

Second Assist. P. M. General:

DEAR SIR: Being one who, with his friends, have largely interested themselves in the mining interests of Colorado, I most respectfully urge upon you the importance of increased mail facilities from Silverton to Parrott City, and that the same be increased by making a *daily* and *fast* line between these two points. The population around and between these two points is rapidly increasing, and will continue to do so for the coming year.

By increasing the mail service as suggested you will confer a great favor on the people now there, as it will upon the many thousands yet to be there the present season.

Very respectfully, yours,

A. McDONALD.

An ex-Senator of the United States.

Also the following:

WASHINGTON, D. C., May 5, 1879.

Hon. D. M. KEY,

P. M. General:

SIR: I have the honor to transmit herewith letter from the State officers of Colorado, asking that the service on mail route from Silverton to Parrott City be increased to a *daily*, and on faster time.

This request is reasonable, and the order should be at once made to that effect, and I hope you will grant the request.

Very respectfully,

JAMES B. BELFORD.

Then and at present member of Congress from Colorado.

DENVER, COLORADO, April 28, 1879.

Hon. D. M. KEY,

Postmaster-General:

SIR: The undersigned, the State officers of Colorado, respectfully represent that the mining and agricultural interests of Southwestern Colorado are developing with extraordinary rapidity, and with this increasing immigration the necessity for better mail facilities is seriously felt.

We therefore have the honor to ask that the mail service from Silverton to Parrott City be increased to a daily line, and the route from Parrott City to Ojo Caliente, via Pagosa Springs, be increased to 3 trips a week, and we also ask that the time be made faster than it now is.

Hoping this will receive your early consideration, we have the honor to be,

FREDERICK W. PITKIN,

Governor of Colorado.

M. H. MELDRUM,

Secretary of State.

JOSEPH C. SHATTUCK,

Superintendent Public Inst.

ROBERT G. HOWELL,

Secretary State Board of Land Commiss.

HENRY C. THATCHER,

Chief Justice of Colorado.

WILLIAM F. STONE,

Associate Justice Sup. C.

This petition is indorsed:

This service is much needed, and I hope the petition of the petitioners will be granted.

H. M. TELLER.

Now on page 953:

CHICAGO, ILL., April 26, 1879.

Hon. D. M. KEY,

Postmaster-General, U. S. A.:

SIR: I have the honor to request that the mail service on the route from Silverton to Parrott City, Colorado, be made a daily service, and fast time. The vast interests of this country and the unprecedented influx of people from all quarters of our country render speedy and frequent communication with the outer world imperative and of great benefit to citizens from all sections of the country, and moneys spent here cannot be said to accrue to the benefit of a section, but to our whole country.

Very respectfully, yours,

A. E. REYNOLDS.

NEW YORK, April 23rd, 1879.

Hon. T. J. BRADY,

Second Assistant P. M. General, Washington, D. C.:

SIR: I have information that the people of Silverton, Parrott City, and Animas City have petitioned asking for daily mail service between the points named.

I urgently recommend that this be done, with a fast schedule.

The people of this remote part of Colorado are entitled to some consideration.

Yours, truly,

J. B. CHAFFEE.

Now, gentlemen, whom do you think the more entitled to belief, the men who have signed those petitions, the men who have written those letters, or the gentleman who, as his honor said, did not spell his name in the right way, or "that way?" How does such testimony, such trash as has been introduced here, impair the strength and the force and the testimony of these gentlemen? Remember this is testimony in the case, and remember another thing, that a man who will not tell the truth in a letter, will lie when he is under oath if he thinks he can escape the penitentiary. I have no faith in the omnipotent power of an oath to

put truth into a liar. The thing cannot be done.. A gentleman who speaks upon his honor will tell the truth as well as he would swear to it.

NO. 40113, TRES ALAMOS TO CLIFTON.

The next route to which I call your attention, is the route from Tres Alamos to Clifton. The route begins at the Southern Pacific Railroad, formerly the great mail line from Fort Worth to Yuma, and supplies the military camps as well as the Apache Indian Agency. It is a very important route, and has contributed largely to prevent outbreaks of the Apache Indians. General Sherman stated on the stand that every station on this route was a picket-line for the Army, and its importance and necessity could not be overestimated. Recent events have shown that the Apaches are the most vicious of all the Indian tribes. General Sherman said that the day after he passed over the line of this route one driver and one station-keeper were murdered by them. There is no other possible way by which Camp Grant, Camp Thomas, Camp Goodwin, the San Carlos Agency, and Clifton can receive their mails except by this route, and these camps embrace a large portion of the Army of the southwest.

Page 1499:

CLIFTON ARIZONA.

HON. POSTMASTER-GENERAL,
Washington, D. C.:

SIR: The undersigned citizens of Clifton and vicinity, supplied by the mail route from Tres Alamos to this place, ask leave to request that an increase of mail facilities, with faster time, be ordered.

There is a daily mail both ways (east and west) to Tres Alamos, and as all our western mail, which is by far the largest part, comes to Tres Alamos and lies over for one week we are put to great disadvantage.

The settlement along the Gila River is very rapidly increasing, both in numbers and importance, and it does seem to us that the Government should at least give us three mails a week each way. With the wish that this be immediately considered,

We are, respectfully,

This petition is signed by two pages of petitioners in double column.
On the same page:

HON. T. J. BRADY,
Assistant P. M. G.:

The undersigned military officers of Camp Grant, Arizona, and citizens of the same place, beg most earnestly to urge that you immediately order upon the route from Tres Alamos to Clifton a daily mail with a fast schedule. We ought to have better mail facilities, and we believe if you were cognizant with all the facts you would at once order a daily service.

Hoping that you will consider this petition immediately and favorably,

We are, respectfully,

A. K. ARNOLD,
Major, Commanding Fort Gray.
B. H. CHEEON,
2nd Lt., Ch. Con'g.
M. W. STEWART, *P. M.*
WM. GEARY,
2nd Lt. 12th Inf't.
J. C. WORTHINGTON,
Ass't Surgeon, U. S. A.
E. J. THOMPSON,
Capt. 12th Inf't.
F. V. NEWMAN,
Assistant P. M.
I. C. SUPPEE,
Captain 6th Cav.
C. H. CAMPBELL,
Captain 6th Cav.
CHAS. M. BLAKE,
Chaplain, U. S. A.

And a great many others. There are four pages of petitioners besides those officers, and on the same page, to the same address:

SIR: We ask leave to present this our petition for an increase of mail from Tres Alamos to Clifton, from one trip to three times a week.

This line runs a long distance along the Gila River, and has seven offices distributed on it, including the terminals.

It supplies a large mining population which is constantly increasing, as well as the agricultural sections on the Gila River. Camp Grant is also on this route, and this is the only source of supply.

We are satisfied that if you will investigate this matter, you will order an increase, and direct the carrier to make faster time.

Hoping our petition will receive immediate action, we are, &c.

That is signed by a page of petitioners.

On page 1501:

Hon. D. M. KEY,
Postmaster-General:

We, the undersigned citizens of Santa Fé and vicinity, would respectfully represent that for years past the mining districts of Southern and Western Arizona have been largely supplied with grain, forage, &c., from the nucleus along the Rio Grande, in New Mexico, and that said supplies are becoming greater every year; that the business thus developing requires greater mail facilities between the sections named than is at present supplied; that the mail route between Clifton and Tres Alamos, Arizona, has an insufficient service for the business demands upon it.

Wherefore your petitioners would earnestly urge that a daily, or at least a tri-weekly, service be placed on said route, with *fast time*.

Fast time underscored at that.

This increase is asked because of the imperative demand for increased mail facilities along said routes on account of the settlement now being extended from the Gila River in every direction.

As in duty bound, we would ever pray, &c.

Signed by two pages of petitioners in double column. Another to the same address:

SIR: We ask leave to present this our petition for an increase of mail from Tres Alamos to Clifton from one trip to three times a week. This line runs for a long distance along the Gila River, and has seven offices distributed on it, including the terminals. It supplies a large mining population which is constantly increasing, as well as the agricultural section of the Gila River.

Camp Grant is also on this route, and is the only source of supply. We are satisfied that if you will investigate this matter you will order an increase and direct the carrier to make faster time.

And signed by two pages of petitioners. Upon the same page, and to the same address:

SIR: I have the honor to call your attention to the inadequate mail service on route 40113, from Tres Alamos to Clifton, Arizona, and to request that the service on this route be increased to at least three times a week, and on a shorter schedule. The mail over this route is supplied from the main route running west, and which is a daily mail; and it is certainly a hardship to those dependent on this route to have their mail only once a week. There are now, including the terminal offices, eight post-offices on this route, and I trust you will see the urgent necessity of ordering the increase asked for.

Very respectfully,

JOHN G. CAMPBELL,
Delegate.

And on the same page, to the same address, the following:

SIR: I would respectfully beg leave to call your attention to the needed mail facilities between New Mexico and Arizona on account of the rapid settlement of each. For years the ranches of the Rio Grande Valley have supplied Southern and Eastern Arizona with produce, and this demand is daily growing more important. The business transacted between the two Territories is so rapidly increasing as to demand in-

creased mail facilities, and my attention has been called to the inadequacy of the service on mail route between Clifton and Tres Alamos, Arizona. It is claimed that the Gila River settlements at present have a business along said route to justify a daily service, and that the present weekly is wholly inadequate to supply the wants of the settlers along the line. If it is possible for your department to increase the service on said route, and order *fast time*—

Fast time underscored—

on same, it would greatly benefit the people along the line for you to do so.

Hoping you may be able to benefit the section of country referred to by supplying increased service, with fast time on said route,

I have the honor to remain, very respectfully, your obedient servant,

SIDNEY M. BARNES,
United States Att'y for New Mexico.

In connection with this I propose now to take up the

ROUTE NO. 35051, FROM BISMARCK TO TONGUE RIVER.

As testified by Mr. Maginnis this route between Bismarck and Tongue River supplied the largest part of the country in the northwest and the military district under the command of General Miles, and shortened the distance from the end of the Northern Pacific Railroad to Fort Keogh. It is at the mouth of the Tongue River on the Yellowstone, nearly fifteen hundred miles. When the route was first established the country between these two points was occupied by hostile Indians, and so far it had never been traveled over or even explored by white men. It therefore became necessary at the very outset to build stations very close together, to keep a sufficient number of men at each station, and to protect the stock and carriers. Mr. Maginnis said when this route was first established there were but very few persons living at or about Fort Keogh and none along the route, and he said it was now thickly settled, and that travelers could have staid in a good farm house every night within a year after the establishment of the route. The Northern Pacific Railroad was long ago completed over the entire length of this route. It is fair to assume that there must be productiveness somewhere to induce the construction of this expensive and long railroad.

Now, gentlemen, you will recollect that we have had a great deal of testimony upon this route. We have had the testimony of Pennell, and we have had the testimony of other persons who were in some way or another connected with the route, and we have had the testimony of Mr. Maginnis, and of General Sherman upon the subject. I propose to show in the first place the testimony for increase of trips and expedition, and then to allude to the testimony of General Sherman and Mr. Maginnis afterwards.

On page 1206:

MILES CITY, MONTANA TERRITORY.

Hon. D. M. KEY,
Postmaster-General:

SIR: The undersigned, citizens of Montana Territory, beg leave to state that the mail service on the route between Bismarck and Tongue River is entirely inadequate for the wants of the people now supplied by said route. The Territory is now settling up very rapidly both east and west of Tongue River and one trip a week can hardly suffice. We therefore, very respectfully but urgently, request that this route be increased to three trips a week and the schedule to at least 65 hours.

Signed by fifteen or twenty petitioners of Miles City, and recommended by the Hon. Mr. Maginnis, and Mr. Miles, and others.

No. 14336—185

On page 1207:

FORT BUFORD, D. T., July 30, 1878.

Hon. J. B. KIDDER,
Vermillion, D. T.:

MY DEAR SIR: As a result of my present trip to the northwest, I learn that the mail service from Bismarck to Fort Keogh, on the Tongue River, is entirely inadequate to the present demands of the rapidly increasing population of the country west of Tongue River; and that at least three trips a week on faster time is absolutely necessary. I therefore beg you to address a letter to the P. O. Department asking that service on this route be increased from one to three trips a week, on a schedule of say 65 (sixty-five) hours.

This, I believe, will be of great service to the military posts, business men, and settlers on Tongue River and the Upper Yellowstone. Hoping that you will be able to accomplish this,

I am, very respectfully, your obed't servant,

JOHN H. CHARLES.

The foregoing is:

Respectfully referred to the Hon. Second Asst. P. M. General, and I hereby certify that Mr. Charles, the writer of the above letter, is well known to me; that he is one of the leading business men of Sioux City, and formerly its mayor; and he is perfectly reliable, and from my own knowledge of the wants of the public in this regard, I have no hesitancy in recommending the additional service asked for, and most earnestly request that it be ordered.

Aug. 2, 1878.

J. P. KIDDER, *Dakota.*

On the same page:

SAINT PAUL, MINN., July 15th, 1878.

Hon. T. J. BRADY,
Second Assistant Postmaster-General:

SIR: As a result of observations made during my present visit to the northwest, I beg leave to submit the following for your consideration:

Settlements are being rapidly and extensively made on the projected line of the Northern Pacific Rail road, and tributary territory between Bismarck, Dak. Territory, the present terminus, and Tongue River, in Montana; and west of Fort Keogh a large immigration has been and is pouring in and occupying the land. These citizens and settlers are inadequately supplied with mail facilities, as are also the military posts in that region, and that want is daily becoming more and more felt. For these reasons I venture to call your attention to the subject, and I respectfully recommend and request that the mail service on the route from Bismarck to Tongue River be increased to three (3) trips per week, each way, and that the schedule time be reduced from ninety (90) to sixty-five (65) hours.

This increase of service would be entirely reasonable, and is not only justified, but, I believe, imperatively demanded by considerations of public welfare.

I have the honor to be, very respectfully, your obedient servant,

C. B. WRIGHT.

President Northern Pacific R. R. Co.

Upon page 1208, to the same address, another letter by the same party, of the same purport; and on the same page a letter addressed to the Postmaster-General as follows:

BANK OF BISMARCK,
Bismarck, D. T., July 18, 1878.

Hon. D. M. KEY,
P. M. General, Washington, D. C.:

SIR: I desire to call your attention to the mail route between this place and Tongue River, Montana.

The country west of us is settling up rapidly, and the mail facilities are entirely inadequate to the wants of those living in that section of the country, including not only the settlers, but the military posts, where the want of more mail facilities are being felt daily. And should the mail route between this place and Tongue River be increased to three trips a week each way, it would meet a want that has become almost a necessity, and one that the parties living on the line of route earnestly beg may be extended to them. This request, in my opinion, is a just one, and a request which, if granted, will be a public welfare.

Very respectfully,

J. W. RAYMOND,
President.

On page 1209, the indorsement upon the same paper:

I earnestly but respectfully recommend the increase of service asked for in this letter of Col. Raymond's. I know personally that the statement herein made is true. Col. R. is a banker, and one of the leading men in Bismarck. Whatever he says can be relied upon.

July 28, 1878.

J. P. KIDDER.

On the same page:

BISMARCK, DAKOTA, July 23, 1878.

To the Hon. the SECOND ASSISTANT POSTMASTER-GENERAL:

SIR: I have the honor to call your attention to the personal call made on you last winter by Gen'l Miles and myself in relation to establishing a daily mail route between Miles City and Bismarck, which at that time, you may remember, received your favorable consideration.

A weekly mail (route 35051) has been let, and the service is now established from this place, but with a once-a-week mail and such a long schedule, the route will not be of much use, and will not shorten the mail time much beyond the long route via Montana.

It is now proposed to increase the service to tri-weekly, and to reduce the schedule from ninety hours to sixty-five. To make the service valuable, this should be done at once, and then the question of daily service may be postponed until another year.

I find the country is settling faster, and the need of this mail is even greater than was set forth by Gen'l Miles at the time of our call, or in the recommendations of other Army officers which have been made to you.

I hope the service may be increased, and the schedule reduced as asked for.

With great respect, your ob'd't serv't,

MARTIN MAGINNIS,
Del. from Montana.

You will remember, gentlemen, in this letter is found another item that corroborates the statement of the witness that I quoted from the record yesterday that disproves the statement of my friend that there was no service on that route until January. This letter is dated on the 23d day of July, and the statement is that the service is now established from this place, but a once-a-week mail, and this is on the 18th of July—another item of evidence to show that I was right, or rather that the record was right, and Mr. Ker was wrong.

On the same page:

LAW OFFICES OF FLANNERY & WETHERBY,
Bismarck, D. T., July 20th, 1878.

Hon. T. J. BRADY,
Second Assistant Postmaster-Gen'l:

DEAR SIR: In view of the rapid development of the country west of the Missouri River, and in the valleys of the Yellowstone and Tongue Rivers, and the large number of emigrants continually going into this country, and taking lands along the projected line of the N. P. R. R., who at present are but poorly supplied with mail facilities, I beg leave to suggest that the service on the route between Bismarck, D. T., and Fort Keogh be increased to three trips a week, and that the time be reduced from ninety to sixty-five hours, which will result in a great benefit to a large number of worthy pioneers who are doing so much to develop the western country.

Very respectfully,

GEO. P. FLANNERY.

On the same page and to the same address:

Having for some time noticed the rapid increase in the settlement of the country between this point and "Tongue River," Montana, and west of Fort Keogh, M. T., and having experienced the great necessity for better mail facilities between said points, I venture to call your attention to this subject and respectfully ask that you may, at your earliest convenience, take into consideration the advisability of increasing the mail service between Bismarck, D. T., and Tongue River, M. T., to 3 trips each way per week, and that the schedule time be reduced from 90 to 65 hours.

I have the honor to be your ob'd't serv't,

EMER N. COREY,
Clerk of Dist. Court.

On page 1210 :

POST-OFFICE, *Bismarck, D. T.*, July 19, 1878.

THOMAS J. BRADY,

Second Assistant P. M. General, Washington, D. C. :

I have the honor to call the attention of the department to the necessity for increased service on route 35051, from Bismarck to Tongue River.

The country is rapidly settling. One may start from Bismarck on foot and travel to the Custer battle-field, which have already been taken by settlers, and stop every night at the ranche of a settler. An important village has already sprung up at the mouth of the Tongue River, and much of the country not covered by military reservations has been taken for farming purposes.

Several of the most important military posts in the department can best be served by this route, and the service proposed will cost less than the War Department paid last year for carriers carrying special messages from Tongue River to telegraphic points.

The time necessary to reach Tongue River by the old route via Buford is about ten days. This can be reduced not only to the four days allowed in the Miner contract, but when the route is once established, it can and should be still further reduced to at least sixty-five hours.

I have had frequent talks with Gen. Miles in relation to this matter, and I know that he thinks the increased service proposed is very important, and I believe it will be economical on the part of the Government to grant the increase asked.

In all probability, too, the N. P. will be extended next season—work in that direction may even be done this fall—and settlements will surely push ahead of their work. Carriers have already provided for a telegraph line, which should be supplemented by direct and frequent mail communication. A military post, at least a camp, will, no doubt, be established on the Little Missouri at the point where the R. R. will end and where this route now crosses it. On looking at the matter from every possible standpoint the increased service asked for should be granted.

I am, sir, very respectfully, your obed. servant.

C. A. LOUNSBERRY, P. M.

On the same page and to the same address :

SIR: The undersigned, citizens of Montana Territory, beg leave to state that the mail service on the route between Bismarck and Tongue River is entirely inadequate to the wants of the people now supplied by said route.

The Territory is now settling very rapidly both east and west of Tongue River, and one trip a week can hardly suffice.

We therefore very respectfully but urgently request that the route be increased to three trips a week, and the schedule to at least sixty-five hours.

Signed by a page and a half of petitioners.

On the same page and to the same address :

The undersigned, representing the citizens and business men of Bismarck, Dakota Territory, beg to represent that at a recent letting contracts were made for mail service between this place and Tongue River, Montana, the same to be weekly. This service is entirely inadequate to meet the proper wants of the county lying between the terminal points, and especially to supply Tongue River and the country beyond. This route is along the proposed route of the Northern Pacific Railway, and will within a brief period of time, in our judgment, become a great thoroughfare of travel and commerce.

In the interest of the Government and of the people we ask that this service be increased to three times per week, and the speed also increased so we can reach Tongue River in sixty-five hours.

Bismarck, D. T., July 22, 1878.

Signed by Lounsberry, postmaster, by another postmaster at Fort Rice, and by ten or a dozen other petitioners.

On page 1211 to the same address :

MILES CITY, MONTANA T.

Hon. D. M. KEY,

Postmaster-Gen'l :

SIR: The undersigned, citizens of Montana Territory, beg leave to state that the mail service on the route between Bismarck and Tongue River is entirely inadequate to the wants of the people now supplied by said route.

The Territory is now settling up very rapidly both east and west of Tongue River, and one trip a week can hardly suffice.

We therefore very respectfully but urgently request that this route be increased to three trips a week, and the schedule to at least sixty-five hours.

Signed by about twenty petitioners.

And another letter requesting the service from C. A. Lounsberry, and the following:

FORT KEOGH, M. T., *July 28th, 1878.*

To the honorable the POSTMASTER-GENERAL,
Washington, D. C. :

MY DEAR SIR: I have the honor to earnestly recommend that the mail facilities between the Yellowstone Valley and the terminus of the Northern Pacific Railway be increased to mail three or six times a week. Aside from the military necessities of this district of at least a thousand troops, the settlements along the Yellowstone and its tributaries are increasing so rapidly as to require mail accommodations at least three times each week. Much of the mail matter is now carried out over the Union Pacific and then by stage through Bozeman, when the whole Territory of Montana would be benefited by the more direct and short route between Montana and Bismarck.

The agricultural, pastoral, and mineral wealth of this region is bringing into this section a large population, and, in my opinion, a much larger number of citizens would be accommodated by this line than are now benefited by the daily mail from Bismarck to the Black Hills.

I remain, sir, with great respect, very truly, yours,

NELSON A. MILES,
Col. and B't Maj. Gen'l, U. S. A., Com'd'g Dist. of Yellowstone.

And another letter from the same officer on page 1202, to the same purport, and the following on the same page:

HEADQUARTERS DEPARTMENT OF DAKOTA,
St. Paul, Minn., Dec'r 4, 1878.

Respectfully forwarded to the headquarters of the military division of the Missouri:

I strongly and earnestly recommend that the increased mail service asked for herein be granted.

The posts on the Yellowstone are of such great importance that for military reasons alone the communication with them by mail should be *frequent, regular, and certain*. Besides, these posts have very large garrisons, and the population which has clustered around them, already of importance, is constantly increasing; so that the number of persons dependent for their mails on the route in question, and the private interests involved, fully justify, in my judgment, the increase asked for.

ALFRED H. TERRY,
Brigadier-General, Commanding.

Now, on page 1213:

WAR DEPARTMENT,
Washington City, December 12, 1878.

SIR: I have the honor to transmit for your action copy of a letter from Col. Nelson A. Miles, 5th Infantry, requesting that the mail service between Bismarck, Dakota Territory, and Fort Keogh, Montana Territory, be increased to a tri-weekly or daily mail.

The General of the Army recommends a tri-weekly mail.

Very respectfully, your obedient servant,

G. W. MCCRARY,
Secretary of War.

The honorable the POSTMASTER-GENERAL.

On page 1215:

I have the honor to join the honorable J. P. Kidder, Hon. M. Maginnis, and others in recommending increase of service to daily on route from Bismarck to Tongue River. The necessity for daily service on that route is beyond question.

Respectfully,

G. G. BENNETT.

WASHINGTON, D. C., *June 11th, '79.*

MY DEAR GENERAL: The inclosed explains itself. Please file the paper with the other recommendations in the case. The increase seems to be very much needed, and

the friends of the interest are very earnest and sincere in the movement. I hope you can see it possible to determine the question favorably before July 1st. Can you let me know just how the case stands, and the chances for your favorable action?

Very truly, yours,

HENRY H. BINGHAM.

Gen'l BRADY,
Washington, D. C.

The jury will recollect how frequently the name of this person was sneered at in connection with this route. It was proved that General Bingham is a Member of Congress from Philadelphia, and that he was a member at that time and afterwards chairman of the Post-Office Committee. Therefore he was well acquainted with the post-routes throughout the country, and these especial routes being brought to his attention by the friends of those interests, he, as a member of the Post-Office Committee, as a Member of Congress and as a public servant, sends this letter to General Brady. We hear Generals Ker, Merrick, and Bliss sneering at the idea of a man from Philadelphia knowing anything about the mails in Montana.

Mr. KER. I did not sneer at General Bingham. He is a warm personal friend of mine. I never sneer at a friend.

Mr. CARPENTER. But you sneered at the idea of his knowing anything about it.

Mr. KER. No, sir; you are mistaken. I said that his was the only letter upon which the expedition was ordered.

Mr. CARPENTER. I will hunt up the record and find that you did sneer at him before we got through. The question was asked who General Bingham was, and there was talk about a man from Philadelphia knowing anything about the mails in Montana.

The COURT. That inquiry was made by the court. I was not aware that this gentleman was a Member of Congress when the letter was read. I was not aware what Bingham it was. I simply made the inquiry to be informed.

Mr. CARPENTER. Yes, sir; but long before your honor made that inquiry the gentleman had made numerous remarks upon the subject, ridiculing the idea that a man who lived in Philadelphia could know anything about a post-route in Montana or Dakota.

Mr. MERRICK. With the highest appreciation of General Bingham, I do not think a man in Philadelphia would know much about it.

Mr. CARPENTER. After hearing Mr. Ker for three days I think you are about right.

Mr. MERRICK. I do not think a man from South Carolina is likely to correct him much.

Mr. CARPENTER. If he knows anything about the case he can. I read from page 1215:

ST. PAUL, MINN., *Dec. 21st, 1878.*

To the POSTMASTER-GENERAL:

We, the undersigned, members of the Board of Trade and principal business men of the city of St. Paul, respectfully represent that the mail facilities from the terminus of the Northern Pacific R. R. at Bismarck, west to Fort Keogh and the settlements on the Yellowstone, are wholly and entirely inadequate; that there are considerable settlements in that region, and that they are increasing largely every season; that the promotion of settlements would result in a great saving to the Government by doing away with the necessity of maintaining military posts for protection.

We would further respectfully represent that the corresponding lines of communication in the southwest are supplied with rapid daily mails, while the line above referred to, which is one of the principal lines in the northwest, has only a weekly mail and slow time. We therefore earnestly join in the request of the people of the future great wheat-growing region, that the line from Bismarck to Fort Keogh be made a daily line, and that the time be reduced to 65 hours.

Now, on page 1216, to the same address:

SIR: The undersigned, representing the citizens and business men located on the Yellowstone and its tributaries in Montana, beg to represent that at a late letting contracts were made for mail service between Tongue River, Montana, and Bismarck, Dakota, for service once a week. This service is entirely inadequate to meet the proper wants of the country lying between the terminal points, but more especially to supply Tongue River and the country beyond. This route is along the proposed route of the Northern Pacific Railway, and will, within a brief period, in our judgment, become a great thoroughfare of travel and commerce.

In the interest of the Government and the people, we ask that you increase this service to a daily mail. There are at least two thousand people now along the line of the Yellowstone and between that valley and Bismarck, and by establishing this direct mail route the whole business interests of Montana are benefited.

This petition is signed by a postmaster and two pages of petitioners. There is this indorsement upon the same page:

HEADQUARTERS DISTRICT OF YELLOWSTONE,
FORT KEOGH, MONTANA, July 31, 1878.

I would earnestly indorse the above petition, and add that this line is the only direct one between the settlements of Montana and the East, and I consider it important and necessary not only for the thousands of citizens, but the military that occupy the Yellowstone Valley and Western Montana.

NELSON A. MILES,
Colonel and Bt. Maj. Gen'l, U. S. Army, Comm'd'g Dist. of Yellowstone.

On the same page to the same address, is the following:

HOUSE OF REPRESENTATIVES,
WASHINGTON, D. C., March 1st, 1879.

SIR: I desire to call your attention to the necessity of daily mail service from Bismarck to Fort Keogh, in the Valley of the Yellowstone.

The tide of emigration which precedes the building of a railroad on the frontier is always large. Parties always seek for locations on the probable line of a new road.

The Northern Pacific Company have contracted for one hundred miles the coming season, and expect to push the road to rapid completion to the Yellowstone. The large settlements already in that valley, as well as the military, are justly entitled to daily service, and I earnestly recommend that the service be so increased.

Respectfully,

J. P. KIDDER.

The indorsement on that is as follows:

Heartily endorse the within letter. Have previously made recommendations to this effect, which are on file in the department. Hope the request may be granted.

MARTIN MAGINNIS.

Also on the same page:

NORTHERN PACIFIC RAILROAD COMPANY.
GENERAL OFFICE, No. 23 5TH AVENUE, NEW YORK CITY,
July 31st, 1879.

Hon. THOS. J. BRADY,

Second Assistant Postmaster-General, Washington, D. C.:

SIR: The Northern Pacific Railroad is actively pushing track to the westward. It is imperative and of national importance that in the interest of this great work we should be reinforced in legitimate modes by the General Government. Central Montana, our immediate objective point, is only about 600 miles distant from Bismarck, yet the bulk of the emigrant and business population of the northwest have to take a circuitous route of over two thousand miles to reach Helena. We expect to cover two hundred miles of the intervening distance in the next 12 months, and we urgently ask that daily mail service (Sunday's excepted) be at once established between our roads and the daily lines permeating Montana. This will not only facilitate our railroad operations, but is an independent and absolute necessity to the many hundreds of people who are pushing in advance of our work. The Yellowstone and its tributaries are beyond comparison the richest of the Government lands still open to settlement, and the present tide of emigration promises many thousands of settlers in that region who will prove a perpetual barrier to hostile Indians from the North, while keeping those south of that line in subjection. Forts Stevenson, Buford, Keogh, Custer, and

Ellis will soon be surrounded by a class of settlers on whom they can draw not only for support, but assistance in danger.

From any point you view this request for rapid and convenient mail service, it seems to be the duty of the Post-Office Department to at once put it in operation.

Very respectfully, your ob't s'v't,

FREDERICK BILLING,
President of the Northern P. R. R. Co.

I will now ask Mr. Wilson to read General Sherman's testimony for me.

Mr. WILSON. [Reading:]

Q. Now, I want you to state your opinion first, as to the agency or instrumentality to bring about peace or to hasten its coming, and second as to the instrumentality for preservation of peace, of frequent mails.

I omit a little interlude there:

A. Nothing enables an officer to keep peace in a country confided to his care better than frequent intelligence from all parts of it; so much so that we expend probably one-quarter of our force in doing that work to-day, in keeping up courier lines where there are no mail lines. As a rule we endeavor to get the Post-Office Department to establish as rapid and frequent mails as we can, because in that way they assist us in obtaining quick intelligence whereby the remedy may be applied before the danger becomes too great. I say that frequent mails are very advantageous and very useful in suppressing Indian outbreaks.

Q. How is it as to preventing them?—A. Anticipating them and thereby preventing them.

Q. About what part of the force has to be used as couriers? I did not quite understand you—about one-fourth?

Mr. BLISS. I object to that.

The COURT. He has already answered that question.

Mr. INGERSOLL. I did not happen to hear what he said.

A. Frequently about one-quarter is necessary to keep up communication.

Q. I will ask you on a comparison which in your judgment would be the most expensive; to use the Army for the purpose of gathering this information or to use frequent mails for that purpose?

Then comes another objection, and then the question:

Q. [Continuing.] Do you remember having recommended a tri-weekly mail to the Secretary of War, George W. McCrary, in the winter of 1878?—A. I do.

Mr. MERRICK. Wait a moment; over what route?

Mr. INGERSOLL. From Bismarck to Fort Keogh, in Montana Territory.

Q. Will you state now, the general circumstances under which you did that, and why you thought it advisable?—A. At that time Bismarck was the terminus of the Northern Pacific Railroad, and all the mails went from that terminus to Fort Keogh in a straight line, now passed over by the Pacific Railroad itself. It was, in anticipation of the construction of that road, shorter by nearly ten days, than around by Fort Buford, which, if you remember the geography of the country, is around northwest about two hundred and fifty miles and southwest three hundred and odd miles; whereas, by going across the bend of the stage line we got the mail in three or four days instead of weeks.

Q. Were there any military reasons?—A. It picketed the country between Bismarck and Fort Keogh, which was the first post on the Yellowstone.

Q. What do you mean by picketing? I want the jury to understand.—A. About every twenty miles the stage company put up a station with two or three men to take care of the horses. The stations were either sod houses or log cabins, and loop-holed, and they would also have a stable, either under ground or above ground, in which to stable the spare horses. These stations would be about every twenty miles, and at the stations two or three men with rifles, which answered the purpose of soldiers. Then every twenty-four or thirty-six hours the stage passed along, and it picketed the road just the same as with soldiers, exactly; in the same manner, and to the same extent.

Q. Did you therefore consider it of importance to the General Government?—A. I knew it was very important. Either they had to do it, or we would have to do it with our troops.

Q. Did that mail route constitute what might be properly called a line of defense?—A. Yes, sir; a line of defense and a line of communication.

Q. Was that at that time one of the most dangerous parts of the country so far as Indian outbreaks were concerned?—A. It was about the most dangerous part of the

country there was to guard between Bismarck and Fort Keogh. Now it is all settled up with good farms.

Q. Is that the country in which General Custer was killed?—A. A little west of that, about one hundred and forty miles west by south of Keogh.

Mr. CARPENTER. Now, gentlemen of the jury, in addition to that testimony by General Sherman, you will recollect the testimony of Mr. Maginnis, who is the Delegate from that Territory, in which he stated that this route from Bismarck to Tongue River saved about fifteen hundred miles in the distance of carrying the mail. He described to you, as you will remember, the route that the mail was carried before this route was established, and showed that it saved fifteen hundred miles. In addition to the testimony of General Sherman showing its value, you will see the immense saving to the Government by sending the mail direct instead of around, as it was before. General Sherman's testimony is important upon this point, and is as direct and as positive as any testimony could possibly be. You can recollect in that connection that he testified in regard to another route to which I referred this morning as to its being a line of defense and a line of communication, that these stations stand in the place of forts, and are necessary for the military protection of the country, as well as to afford mail facilities to the people living along the route and at the terminal points of the route. Yet there are persons, Pennell, and people of that sort, that come here and seem to think this was not much of a route. But the great point made by the prosecution as to this route is, that after the contract had been awarded to Miner, Miner did not want it, and he tried to get rid of it. Upon that they have harped extensively; a route that he did not want, and that he wrote to the Postmaster-General about, stating that the mail could not be carried, and that the service could not be performed; and yet he went to work after that to get additional trips and to get it expedited. Well, he did apply to be relieved from it. He did say that the country was covered with Indians, and that he could not carry the mail. The proof in this case shows that the riders were shot at by the Indians. We will show all that. What did the Government say to him? "You have got the contract and you shall carry the mail. We want it carried." Why did not the Government release him? Because of these very officers and soldiers at Fort Keogh, and because of the people at the mouth of Tongue River and in the Yellowstone Valley and at Bismarck, who were clamorous to have this new mail route put through, giving direct communication between Bismarck, Dakota, and Montana Territory. You recollect what Mr. Maginnis said about it; that the only way the mail could get into the Territory of Montana prior to the establishment of this route was by the back door of that Territory, and as I have said, fifteen hundred miles longer than this route. Well, now, where is the crime in Miner's first trying to get rid of this route and then trying to get it expedited afterwards? Is there any? I do not see it. The Government says, "You have got to go on and carry it. True, it is a wild country and there are Indians roaming over it, but Congress has said it should be a mail route." They talked to you as though Brady established every post-route they complain of. You would judge from hearing counsel speak upon the subject that we had established all the routes on purpose to increase and expedite them, on purpose to make additional trips, and on purpose to swindle the Government. Congress is the authority that establishes these routes. We have nothing to do with that. The Postmaster-General has nothing to do with that. The duty of the Postmaster-General is when Congress establishes a post-

route to put service on that route, and that is precisely what was done here. When Miner was awarded the contract the Government said to him: "You have got to carry it." Now, there were additional trips asked for, and the route was expedited; but if ever any route ought to have been expedited upon the testimony in this case this route ought to have been. Are the statements of such men as General Sherman, Mr. Maginnis, the members of boards of trade at Saint Paul, the business men of Bismarck, the business men of Miles City, the business men of the Yellowstone Valley, the members of the Board of Trade of Minneapolis, the president of the bank at Bismarck, and the other business men there, and Mr. Billings, president of the Northern Pacific Railroad, not to be taken into consideration or accepted as truth while some miserable, contemptible, failing subcontractor is to be believed on a question of this kind?

Mr. WILSON. Also General Miles and General Terry.

Mr. CARPENTER. Yes, General Miles and General Terry and all the military there; everybody except some contractor or set of contractors that, according to their own account of it, made these failures.

Mr. KER. There was no subcontractor on that route.

Mr. CARPENTER. I am speaking of the general rule. The general line of proof is that it is the subcontractor who is aggrieved, and therefore your witness.

Mr. HENKLE. These were discharged drivers.

Mr. CARPENTER. Oh, yes, discharged drivers. My friend suggests that they did not rise to the dignity of subcontractors, but they were bad drivers that we discharged and they had for witnesses.

Now, gentlemen, if human testimony can establish the propriety of increasing a mail route and giving additional trips, it is in this record. If a man is to be sent to the penitentiary for doing such an act under such testimony, I would like to know what testimony would keep him out of the penitentiary. Do you not believe these men? If you do believe these men, neither Miner nor Vaile nor Brady are in fault in regard to this route. Oh, well, but they say we did not always make the time on this route and other routes. Please remember, gentlemen, that if we did not make the time it was our loss. Please remember that in every case where expedition has been ordered, and we have failed to make the expedited time, the Government has taken that out of our pockets. It has not cost the Government one cent. In every case where we have failed to make a trip the Government has fined us the amount of the trip. If we did not make the expedition during the winter on all these routes on account of the snow or any other difficulty, who lost by it? We did. The Government did not lose a cent. This partner of ours in this conspiracy took excellent care to fine us every time we failed to make a trip, and to make deductions every time we performed the service imperfectly. Why all this howling about our not making the time? We paid for it; not the Government; we paid very dear for it, too, for on one route, as I said to you yesterday, we were fined \$15,500 where the pay was but \$9,500. All this is mere bosh. If a route is expedited, and the time is not made, the contractor pays for it, not the Government. The Government does not lose a cent.

It is the same thing in regard to putting on service. With what holy horror the counsel have proclaimed to you that on such a route the service that should have been put on on the 1st day of July was not put on until September or October or November or December, as the case might be. Sir, did the Government ever pay us a dollar until we put the service on the route? Who lost anything by it? Was the Gov-

ernment cheated or swindled? If, on account of Indian difficulties in Arizona, if, on account of Indian difficulties in other quarters, we did not put the service on as quickly as we should have done under the contracts, it was our loss, and not the Government's. The Government has no right to set up a howl here and pretend to be swindled, when it never paid us one copper for an hour's service that we did not perform. This record shows it, and these tables bristle all over with the fact that not only has the Government never paid us for any service not rendered, but for all service imperfectly rendered it has put the knife of deductions to us for that service, and ruinous deductions, too. You will remember that one of the charges in this indictment is that Brady would not make deductions, and did not; that there were none made upon these nineteen routes, and that he refused to impose fines upon the defendants; that there were no fines imposed upon the nineteen routes. Then they bring in here eighteen tables—all the routes they proved anything about, for they have abandoned one of them, and they bristle all over with fines and deductions from the beginning to the end. These gentlemen stand up and cry that the Government has been swindled because we were not fined and then prove that we were fined; that the Government was swindled because deductions were not made, and then prove they were made, and then come in and say "Oh, you imperfectly performed the service. There were deductions made, but you cheated the Government anyway. You did not perform it at all, and you were fined, and yet the Government was cheated." I would like to know how all that can be. Why, it is as bad as the old hardshell Baptist poetry:

You can and you can't, you will and you won't;
You shall and you shan't, and you'll be damned if you don't.

Now, gentlemen, of all the routes specified in this indictment there has been the greatest hue and cry about this. The newspapers have been fullest of it, and there has been no end to innuendoes of counsel, to their evidence and to their side bar remarks on this route.

Mr. HENKLE. I call your attention to the fact that the deductions on this route amounted to \$46,299.89.

Mr. CARPENTER. What is the whole pay?

Mr. HENKLE. One hundred and fifty-seven thousand four hundred and eighty-seven dollars and eighty-three cents, and the deductions amount to about one-third.

Mr. CARPENTER. That shows that the Government was cheated on that route. If we failed to perform service on account of Indians, we were fined. If we started and did not get through on time deductions were made. I tell you, gentlemen, it is ridiculous and preposterous to say that any man on this earth would decide to expedite a route and take money from a contractor for doing it, and then fine him \$45,000 on one route. The thing is preposterous, ridiculous. It only need to be stated to disprove itself. I do not want any such partner. And it is not only true of that route, but true of all the rest. I intend to refer the jury to all these tables before I get through, consecutively, not only for that purpose, but to show them who got the money on these routes after a certain time. I think the proof in this case shows that the Postmaster-General was justified in making the order for these additional trips. I think he was justified in making this order for expedition. I think it shows that the contractor was perfectly justified in asking for it. If the Government compelled him to make roads through a new country; to establish stations through a new country; to picket that

whole line between Bismarck and the Yellowstone River, I know of no reason why he has not a right to ask the Government to give him a contract that was remunerative to do it. But the testimony on the stand is that it was not remunerative. Mr. Vaile, the only witness that has testified anything about it, said that that contract had been a losing one with all the expedition and all the additional trips from the beginning of the contract; that it never had paid a dollar that it had been a dead loss; so we did not swindle the Government much on that. They got altogether the best of us. They got a good service through an important country, and they did not pay us for it either. They put the knife of fines and deductions to us until we not only had no profit left but were out of pocket. That is the story in regard to that route. Now, are General Sherman, General Miles, Mr. Maginnis, Mr. Kidder, a former Delegate from the Territory, Mr. Bennett, and these business men from Saint Paul, from Bismarck, from the Yellowstone, and from Miles City to be believed, or are these carriers that were disgusted and disappointed to be believed? The carriers did not all turn out very well, either, upon this route. They had a gentleman here whose name was Ketchum, and he testified with regard to that route. He was one of the gentlemen who did not meet the expectations of the counsel for the Government, and although he was their own witness originally, and they had brought him here and kept him here at great expense, when he did not testify just as they thought he would have testified, they wanted to cross-examine him. He turned out to be an honest man, and he testified to the facts and justified the contractors from beginning to end. They undertook to prove that we had sworn that we required more horses and more men than were needed. This very witness of theirs proved that we would require more than we swore we required or more than the expedition was based upon. It is true Miner made an oath that it required one hundred and fifty men and one hundred and fifty animals. Very well. There was no road through there. There were no stations, and there were a great many Indians. Now, the affidavit as to the number of men and animals that are required to carry the mail upon a route is an estimate always. It is the judgment of the man who is making the oath. Men of different temperaments will make different estimates. It might be formulated I should think in this way: Every appreciable increase of speed increases the number of men and animals. What the number of each may be will depend upon the individual judgment of the person considering it. Now this country was filled up with Indians as General Sherman testified. Look at his testimony. There were fifteen stations between Bismarck and Tongue River.

General Sherman's testimony is that they would have needed two or three men at each of these stations with rifles in order to protect the line, and the stock, and the carriers. That would have been forty-five men just to protect the stock and carriers. Now I judge it is to be argued by the counsel for the prosecution, though I have heard nothing of it in the opening, that the only carriers you can take into consideration are the men who absolutely went with the mail, who drove the stage, or who rode the horses. Gentlemen, the act means no such thing. That is preposterous. If you undertake to carry a mail you require so many animals to carry it. What number of men do you require? You require the number of men needed absolutely in the service and the number of men for the stations along the route, and more than that the number of men required to supply that route with forage. All that is included in the term carrier. It is preposterous to suppose that the only person that the act intended to provide for was the man that rode the horse or drove

the stage. He is a very small part of the outfit for a mail route. Well, this route had no bridges, and no roads, and a great many Indians. Miner did not want to carry it at all. He had rather not carry it at any price. The Government said, "You have got to carry it." Then he said, "I think it will take one hundred and fifty horses and one hundred and fifty men. There are Indians over three hundred miles. I have got to build all these stations. I have got to picket all of them after I build them. The Indians will steal my horses and drive them off, and it will take not only one hundred and fifty men and one hundred and fifty animals," but in trying to get out of this contract he said that the mail could not be carried except by a military guard, and that is what he thought. If he thought it required much of a military guard, it seems to me his estimate of men and animals was rather low. Now, gentlemen, so much for that route.

At this point (12 o'clock and 25 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. CARPENTER. [Resuming.] May it please your honor, and gentlemen of the jury: I will next call your attention to the

ROUTE NO. 44140, EUGENE CITY TO BRIDGE CREEK.

This route was established for the purpose of furnishing Southern and Eastern Oregon with mails from California and the Atlantic States four days quicker than they could be delivered then by any other means. The State of Oregon appropriated six hundred thousand acres of land to build a road over a portion of the line of this route. All mails from the East came via California over the California and Oregon Railroad to Eugene City. Mail matter for East Oregon would either have to pass over this route, less than two hundred miles, or go around via Portland and The Dalles and back again to Bridge Creek, a distance of eight hundred miles, and for this reason Senators Grover, Slater Mitchell, and others had the route established, and urgently requested this increase, as documentary evidence shows. The evidence shows that the fines and deductions made on this route, amounting to \$17,755, made it anything but a profitable contract.

It is charged in the indictment that this increase was made by false and fraudulent petitions, and false and fraudulent letters, but the documentary evidence shows that every petition is certified to by the postmaster of the town in which they were made, stating that the signers thereto lived along the line of the route and received their mail at the post-office named. The evidence of the elder and younger Wilcox shows that every letter and every petition was perfectly honest, and that there was no fraud, no wrong, and nothing improper connected with it. The evidence of Senator Mitchell on this subject is conclusive.

On page 1520 of the record you will find the following letter:

1027 VERMONT AV., WASH., April 20, 1879.

Hon. T. J. BRADY,

Second Assistant P. M. General:

SIR: Before leaving Washington, I feel constrained, in behalf of the people I have lately in part represented, and at their earnest solicitation (those interested in the service) to earnestly recommend that the mail service on route No. —, from Eugene City, Oregon, to Bridge Creek, Oregon, be increased to three times per week, and that

the schedule time be reduced from 130 to 100 hours. This is a very important route ; in fact the only one giving *direct* communication between the great Willamette Valley and Eastern Oregon, except the roundabout way of the Columbia River, if that can properly be called an exception. The service is now but once a week. The demand is very urgent for at least three times a week, and the schedule is entirely too long and should be reduced to 100 hours. I earnestly hope this will be done.

Respectfully,

JOHN H. MITCHELL.

On the same page :

MOHAWK, OREGON, —, 1879.

Hon. JOHN WHITEAKER,
Washington, D. C. :

SIR: Owing to the rapid settlement of the country east of the mountains by enterprising, industrious people, and the fine agricultural country along the valley of the McKinzie River west of the mountains, there seems to be a necessity for greater mail facilities than have as yet been given the people of those parts, and I hope you will lend your influence to the laudable enterprise of increasing this route from its present weekly service to that of daily service and fast time.

Very respectfully,

W. S. MAXWELL.

Indorsed :

Referred and recommended.

WHITEAKER.

On the same page :

To the Hon. P. M. GENERAL,
Washington, D. C. :

We, the undersigned, citizens of Springfield, Lane County, Oregon, respectfully represent that, in their opinion, the mail facilities on the route from Eugene City to Bridge Creek, Oregon, are not sufficient for the actual necessities of the people. We therefore earnestly recommend that service on said route be changed from one trip a week to that of *daily service route*—

Underscored—

and that the speed be greatly increased.

Signed by nearly a page of petitioners in double column, and then the following :

I, P. A. Kennedy, postmaster for the town of Springfield, Oregon, do hereby certify that I am personally acquainted with a large number of the signers of the above petition, and have good reason to believe that each name was written by the person as above represented.

P. A. KENNEDY.

SPRINGFIELD, OREGON, *May* 10, 1879.

On page 1521 :

EUGENE CITY, OREGON, *April* 30, 1879.

Hon. JOHN WHITEAKER, M. C.,
Washington, D. C. :

SIR: The mail route running from this place to Bridge Creek, Wasco County, over the McKinzie wagon-road, supplies, as you are doubtless well aware, a rich and growing portion of the State with the only means of communication with the Upper Willamette Valley, and is limited to once a week, which I think is altogether inadequate to the wants of the people. In view of this fact I hope you will aid the numerous petitioners on this route in their efforts to obtain an increase of service and of speed. Petitions are being circulated here now, and no doubt will reach Washington in a few days.

Yours, respectfully,

F. W. OSBURN.

Indorsed as follows :

Referred and recommended.

WHITEAKER.

On the same page to the same address:

SPRINGFIELD, OREGON, *May 10, 1879.*

JOHN WHITEAKER, M. C.,
Washington, D. C.:

DEAR SIR: Petitions having been circulated and numerous signed by citizens of this and Wasco County, praying for an increase of service on the mail route from Eugene to Bridge Creek, I desire to ask your assistance in securing such an increase of service as may seem proper and right.

Very truly, your friend,

W. R. WALKER.

Indorsed as follows:

Referred and recommended.

WHITEAKER.

Also, on the same page the following:

SPRINGFIELD, OREGON, *May 10, 1879.*

S. W. DORSEY, U. S. S.,
Washington City, D. C.:

DEAR SIR: An effort is being made to secure an increase of service on the mail route leading from Eugene City, via McKinzie and Ocheco, to Bridge Creek, Wasco County. The country through which this route passes both east and west of the Cascade range of mountains is rapidly filling up with settlers and the mail facilities under the present contract is, in my opinion, entirely inadequate to the population. I would therefore most respectfully ask your assistance in securing such increase of service as prayed for in the petition.

Very respectfully, your ob'd't servant,

W. R. WALKER.

Also, the following to the same address and of the same date:

SPRINGFIELD, *May 10, 1879.*

Hon. S. W. DORSEY, U. S. S.,
Washington, D. C.:

DEAR SIR: Having learned of your willingness to assist in procuring mail facilities, I take the liberty of addressing you and asking you to assist us in procuring an increased mail service on the route from Eugene to Bridge Creek, which is now only once a week, over a route that should have a daily mail service, and I hope you will favor us with your influence for that purpose.

Very respectfully,

B. F. FINN.

Also the following:

POSTMASTER-GENERAL, *Washington, D. C.:*

We, the undersigned citizens of Eugene and Lane County, Oregon, respectfully represent that, in our opinion, the present mail service on the route from Eugene to Bridge Creek is quite insufficient for the wants of the people, and we therefore earnestly recommend that the service on said route be changed from weekly to daily service, and that the speed on said route be greatly increased.

Signed by about three-quarters of a page of petitioners with the following certificate:

I, A. S. Patterson, postmaster at Eugene City, Oregon, do hereby certify that I am personally acquainted with many of the signers of the above, and have good reason to believe that all the above signatures are genuine.

A. S. PATTERSON, P. M.

EUGENE CITY, *May 10, 1879.*

On page 1522:

EUGENE CITY, *May 8rd, 1879.*

Hon. S. W. DORSEY,
U. S. Senate, Washington, D. C.:

DEAR SIR: You will confer a great favor on the citizens of this State by aiding to increase the mail service on the McKinzie route from Eugene City to Bridge Creek from a weekly to a daily mail.

Respectfully,

JOSHUA J. WALTON,
Judge of said County.

Also, on the same page:

To the P. M. GENERAL, *Washington, D. C.*:

SIR: The citizens of Eugene City, Oregon, beg to ask that the mail service on the route from this place to Bridge Creek, be increased from one trip to three trips per week, and the schedule changed so as to make the speed much faster than at present.

This route supplies a vast region lying east and west of the Cascade Mountains, which now has a large population. The immigration to this section is very great, and we think the Government should supply these pioneers with proper mail facilities.

Signed by about a page of petitioners, and with the following certificate:

I, A. S. Patterson, postmaster at Eugene City, Oregon, do hereby certify that I am personally acquainted with many of the signers of the above petition, and believe all the above signatures are genuine.

A. S. PATTERSON, *P. M.*

EUGENE CITY, *May 10, 1879.*

Also, on the same page:

WASHINGTON, *D. C., May 23rd, 1879.*

Hon. THOMAS J. BRADY,
Second Assistant P. M. Gen'l:

SIR: I have the honor to transmit herewith letters addressed to me in relation to an increase of mail service on the route from Eugene City to Bridge Creek, Oregon, which please place on file in your department, and to request your early consideration of the same.

Very respectfully,

S. W. DORSEY.

You will recollect, gentlemen, the testimony of Senator Mitchell in regard to this route. He showed most conclusively to the jury who had produced the action of the Post-Office Department. He said that he had been repeatedly to the Second Assistant Postmaster-General upon the subject of this route, and that he went because his constituents had constantly urged him to do so; because by letter and petition oft repeated they had requested, and urgently requested this service to be put on. And these certificates and these statements and these petitions, gentlemen of the jury, if they did not warrant the increase that was made upon the route, and if they did not warrant us in asking it, I ask again of this jury, what testimony could?

The next route to which I propose to call your attention is the

ROUTE NO. 38113, RAWLINS TO WHITE RIVER, COLORADO.

The increase on this route resulted, in the first place, from the threatening attitude of the Ute Indians, White River being the chief agency for that tribe. It was done solely for the purpose of having rapid and frequent communication between the railway and telegraph at Rawlins, and the headquarters at White River, Rawlins being on the Union Pacific Railway, and White River Agency one hundred and eighty miles south of it. This difficulty with the Indians finally resulted in the Meeker massacre, and the subsequent battle when Thornburgh and his comrades were killed. After that, a large force of troops were sent to this agency, and they demanded, as the General of the Army did, a daily mail on the quickest possible time, which was granted. The fines and deductions on this route have been very great, resulting entirely from the difficulty of carrying the mail in winter over three great ranges of mountains where the snow is almost incessant. While it was alleged that the contractors made a great deal of money, the simple fact is, they made none.

On page 1118 of the record:

DIXON, WYOMING TER., *January, 1879.*

To the honorable D. M. KEY,
Postmaster-General:

SIR: We, the undersigned, citizens of Colorado and Wyoming, and supplied with mail by the route from White River to Rawlins, No. 38113, would very respectfully represent that the service as now carried, namely, one time a week, is entirely inadequate to the wants of the vast community now relying solely on this route for its mail. That the community is being rapidly settled by an industrious, thrifty, and intelligent class of people, and who have been accustomed to every mail facility, thereby making their want greater. That the mail they should receive by the route from Laramie to Hahn's Peak, and thence to Windsor, is forced to be sent over route No. 38113, and thus virtually giving only one mail a week. And with the foregoing statements, which but poorly represent the reasons for this petition, we would respectfully, but urgently, request that the service on this route be increased to at least 3 trips per week, and the time reduced to 84 hours.

Very respectfully,

That is signed by a page and a half of petitioners.

On the same page, to the same address:

RAWLINS, WY. T., *Jan'y, 1879.*

To the Hon. D. M. KEY,
Postmaster-Gen'l, Washington, D. C.:

SIR: We would very respectfully, but earnestly, call your attention to the urgent necessity for an increase of service on route No. 38113, from White River, in Colorado, to Rawlins, Wyoming Ter.

The service as now carried is only once a week, and in slow time, and entirely inadequate to the wants of the vast community relying solely on this route for mail accommodations.

We would further call your attention to the increased stock and mining interests and rapid settlements of the country supplied by this route by a people who know and appreciate sufficient mail facilities, and to whom its wants is the more keenly felt. We therefore earnestly request that service on this route be increased to at least three (3) times a week, with the running time reduced to 84 hours.

Very respectfully,

This is indorsed as follows:

I respectfully recommend the increase of mail service as per the within petition, believing it to be—

I suppose it should be, "Believing it to be for the interest of the people interested," but it is—

believing it to be to the people interested.

J. B. CHAFFEE.

I concur in the above recommendation, and earnestly urge that the within request may be granted.

W. W. CORLETT.

On page 1119:

OFFICE OF THE CLERK OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT, WYOMING TERRITORY,
Rawlins, Wyo., Jan'y 20th, 1879.

Hon. D. M. KEY,
Postmaster-General, Washington, D. C.:

SIR: Will you allow us to respectfully call your attention to the fact that the mail facilities on the route from here to White River, Col., are entirely inadequate to the necessities of the people who reside along said route. The country between here and White River is being rapidly settled up by a people the most of whom have come in from the East and have been accustomed to daily mails, and they are very seriously discommoded.

The commissioners of the county are encouraging the settlement of the county named by large outlays of money in building roads and bridges and doing all in their power for the accommodation of the people, and if you will cause increased service of

the mails it will be more of an inducement than anything we can do or offer. Imagine, if you will, a great many stock-men entirely cut off from market quotations. People, men, women, and children with a mail but once in seven days to warn them of Indian outbreaks, &c., &c. All things considered, we think, and it is the unanimous opinion of our people, that the mail service should be increased as soon as possible.

We would therefore ask that you investigate, and if you find our statement of the matter be true, cause increased service at your earliest possible convenience, and by so doing you will greatly accommodate and favor many people.

Respectfully,

J. B. ADAMS,
County Clerk.
G. C. SMITH,
Pros. Attorney.
J. G. RANKIN,
Sheriff.
M. E. HOKES,
Judge of Probate.
J. C. FRENCK,
Member Ter. Council.
LAWRENCE HAYS,
Member Ter. Council.

This petition is indorsed as follows :

Having carefully examined the grounds on which the within petition and others accompanying it are based, I feel warranted in indorsing the applications made, and in urging them upon the favorable consideration of the Postmaster-General.

JOHN W. HOYT,
Governor of Wyoming.

On page 1137 of the record :

To the Hon. the SECOND ASSISTANT POSTMASTER-GENERAL,
Washington, D. C., Contract Office :

SIR: We, the undersigned, citizens and residents of Rawlins, Wyoming, and other points on mail route No. 38113, from Rawlins, Wyoming, to Meeker, Colorado [White River], respectfully but urgently petition and pray that the mail service on said route No. 38113 from Rawlins, Wyoming, to Meeker, Colorado [White River], be increased from three times per week to seven times per week, and if practicable that the running time be reduced from the present schedule to thirty-six (36) hours, thereby accommodating the demands and important business interest of the country to, from, and through which the route runs and connects and allowing important correspondence to be answered by return trip from both ends of said route.

Signed by A. McCargan, special agent.

It is also signed by J. C. Friend, editor, and two or three pages of other names.

On the same page the following :

To the Hon. SECOND ASSISTANT POSTMASTER-GENERAL,
Contract Office, Washington, D. C. :

SIR: We, the undersigned, citizens and residents at and near Baggs' Crossing and Dixon post-offices, and who reside near mail route number 38113, and receive mail and accommodation from said route No. 38113, from Rawlins, Wyoming, to Meeker, Colorado, respectfully but earnestly petition and pray that the mail service on said route number 38113 be increased from three times per week to seven times per week, and, if practicable, that the running time on said route be reduced from the present schedule to 36 hours, thereby accommodating the important business interests of the town and country to, from, and through which said route passes, and thus allowing answers to important mail matter to be sent by return trip from all points on said route, and thus they will ever pray.

Signed by Capt. J. F. Munson, U. S. A.; George B. Walker, lieutenant, U. S. A.; the postmaster at Baggs, and something over a page of others.

Now, gentlemen, that is the proof upon this route in regard to the expedition. What is there that is not satisfactory about that ?

To be sure we had some contractors here who testified upon that subject, and a nice lot they were. You were asked to believe those subcontractors that were brought here upon that route against such men as have signed these petitions—a set of subcontractors that were, according to their own testimony, in league with each other to swindle the contractors all the time. One of them would have a subcontract and he would throw it down and the other one would come in and get a contract from the postmaster, and then the other would have a subcontract and he would throw it down, and the other would come in. They were just changing about, and jumping from one thing to the other, paying no regard whatever to their subcontracts or their obligations, and because they did not succeed in swindling the contractors to the utmost extent that they hoped, my friends brought them on here, and they made capital witnesses for their use, and now we are asked to believe such a set of scallawags against gentlemen of honor and character; against military officers of a high grade; against citizens all over that region of country; against members of Congress and United States Senators; indeed, against the most irrefragable testimony. I never saw more consummate impudence in my life than to set up such a set of fellows as that against gentlemen who have testified on that subject. [To Mr. Merrick, who laughed.] It is amusing when you come to think of it.

Mr. MERRICK. Rerdell wrote those letters.

Mr. CARPENTER. He did not write your letters, did he?

Mr. MERRICK. He wrote your letters.

Mr. CARPENTER. He had a perfect right to write them. He had a right to write a letter to be signed by another. I admit that Rerdell wrote some of them, but as to others it is not true in point of fact. But what of that? Do you mean to say that because another man writes a letter when you sign it you do not make it yours? Do you mean to say that because a man chooses to employ an amanuensis to write a letter when he has not the time to write it, and he signs it, that it is a forgery? I judge so from the argument of the gentleman. He paraded the other day a letter of Governor Pitkin on another route. It was Rerdell's letter, he said. The witness said the body of the letter was in Rerdell's handwriting. That may or may not be so. The chief justice of the State of Colorado had signed another that the witness said had been written by Rerdell, and an associate justice of the court had signed another. Mr. Ker absolutely commented upon those letters as though they were forgeries. Is there any pretense that the names of Pitkin and the chief justice and the associate justice of the court, or that these parties who have signed these letters, did not know what the letter contained, and is it not superlative nonsense to pretend that there is anything wrong about a thing of that sort? But it is upon a par with this whole case. I tell you, gentlemen, there is not enough in it to fill the eye of a mosquito of honest testimony and law that looks towards the guilt of these parties. There is nothing in it. There is a great deal of proof, but upon my word I do not think there are two pages of proof in this case that is legally admissible. They have not proved anything to prove anything about. We are charged with a conspiracy in writing some letters and somebody else signed them. We are charged with a conspiracy in getting up letters on a route, and where is the proof of that? I do not intend that the minds of this jury shall go from that point while I am discussing the question. All this stuff and proof is simply absurd. It is what the author of the "coming race" calls "coon-posh, the very hollow of bosh," to talk about a man's writing a letter

that somebody else signed, and then pretending there is anything wrong about that, or that it is forgery. It is ridiculous. It is not worth the serious notice of any man of sense for a single moment, and I am not going to commit the mistake either that the editor did when he took three columns to reply to a correspondent, and then wound up by observing that he was not worth the least possible notice.

Gentlemen, the next route to which I call your attention is—

ROUTE 46247, REDDING TO ALTURAS, CALIFORNIA.

This route was increased and expedited months before my client, Senator Dorsey, had anything to do with it. His connection with it commenced April 1, 1879. Peck's proposal and oath were filed on the 3d day of December, 1878, for increase. The order was made December 3, 1878, and took effect December 16, 1878. There was no increase made on this route afterwards until some time in 1881, but instead of that the service was reduced May 1, 1880, but was afterwards, by the request and solicitation of Mr. Berry, a member of Congress, Mr. Page, another member of Congress, and the Senators from California restored. The letters and petitions on file and in evidence give the fullest reason for the necessity of this service. The mail route is the main artery to the whole northeast of California, beginning at the end of the California and Oregon Railway and running northeast one hundred and seventy-five miles with branch post-roads from them furnishing small settlements and remote county seats.

On page 1001 of the record you will find this petition:

SIR: The undersigned, your petitioners, citizens of Shasta, Lassen, and Modoc counties, in the State of Cal., would respectfully represent:

That the mail facilities for the section supplied by route No. 46254, old letting, and under new letting No. 46247—

That is this route—

from Redding to Alturas, is totally insufficient for the wants of the community supplied thereby.

They would state that on the letting of the present contract the mail was carried semi-weekly and afterwards increased to tri-weekly, and which was still insufficient to accommodate the business and growing population of this section.

In the list of proposals now advertised they find that the above-named route from Redding to Alturas is reduced to a semi-weekly, which will work great injury to the business interests and inconvenience to the community supplied thereby.

Your petitioners feel that in justice to the present and increasing wealth and population of this section that route No. 46247, from Redding to Alturas, should be increased to six trips per week, each way, and the time reduced to 72 hours between those points, and for which your petitioners will ever pray.

To the SECOND ASSISTANT P. M. GENERAL,
Washington, D. C.

On page 1002 is the following:

SIR: The undersigned, your petitioners, citizens of Shasta, Lassen, and Modoc counties, would respectfully represent that the mail facilities for the sections supplied by route 46254, old letting, 46247, from Redding to Alturas, is totally insufficient for the wants of the community supplied thereby.

The remainder of the petition is the same as the one I have just read, and it is signed by eight or ten petitioners. I take the statement of the number of petitioners from what Colonel Bliss says. I presume it is accurate enough for all practical purposes. Now, on page 1003:

To the Hon. ASSIST. P. M. GENERAL,
Washington, D. C.:

Application for mail service six times a week from Redding, Shasta Co., Cal., to Alturas, Modoc County, Cal., is, in my opinion, a proper one at this time on account of

the country traversed by said route, the settlements already made thereon and the impetus it will give to the settlement of such an extensive country. For we know that people of means and intelligence are loth to emigrate to a country that is deprived of frequent and rapid communications with the old and thickly settled portions of the country.

Respectfully,

C. C. BUSH, *P. M.*

REDDING, *Aug. 17th, 1878.*

On the same page :

POST-OFFICE, ALTURAS, CAL.,
Aug. 12th, 1878.

To the Hon. SECOND ASSISTANT P. M. GENERAL,
Washington, D. C. :

I hereby recommend the increase of service from three trips per week to six trips per week, and the reduction of schedule time from 108 hours to 72 hours on route No. 46247, from Redding to Alturas, California.

The proposed change of schedule time and increase of service is imperatively demanded by the growing wealth and population of this section, and would be of great benefit to the people.

N. B. RINE, *P. M.*

On the same page :

To the Hon. SECOND ASSISTANT POSTMASTER-GENERAL,
Washington, D. C. :

We, the undersigned citizens, residing on mail route No. 46247, from Redding, California, to Alturas, California, respectfully petition for an increase of mail service on said route, increasing the service from three trips per week to six trips per week, believing the same to be necessary on account of the large increase of population on said route. All of which is most respectfully submitted.

That is signed by three pages of petitioners.

On the same page :

To the Hon. SECOND ASSISTANT POSTMASTER-GENERAL,
Washington, D. C. :

We, the undersigned, citizens and residents on mail route No. 46247, from Redding, California, to Alturas, in California, respectfully petition to the Post-Office Department to reduce the time of schedule by expediting the time from 108 hours to 72 hours. We think by reducing the schedule would be a benefit to the Government by increasing of the mail on the above-named route. All of which is most respectfully submitted.

That is signed by five or six pages of petitioners.

It is indorsed:

I earnestly request that the prayer of the petitioners be granted.

J. K. LUTTRELL, *M. C., Cal.*

Some of these petitions were also indorsed by Hon. J. T. Farley, United States Senator, Hon. Newton Booth, United States Senator, Hon. C. P. Berry, Hon. R. Pacheco, member of Congress, Hon. H. F. Page, member of Congress, and Hon. Horace Davis, member of Congress, from California, and Hon. James H. Slater, United States Senator, and Hon. John Whiteaker, member of Congress from Oregon. You recollect, gentlemen of the jury, the testimony upon this subject. I cannot see where or how there could be stronger evidence that the additional trips should have been put on. I do not see anything in it that shows we had not a perfect right to ask it.

NO. 38134, FROM PUEBLO TO ROSITA.

The next route, gentlemen, to which I will call your attention, is route 38134, from Pueblo to Rosita. A great deal has been said about this route, and a vast amount of noise has been made about it. A witness

was called to the stand and testified that the mails in the post-office at Pueblo were made up and closed at 1 o'clock in the afternoon, and Mr. Bliss stated to the court and jury that Pueblo was a side station, and not a terminal point. The truth is that the proof shows that Pueblo is the terminal point of the Atchison, Topeka and Santa Fé Railroad in Colorado, one of the largest corporations in the world. It was for years the terminal point of the Denver and Rio Grande Railroad, between there and Kansas City. Before the extension of the Rio Grande road to Leadville, all trains from the south, east, north, and west, arrived at Pueblo. To show you the reason why daily mails were to be run from Pueblo to Rosita I submit this diagram. [Exhibiting a diagram to the jury.] It is perhaps not exactly like the map. It is on a small scale. Of course I do not pretend to say that it is an accurate diagram, but it is substantially so, as showing the relation of the points I propose to discuss. It shows the relation of Pueblo, Cañon City, and Rosita to each other. The reason why the mail line was established from Pueblo to Rosita, Rosita then being, as it now is, a most prosperous and growing mining town, and I may add with one of the best mines in the world there now and at that time, was this: That the mail train arrived about 1 o'clock p. m. in Pueblo. That is the proof in the case. Mr. Sears, who was postmaster at Greenhorn, testified that the mails left Pueblo between 2 and 3 o'clock for the east, west, and north. The clerk who was on the stand, a man by the name of Marks, I think it was, said the mails arrived there at 1 o'clock. I think he must have been somewhat in error, but either is sufficient for my purpose. All the mail brought there by other trains, and those furnished by the local office between that time and 7 o'clock the next morning, could be sent direct to Rosita the same day instead of lying over in Cañon City one day. Now, there were evening trains and there were other mail lines, and Pueblo, as was proved, is a large, flourishing city of five or six thousand inhabitants. All the mail that came into the post-office after 1 o'clock at the time the mail was made up, would have to lay over until the next day at 1 o'clock, and then go to Cañon City, and not be sent to Rosita until the next day by another stage line that ran from Cañon City to Rosita. The mail that arrived after the making up of the mail at 1 o'clock to-day, for instance, would go out to-morrow morning at 7 o'clock and reach Rosita to-morrow afternoon, which would be exactly one day in advance of what it would be if it went by the other route. I admit there is proof here, and do not intend to blink at any of it, that the through mail did not go by this route ordinarily; but that was nobody's fault except the postmasters there. We contracted to carry it and the through mail might as well have gone by this route as the other. That was the fault of the postmaster, if anybody; but if you only consider that the mail that came in by other trains afterwards, and from other sources by stage, accumulated in the office, then this mail route was not an extravagant one. Those people had a right to get their mail without waiting a day for it. As I say, it was a large mining camp. There were valuable mines there, as the evidence shows; only seven miles from Silver Cliff, a great mining camp, and those people having such business transactions as are necessarily connected with mines, did not want to wait a day for their mail. They wanted to know what was going on, and wanted a chance to have their letters sent and to transmit answers. Hence the necessity for establishing the route. The mail and passengers had either to go through this way over this route, or to take the train between one and two o'clock to Cañon City and remain there over night, leaving by stage

the next morning and reaching Rosita in the afternoon. The difference in time was simply the difference of a day's business. After the completion of the railroad from Cañon City to Silver Creek, which is only seven miles from Rosita, the Postmaster-General discontinued this route, and very properly, too, because the train leaving Pueblo would run through to Silver Cliff the same night, and the mail would be delivered the same night, or early the next morning at Rosita, sooner than it could be gotten through by this route, and a much shorter distance. Therefore it was very properly discontinued. Now, gentlemen, there was a postmaster on that route at Greenwood, and he was a very bitter fellow. He wrote letters about it and testified about it. You saw him here. That postmaster is the evidence they have got on the one hand, and some of the persons who were connected with the carrying of the mail. On the other hand I propose to show you that the highest men that ever lived in Colorado, the men of the largest capital, and the men of the highest character in that country recommended this route and asked the Government to establish it. I begin with the king of them all, one of the early pioneers there, a man that Colorado trusted as she never trusted any other man. A man who represented her here in the Senate as long as he wished to do so, a man that you all know by reputation, and most of you, I presume, personally, as you are citizens of Washington. I read his letter from page 1021:

NEW YORK, April 22, 1879.

General T. J. BRADY,
Second Assistant Postmaster-General, Washington, D. C.:

DEAR SIR: If you have not already done so, I ask that the mail service from Pueblo to Rosita be made seven times a week, with quick time. The extraordinary development of the mining interest at Silver Cliff and Rosita have attracted a great many people, and it seems to me the Government owes it to them to furnish proper mail facilities.

I earnestly recommend early and favorable action.

I am, respectfully, yours,

J. B. CHAFFEE.

On the same page:

DENVER, COLORADO, April 25, 1879.

Hon. D. M. KEY, P. M. General:

SIR: Numbers of people are going into the Rosita and Silver Cliff mining region daily, and later on it is thought their numbers will increase. I write this to urge an increase in the mail service from Pueblo to Rosita to seven times a week, with fast time.

I trust you will be able to put this service on immediately.

Very respectfully,

FREDERICK W. PITKIN,
Governor of Colorado.

On the back is the following indorsement:

Referred to P. M. G.

JAMES B. BELFORD.

If any man in this world stands higher for truth and veracity than Frederick W. Pitkin I never have heard of him yet. He is the soul of honor, as is Senator Chaffee.

On page 1022:

DENVER, COLORADO, April 26, 1879.

SIR: The mail from Pueblo to Rosita ought to run daily, and the time it is made in should be reduced.

That part of our State is now attracting thousands of people, and the additional mail facilities are absolutely imperative.

I hope you will have it made daily immediately.

Very respectfully,

HENRY C. THATCHER,
Chief Justice, Colorado.
WILBUR F. STONE,
Associate Justice Supreme Court.

Hon. T. J. BRADY,
Second Ass't P. M. General.

On the same page:

PUEBLO, COL., April 30, 1879.

Hon. T. J. BRADY,
2nd Asst. P. M. General, Washington, D. C.:

SIR: The people of Pueblo and the flourishing mining town of Rosita feel the need of a daily mail between the two towns, and from the fact that Pueblo is one of the best valley towns in the State in point of population [excepting Denver], we think the people are entitled to this benefit, and if consistent with your position we shall take it as a great favor if you will at an early day establish a daily mail over said route, and order service thereon.

I have the honor to be, very respectfully, your obedient servant,

G. M. CHILCOTT.

He is the present United States Senator from that State, and both Judge Thatcher and Mr. Chilcott reside at Pueblo, and know what they ask and what the people wish. Now, on page 1049:

ROSITA, COLORADO.

Hon. D. M. KEY,
Postmaster-General:

SIR: We have the honor to call your attention to the urgent necessity for an increase of mail service on the route from Pueblo to Rosita, Colorado.

The extensive mining interests now being developed at Rosita and surrounding country, is of such vast proportions, drawing an immense immigration from all parts of the country, and a class of immigration who are accustomed to ample mail facilities, render an increase on this route an absolute necessity.

We therefore very respectfully, but urgently, petition that this be increased to a daily service, and on a shorter schedule.

Very respectfully,

Indorsed:

Believing that an increase of service would be quite beneficial to the citizens of the county, and others on the route, I fully indorse the foregoing petition.

JAMES A. GOOCH,
P. M., Rosita.

The petition is signed by a large number of persons.

On the same page:

PUEBLO, COLORADO.

To the Hon. THOMAS BRADY,
Second Assistant P. M. General:

SIR: The undersigned have the honor to state that, in their judgment, the mail service on the mail route between this city and Rosita, now being run three times a week, should be increased to a daily line with fast schedule time. It is now very slow.

The public interests of this section will be greatly subserved by this increase of service, and we believe, in view of the large population now supplied by this route, and the fact of the immense immigration now flowing in upon us by every train, that there should be no delay in having this done, and we shall hope to hear the order is made soon as we ask.

Signed by divers people, as Mr. Bliss says, and indorsed on the back as follows:

Respectfully referred to Postmaster-General. The request of petitioners is reasonable and necessary, and hope the service will be increased immediately.

J. B. BELFORD, M. C.

I concur in the above.

H. M. TELLER.

On page 1051 also :

To the POSTMASTER-GENERAL,
Washington, D. C. :

The undersigned citizens of Pueblo, Colorado, beg to represent that the new mining towns of Silver Cliff and Rosita are more accessible to this place than to any other railroad point, and that you have ordered seven times a week mail service from Cañon City to Silver Cliff, while we have only a weekly line.

We urge that you place us on the same footing as Cañon City. This is the natural and proper outlet for all trade and travel to the places indicated, and with a fast schedule of, say ten or eleven hours, and seven times a week mail to Rosita, it would prove of vast importance to the people of both places.

We trust you will put this service on immediately.

Signed by a large number of people, and on the back of it this indorsement :

Respectfully referred to the Post-Office Department. This service as asked for is absolutely necessary, and I hope it will be ordered at once.

J. B. BELFORD.

I concur in the above.

H. M. TELLER.

On the same page:

GENERAL BRADY,
Second Assistant Postmaster-General :

SIR: The undersigned, citizens of Pueblo, Colorado, have the honor to respectfully but earnestly recommend to you the necessity of increasing the mail service on the route between here and Rosita to a daily line.

The extraordinary mining interest developing in this portion of Colorado, and the enormous increase of our population, and consequent increase and demand for proper and expeditious communication by mail, renders it necessary not only to increase this to a daily line, but to increase the speed also. It should be carried in half the time now occupied.

We hope this petition will receive speedy and favorable attention.

The petition is signed, among others, by Mr. Chilcott, now Senator. It is indorsed:

Respectfully referred to the P. O. Department within petition of citizens and business men of Pueblo, Col., with request that this service be put on.

JAMES B. BELFORD.

I concur in the above.

H. M. TELLER.

Now, on page 1052:

Hon. D. M. KEY,
Postmaster-General :

SIR: We have the honor to call your attention to the mail route between this place and Rosita, and to request that the service thereon be increased so as to make it a daily line and fast time.

This increase should have been made long ago, and now in view of the great influx of population (every train arriving here is loaded) and the vastly greater necessity now than ever before for these additional facilities, your petitioners hope you will order the increase asked for.

Signed by divers people and indorsed :

Respectfully referred to the P. O. Department. I hope this service will be increased as asked for, as the development of this part of the State is very rapid.

J. B. BELFORD.

I concur in the above.

H. M. TELLER.

Now, gentlemen of the jury, if there is any truth in man, and human testimony can be relied upon at all, the additional trips should have

been ordered on this route and the expedition should have been ordered. What more could anybody prove? I have shown you the reason why this route should have been established in the first place, and you have seen the reason why the expedition should take place. They have given some of the reasons. Mr. Teller, upon the stand, gave his reasons not only for that expedition, but for expedition upon the other routes in Colorado that he recommended. I do not think there is a route that was expedited or an additional trip ordered in Colorado that Mr. Teller did not approve and did not recommend. I do not remember any; but whether he did or not, his testimony upon the stand covers the whole ground. Mr. Teller is a western man. He has lived in Colorado now for twenty years. He has grown up upon the wide, magnificent plains of the West, in sight of the cloud-capped mountains. He is a broad man, with a large heart, and a clear head; no pettifogger, no contemptible, narrow-minded creature, but a man of broad, statesmanlike views. What was his testimony upon the stand? My friend, Mr. Bliss, undertook to make a great point upon him by asking him whether he knew that such a mail only carried so many letters, and that the mail from Pueblo to Rosita went around by Cañon City. He said he did not care anything about that, he was in favor of giving to the people of the West a daily mail; he was in favor of giving them expeditious mail. He did not think they had lost their rights because they went from New York, or from Vermont, or from Massachusetts into Colorado. He thought they had as much right to a mail there as the people of Eastern cities and countries had. He scouted this doctrine that the only thing to be taken into consideration by the department was productiveness. He insisted that there were other and higher and loftier reasons for this increase. He came upon the stand to give a reason for the opinions he had expressed, and I do not think there was a man upon that jury who did not think he had stated the case properly and wisely, and that it was the proper course for the Government to pursue. Mr. Teller, to be sure, has an idea that a little money may be expended in the Post-Office Department as well as in all other departments of the Government. He thinks perhaps that six or seven millions of dollars applied to that department is as well spent as if applied to the War or the Navy Department, or the Indians, or pensions, or anywhere else. Why not? A department that spreads intelligence, a department that carries messages of business, of friendship, and of love, that cheers the heart of the pioneer in the far West, that cheers the heart of the old mother and the old father in the East. Why in Heaven's name should this Government be so niggardly as to insist that that old man and that old woman and this struggling boy must pay for every letter every cent that it costs the Government to get it there? The proposition is preposterous. These people help pay the deficiency. The West pays its full share of it as I have shown you and as I shall show you more fully. And if it does not pay, what then? A great Government like the United States, covering a country from ocean to ocean, with such power, with such a population, with such vast wealth, with such resources, haggling over a few million dollars that are distributed over more than ten thousand mail routes in the United States, and insisting that productiveness is the only thing to be taken into consideration when the proposition is to increase the speed or to add trips. In Wirt's life of Patrick Henry, it is related of Henry that upon one occasion he made a bold and successful defense of a government officer who had been sued in Richmond for taking some cattle for the patriot army during the revolutionary war. The name of the man who brought the suit was Hawk. Henry described with his usual pathetic

ardor and inspiring genius the great scenes through which the colonies had passed in their struggle for independence, until at last he reached the point of the surrender of the English army at Yorktown, described the ringing of the bells, the pæans of praise that were shouted through the whole country, and the outpouring of the great American heart in thanks to that Providence that had given them victory over their enemies and given them birth into the family of the nations of the world. Then he turned the tables and said that at that auspicious moment when every heart was full of gladness, every eye beamed with joy, and every soul was lifted up to its Maker in thanks for their great deliverance and the great boon that God in his providence had given them, this fellow Hawk was running through the streets in Richmond crying, "Beef! beef! beef!" So it was with my friend Bliss. Show him all this grand country. Show him what this Government had done and the progress it has made, show him the immense interests involved in these mails, and yet he and my friends here with him in chorus round, tenor, bass, and alto, sing, "Productiveness! productiveness! productiveness!"

Mr. KER. What page is that on?

Mr. CARPENTER. Every page of the case; every one. You cannot open your mouths without getting it out. Gentlemen, I think the route from Pueblo to Rosita may be left upon its merits, and the testimony introduced.

• NO. 38135, SAINT CHARLES TO GREENHORN.

Now, the route from Pueblo to Greenhorn was very much such a case as the other. I do not know which they have exhausted themselves the most upon. In regard to this route, the testimony of Mr. Sears, called here by the Government, answers every charge. You remember the testimony of Secretary Teller, when asked by Mr. Bliss what difference it made whether the mail arrived at 2 o'clock or at 6 o'clock. He said it made the difference between two and six. What the people at Greenhorn wanted, and those living at the intermediate office, was to send a letter in the morning to Pueblo, their commercial center, and have it reach there in time to have their orders executed and returned to them the next day. This is the route, you will remember, upon which so much stress was laid in regard to the advertisement of the distance being longer than it really was. We have heard a great deal about that. The route was advertised as being thirty-five miles, and in fact it was twenty-three; for instance, that is, it was twelve or thirteen miles shorter than it was advertised. Here is a badge of stupendous fraud. The route was advertised twelve or thirteen miles longer than it absolutely was, and the contractor got the benefit of that distance. That has been held up in every conceivable shape, a panorama has been made of it, and everywhere it has been shown what a swindle it was for us to take that contract in that way. That is not all. When they came to add Pueblo to it that made the distance what it was originally under the advertisement. Horror of horrors! We were absolutely paid for that additional distance. Well, why not? That is the law. We take our chances. If the route is shorter we get the benefit of it. If it is longer we get the worst of it. Why not? There were other routes that were not correctly advertised. I heard something about them. When they were reading about this route from Pueblo to Greenhorn the full sonorous tones of my friends rung upon the air. When they came to read about

the route from Vermillion to Sioux Falls, which was advertised as fifty miles, and turned out to be about seventy miles, and the Government never paid us a cent for the distance, and the route from Bismarck to Tongue River, which was advertised as two hundred and fifty miles, and turned out to be three hundred and ten, and they never paid us a cent for the difference, they mumbled it over, and, as Hamlet says:

I had as lief the town crier spoke my lines.

Now, gentlemen, don't you think it is rather a rough specimen of a fair prosecution to abuse these contractors because the advertisement was fifteen miles longer on one route, and we got the benefit of it, and then not give us any credit at all for another twenty miles and another sixty miles against us. The sixty miles was over a country where the Indians lay in wait and shot at the mail carriers. We took that sixty miles and did not get a dollar for it, but we did get pay for this twelve or fifteen miles on the Pueblo and Greenhorn route. That is another specimen of the great candor and fairness of my friends for the prosecution which I hope the jury will not overlook. I will give you the testimony upon which this route was increased. We have some very good testimony here, gentlemen, Government officers, among others a special agent of the Post-Office Department who ought to know something about the business.

On page 516 this letter will be found:

PUEBLO, COLORADO, May 6, 1879.

Hon. H. M. TELLER:

DEAR SIR: A petition, signed by most of the citizens living in the southern part of our county, and signed by a great many citizens of Pueblo, to establish a daily mail between this point and Greenhorn, has been sent forward and presented to the Postmaster-General, or, I suppose, rather to the Second Assistant Postmaster-General. I wrote you to state that at least one-third of the citizens of Pueblo County outside of the city of Pueblo got their mail at Greenhorn post-office, and that until the building of the Denver and Rio Grande Railway south of Pueblo they had a daily mail, when it was cut down to twice a week. The expense of a daily mail will be but small, it being but thirty miles, and the people ought to have it. I will take it as a personal favor if you will see the proper authorities and urge the immediate establishing of this line, or rather of this change, from a bi-weekly to a daily mail.

Yours, truly,

J. G. CHILCOTT,

On page 517:

Hon. D. M. KEY,

Postmaster-General:

The undersigned, citizens of the State of Colorado, residing and getting their mail on route 38135, from Pueblo to Greenhorn, respectfully represent that it is necessary that the service on said route should be increased from two trips per week to six trips per week. The country is being very rapidly settled by people of intelligence, and ask the increased mail facilities for the benefit of those who have already made their homes in this section, and as an inducement to others to settle, frequent mails being one of the strongest inducements to intended settlers. We also respectfully request and urge that the running time be reduced so as to run from Pueblo to Greenhorn in eight hours, so that the citizens of Greenhorn may get their mails at a reasonable hour.

It is signed by fifteen names. On the same page:

Hon. D. M. KEY, *Postmaster-General:*

We, the undersigned citizens of the State of Colorado, residing near and getting our mail at Muddy Creek post-office, on route 38135, from Pueblo to Greenhorn, respectfully represent that it is necessary that the service on said route should be increased from two trips per week to six trips per week, and a faster schedule.

It is claimed that the words "and a faster schedule" were inserted in the petition by somebody.

Mr. KER. By Rerdell.

Mr. CARPENTER. That is not conspiracy if he did.

This section of the country is being rapidly settled by people of intelligence, and we ask the increased service for the benefit of us who have already made our homes here, and also as an inducement to others to settle. We also request that the schedule time be reduced so as to run from Pueblo to Greenhorn in eight hours, so that citizens along the route may get their mail at a reasonable hour.

Well, now, will anybody tell me, in the name of common sense, if it is true, as the gentleman says, that they proved the fact, what in Heaven's name Rerdell or anybody else wanted to put in there "and a faster schedule," when the schedule before that was a slow one, and this very petition asked for a reduction to eight hours. I do not know who put it in there. It is not certain.

Mr. KER. It was being carried in that time.

Mr. CARPENTER. I think not.

Mr. KER. The schedule was twelve and a half hours.

Mr. CARPENTER. That makes no difference. I am talking about the schedule time. I explained that yesterday to the jury. I do not care what time it was being carried in. What I want to know is, why Rerdell or anybody else should put in "and faster time," when the schedule was then twelve or thirteen hours, and this petition asked that it be made in eight hours?

Mr. HENKLE. The schedule was sixteen hours.

Mr. CARPENTER. Sixteen hours and the petition was to reduce it. Now here is what they say was interlined, or inserted, by Mr. Rerdell. I would like to know what for? I cannot see any reason for it. I would like the gentleman to explain. When my friend on my left [Mr. Merrick] comes to argue this case, I would like him to explain what part of the conspiracy this proves.

I would like him to explain how that introduction of those words by Rerdell helps the petition or proves the conspiracy. He comes as near doing it as anybody can I know. I do not think he can do it.

On page 518:

Hon. D. M. KEY, *Postmaster-General*:

The undersigned, citizens of the State of Colorado, residing and getting their mail on route 38135, from Pueblo to Greenhorn, respectfully represent that it is necessary that the service on said route should be increased from two trips per week to six trips per week, on quicker time.

And the words "on quicker time" in this petition are claimed also by the counsel for the prosecution to have been put in by Rerdell.

The country is being very rapidly settled by people of intelligence, and ask for increased mail facilities for the benefit of those who have made their homes in this section, and as an inducement to others to settle, frequent mails being one of the strongest inducements to intending settlers. We also respectfully request and urge that the running time be reduced so as to run from Pueblo to Greenhorn in eight hours, so that citizens along the line may get their mails at a seasonable hour.

And here is another petition of precisely the same character. In Heaven's name what harm could it do to put that in, and how does that prove any conspiracy upon the part of anybody on earth.

On the same page:

Hon. D. M. KEY,

Postmaster-General, Washington, D. C.:

DEAR SIR: The undersigned, your petitioners, most respectfully ask you to grant us the following petition:

That you increase the service on route 38135 from two trips per week to a daily mail. In asking this, we do it with the conscientious feeling that we are requesting something of you that did you know the circumstances and condition of the country personally, that you would have no hesitance in acceding to our wishes. Our people

are a reading community, and many of us wish to keep posted in the doings of the world through the medium of a daily paper. This can only be accomplished by having a daily mail again.

You remember this was a daily mail, and was taken off or cut down two trips.

Our population is increasing faster than any one can imagine with—

It should be without—

seeing the number of emigrants, and while a year since a semi-weekly mail supplied our wants, with our present population it does not meet with the necessities of the people. Hence your petitioners will ever pray, &c.

It is signed by thirteen names.

On page 519:

GREENHORN P. O., PUEBLO COUNTY, STATE OF COLORADO.

Hon. D. M. KEY,
Postmaster-General, Washington, D. C.:

DEAR SIR: The undersigned, citizens of the State of Colorado, county aforesaid, residing and getting their mail on route 38135, from Pueblo to Greenhorn, respectfully represent that it is necessary that the service of said route should be increased from two trips a week to three trips per week and faster time. The country is being very rapidly settled by people of intelligence, and we ask the increased mail facilities for the benefit of those who have already made their homes in this section, and as an inducement to others to settle, frequent mails being one of the strongest inducements to intending settlers.

Signed by about eighty people at Greenhorn. It is indorsed:

I respectfully request that the prayer of the petitioners be granted.

JAMES B. BELFORD.

And again:

1879, April 18th, Colorado. I respectfully recommend the increase of service herein prayed for.

H. M. TELLER.
N. P. HILL.

Gentlemen, I propose now to call your attention to—

ROUTE 38140, FROM TRINIDAD, COLORADO, TO MADISON, N. M.

I proceeded once to state the evidence upon which the route was expedited and the additional trips ordered. There is nothing particular in regard to the topography of the route or the geography of the country that demands specific attention. Therefore the petitions and the letters will explain themselves.

Mr. HENKLE. [Submitting a book to Mr. Carpenter.] Judge, read Seers's testimony.

Mr. CARPENTER. You read it.

Mr. HENKLE. Very well; this is the testimony of Mr. Seers, the postmaster at Greenhorn, at page 544:

The WITNESS. I would like to make an explanation in regard to this.

Mr. INGERSOLL. Go on and make it.

The WITNESS. The last few lines written here were written for a purpose, at the request of the farmers there. I recollect the writing of this petition very well, and the mail as carried and as arriving, prior to this time and during the time of the circulating of the petition. It did not come in there regularly, and the farmers that would come to that place for mail would sometimes have to wait later than they wished.

Q. How late would they have to wait?—A. They would have to wait until four o'clock and sometimes till five. At other times it would get there earlier in the day. They wanted the mails to arrive at a certain time which they considered could be done easy enough. So this was done for that purpose.

Q. Did they want it to arrive sooner or later?—A. They wanted it to arrive at about two o'clock.

Q. Would that be sooner or later?—A. That would be sooner than it came sometimes.

Q. Was that the reason they asked to have it expedited; so as to have it get there sooner?—A. That is the reason why we say here, "To carry it in eight hours, and have a certain time of arrival."

Q. That is the way they wanted it?—A. Yes, sir.

Q. Now, it was not brought soon enough the way it was?—A. It was brought sooner sometimes.

Q. Yes, but as a rule it was not?—A. No, sir; not as a rule. The carrier would be late sometimes. He had his own way about coming.

Q. What was his time; how much did he have the right to take?—A. He claimed it as the schedule allowed him—more than they liked.

Q. How much?—A. Sixteen or seventeen hours, I believe.

Mr. CARPENTER. Upon that point, gentlemen of the jury, that witness also stated that in reference to these petitions upon this route from Pueblo to Greenhorn, the petitions at Greenhorn and in that vicinity were got up by the farmers and ranchmen themselves. I recollect that distinctly, so that we had no hand in that and did no writing about that. It is very evident why they wanted the mail to get there earlier than five or six o'clock in the afternoon. The ranchmen live off miles in the country from the post-office. These great stock kings are not near together. Their ranches are several miles apart, and they could not stay around there until dark waiting for their mails. They wanted their mails so they could get home and attend to their stock before night, and that is practically what that witness testified to. •

Now on page 1102:

TRINIDAD, COLORADO, *April 15th*, 1879.

To the POSTMASTER-GENERAL,
Washington, D. C. :

SIR: The undersigned, citizens of Trinidad, Colorado, beg to earnestly ask that the mail service on the route between this place and Madison, New Mexico, be increased to three times a week, and the time made faster than it now is, if possible. This route supplies a large and intelligent class of people in this State, as well as in the Territory of New Mexico, who are now greatly inconvenienced by not having proper postal facilities. We believe the public interest will be subserved by this increase, and we hope it will be ordered immediately.

That is signed by twenty-one persons.

On the same page:

TRINIDAD, COLO., *May 5th*, 1879.

Hon. T. J. BRADY,
Second Assist. P. M. General, Washington, D. C. :

DEAR SIR: I have this day forwarded a petition to you through Hon. S. W. Dorsey, for an increase of mail service between Trinidad, Colorado, and Madison, N. M., for 100 miles SE. of Madison. The people have to go to that point for their mail and when it only arrives once a week it inconveniences the settlers very much. The country along the line is settling up very fast, and the public demand it.

I suppose you are bothered so much with petitions that it takes a great deal of your time. I hope you will consider this one and favor us as we are an isolated people and can only appeal to you for assistance. With the wishes of many for your present action in the matter, I remain,

Respectfully,

W. G. RIFENBURG.

On the same page:

NEW YORK, *April 21st*, 1879.

Hon. D. M. KEY,
Postmaster-General, Washington, D. C. :

DEAR SIR: Friends of mine who are dependent for their mail on the route from Trinidad to Madison, very much desire to have the service made three times a week, and to have the trip made in one day. You will oblige me very much, and accommodate a large number of people, by considering this application favorably.

Yours, respectfully,

J. B. CHAFFEE.

On page 1103 :

HOUSE OF REPRESENTATIVES, U. S.,
Washington, D. C., April 28, 1879.

Gen'l THOMAS J. BRADY,
Second Asst. P. M. G. :

SIR: I am daily in receipt of letters from Trinidad asking that the mail service between that point and Madison, New Mexico, be improved both as to number of times when the mail shall be carried, and also as to the speed with which it is carried. I am informed that the business between the two places is increasing, and that the public interests require that the time mentioned in the present schedule should be shortened or reduced so that the mail may get through the same day it is sent. In view of the number of letters I have received on this subject, I feel warranted in requesting that it be done.

Very respectfully, your ob'd't serv't,

JAS. B. BELFORD.

Gentlemen, that tells the whole story. There was some point made by the counsel for the prosecution in regard to an order made by General Brady to embrace Raton upon this route, and it was contended against the law and against the contract that it should have been made a special service and not attached to this route. The law in regard to special service is that the compensation shall not exceed two-thirds of the salary or fees of the postmaster at the post-office served by a special contract. The postmaster on the stand swore that his compensation did not exceed \$17 per annum. The post-office was from the nearest post-office at least six miles, and probably twelve. Whether it was in proof that there was an intermediate post-office between the town on the railway and Raton I am not certain; but in any event there was six miles of mail to be carried, and as a matter of course nobody was going to carry that for two-thirds of \$17. The only way for them to get a mail at Raton was to put it upon this route, and the Second Assistant Postmaster-General placed it there and allowed to the contractor in the case just the simple pro rata that that post-office added in length to the route. Nothing more or less. And the law is specific upon that subject, that whenever a post-office is added upon a route if it increases the distance the pay shall be pro rata, and there shall be no pay unless it increases the distance, and if it does increase the distance the pay shall be pro rata for that increase, that is to say, the pay shall be the same relatively for that distance that it is for the distance along the whole route.

I do not think there is anything on earth in that. I was astonished to hear the gentleman waste so much time on it. The Postmaster-General had a right to order that post-office put upon that route. He did order it put upon it, and there is no pretense that the order allowed any more than they were entitled to, if the Postmaster-General had a right to put the post-office on the route. The law says he has the right, the regulations of the Department say he has the right, and the contract says he has the right, and I do not see who is to say properly that he has not the right.

The next route to which I shall call your attention, gentlemen, is—

ROUTE 44155, THE DALLES TO BAKER CITY, OREGON.

On page 676 of this record you will find the following :

To the Hon. D. M. KEY,
Postmaster-General of the United States :

The undersigned, citizens of Wasco and Grant Counties, in the State of Oregon, residing in the vicinity of postal route No. 44155, respectfully petition that the mail service on said route be increased to a daily service, in expeditious time, of 72 hours, or the following reasons, to-wit:

That the country along said route is rapidly filling up, and the population constantly increasing.

According to the statement of Mr. Bliss, after the words "in expeditious time" there was interlined the words "of seventy-two hours." That is his statement. I am not aware that there is any proof that it was improperly interlined.

That the country along said route has no telegraphic or other communications with other portions of our Union, except by mail; and in order to protect ourselves from hostile Indians, it will be necessary to have more frequent communications with other parts of the country.

And Mr. Bliss says there are signed to it, I think, fifty or sixty names of people residing along there.

On page 677:

To the Honorable POSTMASTER-GENERAL,
Washington, D. C.:

We, the undersigned petitioners, do most respectfully ask that the mail service on route No. from The Dalles to Baker City may be increased to 6 trips per week, and the running time expedited to 72 hours.

There is no claim that there is any interlineation here.

This is a very important road to the people of Eastern Oregon, as it connects us with other counties and towns. It is also the most direct route to The Dalles and Columbia River, and the counties through which it passes is fast settling up with stock men, farmers, and others. The last summer's Indian war has proved to us that a daily mail on this route would not only be a great benefit to the country at large, but would also be of great benefit to the Government.

On the same page, to the same direction:

We, the citizens of The Dalles and Wasco County, State of Oregon, most respectfully petition and ask that the mail service on route [No. 44155] from The Dalles to Baker City, State of Oregon, be increased to 6 times a week, and the running time on said route be expedited to seventy-two (72) hours. The above named route is a very important route to the people of the State of Oregon, and the country through which it runs is rapidly filling up, and we, the undersigned, are satisfied that our request will not only be beneficial to this country but also profitable to the United States, for the experience of the last Indian war has proven the same, as no communication could be had except by private carriers under heavy expenses. We therefore pray for the granting of the above petition.

That petition is indorsed on page 678:

The prayer of petitioners should be granted. This service should be increased without delay. I earnestly recommend it for the reasons stated in the petitions.

JOHN H. MITCHELL.

OCTOBER 20TH, 1878.

On page 681:

Hon. D. M. KEY,
Postmaster-General:

We, the undersigned, citizens of Eastern Oregon, and residents in that portion of the State supplied by mails by route No. 44155, from The Dalles to Baker City, do most earnestly petition and pray that the service on said mail route from The Dalles to Baker City may be made daily service.

This route is of very great importance to the people of Eastern Oregon, and the region through which it passes is a very rich country, which is receiving a very increase of population—

I suppose the print is defective. It ought to be a "very large increase"—by immigration from the older States. This route should be made a daily route, and we do most earnestly petition and pray that the necessary steps to have daily service be taken at once.

Respectfully submitted.

That is signed by six pages of petitioners.

And another to the same address:

To the Hon. POSTMASTER-GENERAL,
Washington, D. C.:

SIR: We, the people of Eastern Oregon, are very anxious to have more mail facilities than we now have. We therefore ask that mail route No. 44155, from The Dalles to Baker City, may be made a daily mail. We deem it a necessity for the reason that this country is a mining country as well as a farming and stock country, and during the last summer's Indian trouble proved to us that a daily mail would not only perhaps save the lives of many people, but would aid the Government in suppressing those outbreaks which are liable to occur at any time.

We therefore most respectfully and earnestly ask that a daily mail may be established on said route.

On page 682:

To the SECOND ASSISTANT POSTMASTER-GENERAL OF THE UNITED STATES,
Washington City, D. C.:

The undersigned, your petitioners, citizens of the counties of Baker, Grant, and Wasco, in the State of Oregon, residing along the line and in the vicinity of mail route No. 44155, most respectfully petition for an increase of mail service upon said route No. 44155 from The Dalles, in Wasco County, to Baker City, in Baker County, Oregon, from a tri-weekly to a daily mail service upon said route.

Your petitioners would respectfully represent that the country along said mail route is rapidly increasing in population, that the mining, farming, stock, and other interests in said counties have materially increased, and that the tri-weekly mail service is insufficient to meet the wants of said citizens.

Wherefore we ask that daily mail service be established upon said mail route No. 44155, and your petitioners, as in duty bound, will ever pray, &c., &c.

That is signed by about two pages of petitioners.

On page 683:

PRAIRIE CITY, GRANT CO., OREGON,
Dec. 1878.

To the Hon. the POSTMASTER-GENERAL OF THE UNITED STATES:
Washington, District of Columbia:

SIR: The residents of this part of Grant County, State of Oregon, who have their mail facilities at this, the above mentioned place, and which vicinity for the last few years has been fast filling up with a permanent population, and are anxious, and owing to the business and population as compared with other places are entitled to a daily mail each way on route No. 44155 (between Baker City and The Dalles via Canyon City and this place), which will also facilitate communication with the military post of Camp Harney, which is a permanent military point in East Oregon (in fact the only one), owing to the recent and expected Indian troubles, to say nothing of numerous small mining camps in this vicinity.

Therefore we, the undersigned, humbly pray that you will take this petition into your earliest consideration, and grant the prayer of the undersigned petitioners.

That is signed by eighty-seven signers.

That petition is indorsed:

We [I] hereby recommend the granting of the prayer of the within petition.

JAMES H. SLATER.
JOHN WHITEAKER.

The one a Senator from Oregon and the other member of Congress.

On page 684:

THE DALLES, OREGON, *Dec. 19, 1878.*

To the Hon. POSTMASTER-GENERAL,
Washington, D. C.:

SIR: We, the undersigned citizens, would most respectfully ask that the mail service on route 44155, from The Dalles to Baker City, State of Oregon, may be increased to a daily mail. Over this route the people of Eastern Oregon get their mails, and the country through which it passes is fast settling up. It also passes through the mining country of Eastern Oregon, where a daily mail is of great necessity. We are also on the border of Indian reservations, and we believe that in time of Indian troubles a daily mail will not only help to protect the settlers, but will largely aid the military in putting down Indian outbreaks. We, therefore, most earnestly ask for said increase.

It does not seem to say how many signed that petition. There is no reference to it here. And again on the same page :

Hon. D. M. KEY,

Postmaster-General of the United States :

We, the undersigned representatives, residing in the counties through which mail route number 44155, from The Dalles to Baker City, Oregon, passes, would respectfully recommend that the service be increased on said route to a daily service. The recent Indian raids through that section, and the large immigration during the past year render this increase absolutely necessary. We also ask that the schedule of time may be reduced to 72 hours.

Now, gentlemen, here are these numerous petitions indorsed by these men of eminence and respectability. They ask for this service. The members of the legislature of the State residing along the whole line of the route ask for it. Are these not persons entitled to be believed? Are they not credible witnesses? Is there any poof in this case that tends to show that they stated a falsehood in regard to it? They have stated that not only the business interests of their country demand this increase of service, but they have stated that it is a saving to the Government. They have stated that it is a saving of lives, and yet our friends here would haggle for a pennysworth of money against pounds of blood. The testimony of these witnesses, of these petitioners—for they are all witnesses—by General Sherman is that these routes, and their expedition, and their frequency, tends to suppress Indian outbreaks and enable the Army to put them down quickly. In a word, they save human lives, and yet we are told it cannot be done on account of productiveness.

Mr. KER. Miner wrote that.

Mr. CARPENTER. I do not care if Miner did write it. He did not sign it. It is a great thing. That is all there is in this case. I think my friend Ker has got Miner on the brain. It is all there seems to be in this case; that Miner wrote a letter that somebody else signed. I do not care who wrote it. If you write a letter and I sign it, it is my letter and not yours. I thought everybody knew that, and everybody does know it except the counsel for the prosecution in this case, and they will know it as well as you or I do as soon as this case is over.

Mr. MERRICK. Your honor, the usual time for adjournment has come.

The COURT. I suppose it is understood that Mr. Ker has set the gauge by which all the other speeches are to be measured.

Mr. CARPENTER. No, if your honor, please, that is not quite fair to me. I do not think it is perhaps quite fair to Mr. Ker, either. He had to open the case for the Government, and he had to go into all the details and I was required to do the same thing for the defense, and of course our speeches are necessarily longer than anybody else's will be. I know my own is a great deal longer than I want it to be. I am talking as fast as I can, and I am not introducing anything that is not worthy of notice.

Mr. MERRICK. I do not think my friend, Judge Carpenter, appreciates the joke. Your honor remarked to me to-day that the two opening speeches for the Government and the defense necessarily will be longer than the rest.

The COURT. We will now adjourn until to-morrow morning.

Whereupon (at 3 o'clock and 20 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

WEDNESDAY, AUGUST 16, 1882.

The court met at 10 o'clock and 5 minutes a. m.

Present, counsel for the defendants, the Government being unrepresented.

The COURT. [At 10 o'clock and 17 minutes.] I think, Mr. Carpenter, you need not wait any longer for your adversary.

Mr. CARPENTER. May it please the court, and gentlemen of the jury, the next route I shall take up is

NO. 44160, FROM CANYON CITY TO CAMP M'DERMITT.

I will read from page 1355 of the record:

CANYON CITY, September 21, 1878.

Hon. J. H. MITCHELL, U. S. S.:

DEAR SIR: The people of this part of Eastern Oregon are very anxious to have a daily mail from Camp McDermitt by this place to The Dalles. This route is our only mode of communication with the outside world, and a line from The Dalles to Camp McDermitt, connecting with the daily mail from Winnemucca to Boise City, is two hundred and fifty miles shorter than any other mail route connecting with the railroad. This line is also very important from the fact that it runs by way of Camp Harney, the principal military post of Eastern Oregon, and the late Indian trouble has proved to us that for the protection of the citizens of Eastern Oregon we need more and faster mail service than we now have.

We therefore request that you present the matter to the Post-Office Department, and endeavor to secure for us the mail service requested.

Very respectfully,

PHIL. METSCHAN.

U. S. SENATE CHAMBER,
Washington, November 16, 1878.

Hon. T. J. BRADY,

Second Assistant P. M. General:

SIR: Herewith enclosed please find a communication signed by all the officers stationed at Camp Harney, Oregon, showing the great importance of the establishment of mail service between Canyon City, Oregon, via Camp Harney to Camp McDermitt, also a communication from Hon. Phil. Metschan, a leading citizen of Canyon City, on the same subject.

I earnestly recommend that service be established, as prayed for, at the earliest possible moment, as I know it to be imperatively required. I hope this may receive speedy and favorable consideration.

Please advise me.

JOHN H. MITCHELL.

CANYON CITY, OREGON, September 23, 1878.

To the Hon. D. M. KEY,

Postmaster-General:

We, the undersigned, petitioners of this place and of Eastern Oregon, do most respectfully ask that there may be quicker time and oftener mail service on route 44160, from Camp McDermitt, Nevada, to Canyon City, Oregon. This is one of the most important routes in Oregon. It runs through the Indian country; also by the main military posts of Oregon, and would be of great importance in times of Indian trouble to have greater and oftener service than we now have. We therefore ask for a daily mail, and the time expedited to 96 (ninety-six) hours, believing that it would not only be of great benefit to the citizens of Eastern Oregon, but would also be beneficial to the Government. We therefore most earnestly ask that the above petition may be favorably considered.

Signed by E. Hall, postmaster; the Indian agent, the county judge, and three sheets of petitioners signed in double columns. It is indorsed:

I again most earnestly urge that this service be increased to a daily mail, and the

schedule shortened as proposed. There is a continual appeal coming to me for this increase. The interests of the people to be benefited demand it. I therefore earnestly recommend the prayer to be granted.

December, 1878.

JOHN H. MITCHELL.

[At this point, 10 o'clock and 21 minutes a. m., Mr. Ker entered.]

CAMP HARNEY, OREGON, *September 23, 1878.*

To the Hon. POSTMASTER-GENERAL:

SIR: We, the officers, citizens, and soldiers, do most respectfully petition and pray that the mail service on route No. 44160, State of Oregon, from Canyon City, Oregon, to Camp McDermitt, State of Nevada, be increased to daily, and the running time be expedited to ninety-six (96) hours, between Camp McDermitt and Canyon City. This is a very important route to the military of this post, and also to the citizens of this part of Oregon, connecting, as it does, with a daily line of mail from Winnemucca to Camp McDermitt, and in case of another Indian war would be of great benefit both to the military and citizens. This is also the shortest and most direct route from the R. R. to The Dalles, Oregon, and the citizens of Northern Oregon. It is therefore very necessary for oftener and quicker service than we now have.

Signed by about four pages of petitioners in double columns.

On page 1357:

Hon. D. M. KEY,

Postmaster-General:

We, the subscribers, would respectfully represent that the mail route between Canyon City and Camp McDermitt is of very great importance to the people of Eastern Oregon; that it is by several hundred miles the nearest outlet to the railroad for the people of a very large section comprising the whole eastern portion of the State. We therefore very earnestly request and petition that the service on that route, No. 44160, may be made daily service and that the change may be made to take effect very soon. A reduction of the schedule time to 60 hours during the summer months would also be very desirable, but not so absolutely essential as daily service.

It is signed by five sheets of petitioners, three sheets of them, I think, being sworn to as being Utah people, as Mr. Bliss remarks. In this connection, gentlemen, I would like to know why there should have been any Utah petitions upon this route? I have read to you a great number of petitions, and there are a great number still to read of the most urgent character setting forth that not only the business people of Oregon demand the increase asked for and the additional trips asked for, but that in case of Indian outbreaks it is necessary for the preservation of life, it is necessary for the military, and it is necessary for the civil portion of the community. Now, why should two or three of those sheets come from Utah? It may be a fact that they did; I am not disputing that; but what I am contending for is that it could have been nothing but an accident. It could not have strengthened the case. Besides all that, my recollection is that the petition upon which those names are said to appear does not purport to be a petition of citizens of Oregon, but simply starts out by saying, "We, the subscribers." It might be an accident. The persons getting up a large number of petitions or forwarding them might have made a mistake accidentally in pasting them together. I do not see any purpose that could have been subserved by it. I do not see any reason for dishonesty. Here are petitions enough, Heaven knows, without those two or three sheets from Utah.

On the back is an indorsement as follows:

Having examined the foregoing petition and list of names, I find it correct in the statements, except that it affects the middle and southeastern section of the State; the north and northeastern section being supplied from Kelton by way of Boise City to The Dalles. The section, however, supplied by route 44160 is not less important to the section through which it passes than the Kelton route was to the section through

which it passes only a few years since. Therefore, I recommend the granting of the prayer of this petition.

J. H. SLATER.

I concur in the foregoing.

L. F. GROVER.

I concur in the above request.

JOHN WHITEAKER.

On the same page, to the same address, is the following:

We, the undersigned, citizens of the State of Oregon, and residents of Canyon City and vicinity, respectfully represent that postal route No. 44160, from Canyon City to Camp McDermitt, is a most important mail line to the citizens of Eastern Oregon, the same being a direct communication, and the shortest by some hundreds of miles from navigation on the Columbia River and the Atlantic States, reaching the railroad at Winnemucca; that the present service is inadequate to supply properly the rapidly increasing business demands of this portion of the State of Oregon east of Cascade Range. We therefore most respectfully ask that the mail facilities on said route 44160 be increased to a daily service.

Signed by two sheets and a half of signers in double columns.

On page 1358:

This route is nearly two hundred miles the shortest line from Eastern Oregon to the Central Pacific Railroad, and is furthermore of very great importance to the military stationed in Eastern Oregon. It would greatly assist by speedy and frequent communication in preventing and suppressing Indian outbreaks, and thereby encourage emigration to a section adapted to support a large population. We earnestly request that this prayer be granted.

Signed by a page and a half of petitioners.

On the same page and to the same address:

We, the undersigned, residents of the near vicinity of P. O. route No. 44160, from Canyon City, Oregon, to Camp McDermitt, Nevada, most respectfully represent that said route is one of the most important in Oregon. It is about one hundred and fifty miles the nearest route to the railroad for all Eastern Oregon. It is a very important line for the military forces stationed in Eastern Oregon for the protection of the country from Indians. We therefore respectfully request the increase of the service on that route to a daily service.

Signed by about two pages of petitioners in double columns.

On the same page and to the same address:

We, the undersigned, residents of the State of Oregon, very respectfully petition for increased mail facilities on the principal route in the eastern part of the State. Route No. 44160, from Canyon City to Camp McDermitt, is at least one hundred and fifty miles the shortest outlet from a very large section of country to the railroad, and all the outer world. The region through which it passes is rapidly increasing in population, and a daily mail will be of great service to a large region of country, assisting in its development and settlement.

Signed by about two pages of petitioners in double columns. Indorsed:

Hon. John Whiteaker presents petition for increase of service.

On page 1359 is the indorsement:

December 30, 1879. Hon. J. H. Slater files a petition for daily service.

On the same page, to the same address:

The subscribers, citizens of Eastern Oregon, beg leave respectfully to represent that the mail route from Canyon City to Camp McDermitt is the most direct and convenient outlet for a large section of country which is rich in mines, and portions of which are well adapted for agricultural purposes, and which is increasing rapidly in population. We therefore earnestly petition for daily service on that route.

Signed by about three pages of petitioners, and also bearing the following recommendation:

I recommend that the prayer of the above petition be granted.

JOS. H. SLATER.

I indorse the above application.

JOHN WHITEAKER.

Mr. KER. I think I forgot to mention that one of those petitions was written by Miner and signed by people living in Utah. I suppose you have some explanation of that.

Mr. CARPENTER. I have explained it all I wish, and all there is of it, I think.

Hon. THOMAS J. BRADY,
Second Asst P. M. General:

We, the undersigned, citizens of Humboldt County, Nevada, respectfully petition for daily service on route 44160, from Canyon City to Camp McDermitt. This route is nearly two hundred miles the shortest line from Eastern Oregon to the Central Pacific Railroad, and is furthermore of very great importance to the military stationed in Eastern Oregon. It would greatly assist, by speedy and frequent communication, in preventing and suppressing Indian outbreaks, and thereby encourage immigration to a section adapted to support a large population. We earnestly request that this prayer be granted.

DAVID B. TODD,
A. A. Surg., U. S. A.
 A. W. CORLISS,
Capt. 8th Inf.
 JOHN ALLEN.

And about a page of others.

To Hon. D. M. KEY,
Postmaster-General, Washington, D. C.:

We, the undersigned, residents of the near vicinity of P. O. route No. 44160, from Canyon City, Oregon, to Camp McDermitt, Nevada, most respectfully represent that said route is one of the most important in Oregon. It is about one hundred and fifty miles the nearest route to the railroad for all Eastern Oregon. It is a very important line for all the military forces stationed in Eastern Oregon for the protection of the country from Indians. We therefore respectfully ask the increase of the service on that route to a daily service.

Signed by about a page and a half of petitioners, in double columns.

This is the route, gentlemen, upon which so much was said in regard to the service. It is a fact, and the evidence in this case proves it, that upon one part of this route the service was not commenced until January. On the other end of the route it was commenced in September, but as I remarked yesterday, the Government lost nothing by it, for they did not pay us for any service we did not render. There were Indian difficulties in the country, and the service was put on as soon as it could be. And upon that route, or any other route, whether the expedition was made before or after the service commenced, is a matter of no sort of consequence, either in law or in morals. If the route needed to be increased, if the additional trips were needed, the Postmaster-General had the right, and it has been the practice, as has been testified to before you by the witnesses for the Government, to expedite routes and to give additional trips before the service commenced. One or two witnesses on the stand for the Government testified that since the last letting of the mails, and before the contracts that were to go into effect on the 1st of July had gone into effect, it had been done, and that it is the practice in the department to-day, and they have been doing it right along. There is no point about that. After the contract is made the Government has the right, upon a proper showing, to expedite a route or order additional trips. And if the Government had not the right and if the contractors had not the right upon such a showing as that, three United States Senators, a member of Congress, the officers of the different camps, and petitions with thousands of names upon them, I would like to know in what case it would have the right.

With a view of wearying your patience as little as possible, I proceed at once to another route.

NO. 41119, FROM TOQUERVILLE TO ADAIRVILLE.

I read from page 602 of the record:

Hon. D. M. KEY,

Postmaster-General, U. S. A., Washington, D. C.:

DEAR SIR: We, your petitioners, citizens of Kane County, Utah, would most respectfully represent that while neighboring counties are enjoying the benefits of a daily mail, the majority of the citizens of aforesaid county receiving their mail on route 41119 have only tri-weekly service, which is entirely insufficient to meet the wants of the people. This is also the main thoroughfare through Southern Utah to Sunset, Arizona. Many rich mines are being found and developed, and the country is fast filling up and demands more mail facilities, and a change of schedule from tri-weekly to daily service seven times a week, and a running time of forty-eight hours. Your prompt and favorable consideration on this matter will greatly promote the growth and prosperity of this part of the country; and we, your petitioners, will ever pray.

KANAB, KANE COUNTY, UTAH, *May 6, 1879.*

Signed by a number of petitioners, who give their business in most cases. Indorsed:

The increase asked for in this petition is greatly needed. The country between the points mentioned is rapidly filling up, and I understand valuable mines are being developed. I therefore heartily indorse the petition.

GEORGE Q. CANNON.

In connection with this petition, gentlemen of the jury, it is proper to remark that the subcontractor upon the route, Mr. Nephi Johnson, went upon the stand, and his brother or cousin, at all events another man by the name of Johnson, who had interested himself a great deal in behalf of Nephi Johnson, and these two men were the very men that got up and circulated these petitions for this service. And after asking the people of Utah to sign these petitions, and after securing an enormous number of names upon them, the contract not having been as profitable as Mr. Johnson expected, the fines and deductions having been heavy upon the route, Mr. Johnson is brought here and gives the testimony that you have heard in regard to it. I do not mean to accuse him of having said what he did not think was true. I thought he acted like a fair man; but a fair man may be biased somewhat as well as any other kind of man. I do not charge him with any deliberate falsehood, but I want to call the attention of the jury to the fact that this was the very man, and the other Johnson, that got up these petitions, had the route expedited, and the additional trips put on.

Now, on page 603:

The Hon. POSTMASTER-GENERAL,

Washington, D. C.:

SIR: We have the honor to submit for your favorable consideration the fact that the mail service on route 41119, from Toquerville to Adairville, Utah, is entirely insufficient for the wants of those now receiving their mail by this route, and to earnestly request that the service be increased to daily, 7 times a week, and on a less schedule than now carried, that is to say, in about 48 hours. This service is absolutely necessary to accommodate the great number of persons supplied, and to dispose of the large amount of mail matter now carried over this route. The country is already thickly settled along this route, besides a large and intelligent immigration constantly pouring into this country.

JOHNSON, KANE COUNTY, UTAH, *May 24, 1879.*

Signed by a number of people.

You know they undertook to make a great point on the fact that the word or figure "seven" was introduced into this petition. The gentleman spent a good deal of time on that. Both of these petitions contain that number in the body of the petition, and the same remark applies

to that that I made the other day in regard to other petitions of that character. It is all very true that after this service was established, and Mr. Nephi Johnson got the contract, and undertook to carry it with an insufficient number of horses and men, and was fined and deductions were made, that all those Mormon postmasters sent in statements that the schedule was too short and wanted it put back to sixty hours. I ask you, gentlemen of the jury, what confidence is to be placed in statements of that sort. I ask you when a man takes petitions around to the people, as both of these Johnsons did, and get them signed and sign them themselves, and both of them swear hear upon the stand, that they were true, and then these postmasters come here and ask the Second Assistant Postmaster-General to put that route back upon the old schedule—I ask you what officer ought to have regarded any request of that sort from such men, and I ask you what weight is to be given to it by an intelligent jury. Take notice, a large number of people sign the petition and they sign it themselves, and ask for this service, and then when it does not turn out as well as they expect, when the officer in charge at the capital does his duty, and fines them when they do not perform the service, and when they perform it imperfectly deducts from their pay, they come here and want to make you believe that it is a thing that never ought to have been done.

My friend, Judge Wilson, reminds me that Johnson wrote a letter, and calls it to my attention. I will give you the page and the statement in a few moments. Johnson wrote a letter in which he said this mail could be carried in the time named.

NO. 38150, FROM SAGUACHE TO LAKE CITY.

The next route that I will take up, gentlemen, is No. 38150, from Saguache to Lake City. I will read from page 1407 of the record :

To the POSTMASTER-GENERAL:

We, the undersigned, citizens of Saguache and Lake Counties, respectfully ask you to order an increase of service on route 38150, from Saguache to Lake City, from a tri-weekly to a daily, seven times a week, with increased schedule.

In support of said petition, we would respectfully represent that the fast settling up of the country, the rapid development of rich mines, the greatly increased number of reduction works, and the great agricultural and stock-raising interests, create an imperative demand for the increase of mail facilities hereby prayed for.

W. B. FELTON,

County Judge of Saguache.

GEORGE S. PARSONS,

Postmaster, Saguache.

GEORGE NEEDHART,

County Commissioner of Saguache.

J. B. SPENCER,

Commissioner of Saguache.

And there are a number of other signatures.

Indorsed:

I have examined into the necessity for the service petitioned for in the within petition, and am convinced that the prayer of the petition should be granted. I therefore earnestly recommend this to be done without delay.

H. M. TELLER.

I fully concur in the above.

JOHN L. ROUTT.

That is Governor Routt, of Colorado.

Having been requested to give my views on the matter embraced in the within petition, I have no hesitation in saying that I believe that the necessities of the people

require the increased mail facilities asked for, and I most cheerfully recommend the increased service, knowing that the country through which the route passes has greatly increased in its population, wealth, and prosperity.

CHARLES ADAMS,
Special Agt. P. O. D.

Gentlemen, I will not trouble you any more with the evidence upon that route. I have introduced enough to show you that it was proper to grant the prayer of the petitioners; that it was needed; and this is one of the routes you will remember that neither Dorsey, Peck, Miner, Vaile, or any other person ever rode a horse over, ever drove a mile over. The contract was sublet to Mr. Sanderson before the time that the contract commenced, viz, in June, 1878, and Mr. Sanderson has carried that mail from that day until this. He was indicted in the old indictment but he is not indicted in this. With a strange inconsistency, while they have left him out of the indictment they put the route in and charge that the money was paid to Sanderson for our benefit, and I need not ask you, gentlemen, whether there is any proof of that fact or not. There is no proof that Mr. Sanderson ever paid to one of these defendants a solitary dollar upon that or any other route. The warrants were all issued to Mr. Sanderson, and he got the money.

The next route to which I call your attention, gentlemen, is

ROUTE 46132, JULIAN TO COLTON.

That is the route, you will remember, as to which I stated to you during my previous remarks, that while we were indicted for fraudulently obtaining additional trips and expedition of service, while it had been said that the administration which succeeded that of which General Brady was a part, was an honest administration, that they had continued the expedition and increase, and paid it to the last dollar up to the last day of the contract; while on the other hand these gentlemen were seeking to charge us with a crime, this honest administration was paying us the money and saying it was a meritorious contract.

You will not forget, gentlemen of the jury, that under every contract the Postmaster-General has the right, at any time, to curtail the service, to reduce the number of trips, to reduce expedition, and, indeed, to discontinue the route altogether. That is one of the conditions of the contract, and with this power and authority on the part of Mr. James, and his successor, Mr. Howe, that route never was discontinued. The expedition was not lessened, the trips were not lessened, and they paid us every dollar, according to the new contract, up to the time the contract expired. That, perhaps, ought to be reason enough, but for greater caution I will read the petitions and letters.

On page 982 of this record:

UNITED STATES SENATE CHAMBER,
Washington, April 10, 1877.

Hon. D. M. KEY,
Postmaster-General:

DEAR SIR: I respectfully ask your favorable consideration of the inclosed petitions for increase of service on mail route 46132, from Colton to Julian, in California.

Your ob't servant,

NEWTON BOOTH.

At that time Senator from that State.

I concur in the above recommendation.

J. T. FARLEY.

Also a Senator from that State.

COLTON, CAL., April 1st, 1879.

THOMAS J. BRADY,
Second Assist. P. M. General:

In addition to the two routes inclosed, would recommend that the route 46132 be increased to three trips per week.

This will give mail matter to the *whole route* from 24 to 48 hours sooner than by the present one, via San Diego, as can be plainly seen from the map.

Route from Riverside to Temecula is unnecessary, as Riverside is not a distributing point. The same objection applies to route from Riverside to Temescal.

Route from Spadra to Temecula, via Chino, Temescal, &c., is wholly unnecessary. No call exists for it at all.

Please send me specifications for routes now in existence in Southern California, which will greatly aid in making reports on changes and new routes.

Any information at my command, or suggestions as to speed or economy in the service, are cheerfully at your command.

Respectfully,

SCIPIO CRAIG,
P. M., Colton.

To the honorable D. M. KEY,
Postmaster-General, Washington, D. C.:

The undersigned, citizens of California, respectfully represent that route from Colton to Julian, No. 46132, is a very important route. It is the only communication from the rich mines at its southern terminus to the Southern Pacific Railroad, and more frequent and more rapid mail communication is necessary.

That a new road has been opened from the San Jacinto Valley, and the same is being rapidly settled. That route number 46130 has no railroad communications, and that by this change close connection will be made.

We therefore petition that the service on that route be made tri-weekly, and that the schedule be reduced from the present running time to 36 hours.

That is signed by one postmaster and twelve or fifteen other persons

On the same page and to the same address:

The undersigned, citizens of Southern California, represent that the route from Colton to Julian, number 46132, is a very important route. It is the only communication from the rich mines at its southern terminus to the Southern Pacific Railroad, and more frequent and more rapid mail communication is necessary.

That a new road has been opened from the San Jacinto Valley, and the same is being rapidly settled. That route number 46130 has no railroad connection, and that by this change close connection will be made and greatly accommodate parties on this important route.

We therefore petition that the service on that route be made tri-weekly, and that the schedule be reduced from the present running time to 36 hours.

That is signed by the postmaster at Oak Grove, and twelve or fifteen others. It is the same petition in other respects as I have read you.

I will not trouble you, gentlemen, with reading further upon that, as there can be no pretense after the continuance of the route up to the end of the contract that the original contract was wrong.

Mr. KER. It was twenty-six hours.

Mr. CARPENTER. Thirty-six hours.

Mr. KER. Brady made it twenty-six.

Mr. CARPENTER. He had a right to do it. Thirty-six hours was what they asked.

Mr. KER. He made it twenty-six.

Mr. CARPENTER. He had a right to do it.

Mr. KER. Brady continued it up to the end of the term as twenty-six hours.

Mr. CARPENTER. There was not much in it at all, for your honest administration continued it at twenty-six hours, and the records of the Post-Office Department will show it. Go and look at them.

Mr. KER. You ought to discuss the evidence. That is not in evidence.

Mr. CARPENTER. We are discussing facts.

The COURT. You have no right to discuss facts except those in evidence.

Mr. CARPENTER. Is it in evidence that this last administration was an honest administration?

The COURT. The court positively excluded all offers of that character when they were made. The court cannot compare the comparative integrity of two administrations. That we could not do.

Mr. CARPENTER. Surely, your honor, in a criminal prosecution, if it is a fact as I say, and the gentlemen have the records at their control, that this contract was continued at the rate of expedition that Brady put on, that is a fact this court ought not to prevent me from stating to the jury.

The COURT. The court has decided that it is not evidence pertinent to this case and the counsel ought not to comment upon it.

Mr. WILSON. If your honor will pardon me one remark, I will state this: There is this much of evidence on that subject: They have put in the warrants that have been paid on account of this service down to the end of the contract term as I understand.

Mr. CARPENTER. Then that is proof. So that they introduced it.

The COURT. Is that a fact?

Mr. WILSON. If I am mistaken I want to be corrected.

Mr. KER. I say that the evidence shows that the time was increased. The petitions were for thirty-six hours and Brady made it twenty-six, and subsequent to this prosecution being brought the time was increased.

The COURT. I do not know anything about that. The court, I know, laid it down as a rule that it would not go into any evidence, the object of which was to compare the acts of the present administration with the other.

Mr. WILSON. I understand that just as your honor does, and for the reason that the court established that rule there was some testimony that we wanted to get in that we really did not offer. I want to be exactly accurate about this thing. The warrants were put in up to the end of 1881. There is just that much testimony on the subject. I only interrupt for the purpose of having the matter understood exactly as it appears by the record in the case. I say the warrants or payments were put in up to the end of 1881.

Mr. KER. There is no question it was paid for, but not at that rate.

Mr. WILSON. Oh, yes; it is the same rate all the way through.

The COURT. Do the warrants show that fact?

Mr. WILSON. Oh, yes; here they are; they run right along. Warrant \$2,227 was on the 2d of February, 1880. The last warrant that was issued was the 28th of January for the fourth quarter of 1881—\$2,227.50, and that ran right along all through.

The COURT. What does \$2,227 indicate?

Mr. WILSON. That is the amount per quarter.

The COURT. For what?

Mr. WILSON. For service.

The COURT. For what kind of service?

Mr. WILSON. The service as it was under the contract after it had been expedited and increased.

The COURT. That is what I inquired about.

Mr. WILSON. That is it exactly.

Mr. MERRICK. I understand the question to be whether or not the expedition on this route was continued during the present administration.

The COURT. That was the subject that was discussed by Judge Carpenter.

Mr. MERRICK. If we are allowed to go into a comparison and determine the propriety of the expeditions made by Brady by the judgment of the present administration upon them, I am perfectly willing to do it, and I will show that they were cut down—cut to pieces—until the whole thing has been reduced to less than half, and that the present postal star-route service is self-sustaining.

The COURT. That is about a set-off to the irregular statement of Mr. Carpenter.

Mr. CARPENTER. I must contend that my statement was not irregular. It is in the proof.

The COURT. I do not see that it is in the proof. I see that by some means or other these warrants are in evidence as the payments down to the end of 1881.

Mr. CARPENTER. That is long after we ran it.

Mr. MERRICK. Down to the end of the fiscal year.

Mr. WILSON. Down to the fourth quarter of 1881.

Mr. MERRICK. That is 1882. Well, sir, I will take that issue, if there is no objection to it.

The COURT. It is too late to take the issue, because the court has excluded the evidence.

Mr. MERRICK. That I am aware of; but if it is tendered to me, I take it with the permission of the court.

Mr. WILSON. And with the permission of the court, we will be very glad to go into it.

Mr. CARPENTER. As the court has decided against both of you, I will go on.

The COURT. I think it is out of this case altogether. This case must be decided upon its own merits, without comparison with the merits of any other administration.

Mr. CARPENTER. I think so, too. But I was speaking from the record. As these records show that the pay was the same from the date of Brady's expedition down to 1881, it seems to me to have been proved that they continued the route.

The COURT. Suppose they had. It would not have had the slightest influence in the determination of the question we are trying.

Mr. CARPENTER. Of course I bow to the decision of your honor in that as in everything else. I always do.

Now, gentlemen, I will call your attention to

ROUTE NO. 35015, VERMILLION TO SIOUX FALLS, DAKOTA.

On page 1198:

Hon. D. M. KEY,
Postmaster-General:

We, the subscribers, residents on the line of mail route 35015, Dakota Territory, respectfully petition for daily service on that route, and also that the schedule be reduced to ten hours. Southern Dakota is receiving very large numbers of emigrants, and this route is one of the principal lines running northward from a railroad point, and is being very rapidly settled, and is, we believe, entitled to the additional mail facilities asked for.

Signed by a page and a half of petitioners.

Another petition on the same page:

Hon. D. M. KEY,
Postmaster-General:

We, the subscribers, residents on the line of mail route 35015, Dakota Territory, re-

spectfully petition for daily service on that route, and also that the schedule be reduced to ten hours. Southern Dakota is receiving very large numbers of emigrants, and this route is one of the principal lines running northward from a railroad point, and is being very rapidly settled, and is, we believe, entitled to the additional mail facilities asked for.

Signed by half a page of petitioners in double columns.

Indorsed on the back :

Respectfully recommended.

G. G. BENNETT.

You have heard, gentlemen, a great deal about this route, and I want to continue to read more in regard to the other one. This is the route where French was subcontractor, where the route was advertised to be carried in one way and French took it into his head to carry it in another.

Mr. HENKLE. Oh, no; that was from Kearney to Kent.

Mr. CARPENTER. That was from Kearney to Kent. I have made a mistake. I am obliged to my friend, Mr. Henkle. This is the route that was advertised at fifty miles and turned out to be seventy; and this is the route that was expedited so that the time was seven miles an hour, and the postmaster was here and stated that if he had known that he would not have signed the petition.

Mr. HENKLE. Seventy-three miles.

Mr. CARPENTER. Well, seventy-three miles. It was expedited, and it was not carried according to the agreement by the subcontractor, and there were fines imposed and deductions made, and he says he was ruined—ruined because he did not carry the mail according to his contract. I made the mistake because I got hold of the other paper first.

Now, gentlemen, I take up the

ROUTE 34149, KEARNEY TO KENT, NEBRASKA.

and I call your attention to page 370 of the record :

SENATE CHAMBER,
February 16th, 1879.

The Loup Valley is a very large and fertile one, and is being settled up rapidly. I approve of the request made by the settlers for the increased service on the route between Kearney and Loup City, and shall be glad to learn that their petition has been granted.

A. SAUNDERS, U. S. S.

On page 371 :

Hon. D. M. KEY, *Postmaster-General* :

The undersigned, citizens of Nebraska, and getting their mails on route No. 34149, from Kearney to Kent, respectfully represent that it is necessary that the service on said route shall be increased from one trip per week to three trips per week to Loup City, schedule thirteen hours.

Those are the words that they say were inserted in the petition by somebody, but they have never been able to prove by whom they were inserted. Senator Saunders upon that subject testified that he received, according to his impression, that petition from some gentleman at Kearney; that it was sent to him at Washington, and he made his indorsement upon it and sent it to the Postmaster-General. He said he did not know whether it was in it or not; he did not notice and he could not say. It is much more probable that somebody in Kearney, after consulting with his neighbors there in regard to it, inserted those words than that anybody inserted them here, because they have had abundant witnesses

to prove Rerdell's handwriting, and Miner's handwriting, and no witness has testified that that was in the handwriting of either:

The country is being very rapidly settled up by people of intelligence, and we ask the increased mail facilities for the benefit of those who have already made their homes in this section, and as an inducement to others to settle, frequent mails being one of the strongest inducements to impending settlers.

On page 375 :

Hon. ALVIN SAUNDERS,
Washington, D. C. :

DEAR SIR: On behalf of the people of Sherman Valley and the northern part of Custer County receiving their mail on mail route No. 34149, we thank you for the earnest and persistent efforts made by you in our behalf. As we need additional service on said route, we earnestly request that you will exert every endeavor consistent with the high and responsible position in which you are placed to forward our interest in this matter. Our daily stage line is constantly bringing in settlers, and we constantly feel the necessity for better mail facilities because of the lack of frequent service on said route, and the ordinary course of business is greatly retarded. In some instances parties desirous of locating in these counties wholly refuse to locate in a county where they have so much difficulty in hearing from their friends at a distance. Again thanking you for your interest shown in this matter, so important to us, and again requesting you to help us in a matter of so much importance to us as settlers, and indirectly to the whole State, we are,

Very respectfully, yours,

HALE & NIGHTINGALE.

This letter would seem to indicate that at the very time they were having one trip a week on this route there was a daily line of stages over it, which showed the necessity for more mail service, both as to trips and as to expedition.

KEARNEY, NEBRASKA, April 14, 1879.

Hon. E. K. VALENTINE,
Washington, D. C. :

DEAR SIR: The good people of Buffalo and Sherman Counties desire me to ask you to use all honorable means to secure for them a tri-weekly mail between Kearney and Loup City. A petition was sent to the honorable Alvin Saunders some time during the winter. That was signed by a very large number of our people, but we have not been able to learn whether he received it or not, or whether he done anything with it. If you can help us in this matter you will place the entire inhabitants under obligations to you.

Respectfully,

JOHN D. SEAMAN.

Gentlemen of the jury, you will recollect the testimony of Mr. Valentine in this connection. That he thought then that the service was necessary; that he thought when he was on the stand the service was necessary; that it was important to the people of that country, and he gave you testimony that I am sure you have not forgotten, and I will not consume your time in commenting upon it further. He stated one fact however in that connection that I beg you will remember, that the general practice was—and Mr. Saunders, a witness for the Government stated the same thing—where additional trips were ordered, expedition followed as a matter of course. The people wanted a daily mail. They wanted a fast mail. They would not want a daily mail and have it a week in being run.

I stated to you yesterday that the West paid for these mail facilities, and I wish to state now one thing I neglected to state yesterday. I stated yesterday that it was second class and lower grade mail matter that made the mails costly to the Government; that it was not first class mail matter; that that was paying, and paying largely all the time.

Now, gentlemen, there is another fact to be taken into consideration. The franking privilege sends hundreds of tons of documents and books

over these routes every year that the Government does not get a cent for, and the mail contractor does not get a cent ~~for~~, except his pay upon the contract. That is another item that goes to make up this loss.

I stated yesterday several ways in which the West paid for all her mail facilities, and I propose now to comment very briefly upon the way in which she pays it. The production of gold since 1849 in the Western States and Territories, chiefly in those States and Territories in which these very routes lie, exceeded fourteen hundred millions of dollars, and the production of silver—my calculation is from 1849 to 1881, only embracing the year 1880, and my authority is the report of the Director of the Mint—from 1849 to 1881, was more than four hundred millions of dollars, making a total of between eighteen and nineteen hundred millions of dollars that has been produced from that very country of the precious metals within that time. The whole amount of gold and silver in the United States, as estimated by the same authority, at the present time, is six hundred millions of dollars. Therefore the amount that has been brought into the country from this section, as to which this complaint is made about the mails, and as to which so much is said about productiveness, is more than three times the whole amount of gold and silver now in the whole United States. That money has gone into mills, into railroads, into all the varied industries of the Union, and, gentlemen, I think the West has paid. That country has breathed upon the public credit and made it strong, made her bonds at a high premium in the markets of the world. That country has taken the United States from bankruptcy and put them upon a solid foundation, for with all our agricultural wealth and all our manufacturing and our other industries, at one time her paper was very far below par, and at one time we seemed upon the verge of bankruptcy. That country is sending to us seventy or eighty millions of dollars every year of gold and silver, and yet gentlemen say it does not pay.

Now, gentlemen, the prosecution with an inconsistency that is in keeping with this whole case in regard to the things of which I have spoken, and things of which I have not spoken, and things I am not permitted to speak of, relies upon the confessions of the defendants in this case to show that there is a conspiracy. It is true the court has said to you—and they will not, I presume, contend that these confessions or admissions are evidence against anybody except the parties making them, if they did make them, viz, General Brady and Mr. Rerdell. It is in the nature of falsehood eternally to cross its track. Falsehood has so many tongues and so many devious ways that it will cross its track every little while. Truth has no false tongue. She speaks one language now and forever. And these gentlemen rely upon these two different confessions that do not tally at all.

Now, according to the testimony of Walsh, Brady's rate of compensation for expedition was 20 per cent., and Walsh said the business could not stand that. According to the confession of Rerdell it was between 30 and 40 per cent. And they rely equally upon one with the other. Now, the rate was something, if there was any rate. If it was 20 then it was not 30, and if it was 30 it was not 20. One of these rates must be false. There can be no way out of that. One of them is a clear cut lie, because they cannot both be true. Neither of them are true. But that does not destroy the inconsistency of relying upon both.

Now, as to Rerdell's confession. We have not attempted here to attack the testimony of Mr. James, nor of Mr. MacVeagh, nor of Mr. Clayton. They stand as credible witnesses so far as the proof is con-

cerned, and so far as my opinion, and so far as the whole question is concerned. It is not denied that Rerdell went to these men and made practically that statement. But that statement, gentlemen, was not true in any particular. In the first place, Rerdell has since sworn it was not true. In the next place, this record proves it cannot be true.

Mr. KER. Where is the proof of that?

Mr. CARPENTER. Mr. MacVeagh said so.

Mr. MERRICK. No, sir. Hunt it up. I say it is not there.

The COURT. There is no such evidence in this case.

Mr. CARPENTER. There is evidence, if your honor please, that he made a different statement afterward; that he denied it, and said it was not true. It is in MacVeagh's or James's testimony.

Mr. MERRICK. If I am not mistaken in my recollection, all that is said is this: That he had heard of some retraction; and that was on cross-examination and is not competent.

Mr. CARPENTER. Well, all right. Then I will show you it is not true by the record. You will not object to that.

Mr. MERRICK. No; that is all right, if you can.

Mr. CARPENTER. Thank you, sir. I am happy to proceed uninterrupted on any terms.

Mr. MERRICK. I shall not interrupt you as long as you confine yourself to the evidence.

Mr. CARPENTER. I am much obliged to the gentleman. They have set an example we will be sure to follow. His turn comes by and by. Now, gentlemen, I will show you from this record that that cannot be true. There is some testimony in this case that is not disputed in any way. For instance, take Peck's contract with French on route 34149, from Kearney to Kent, the last one I alluded to, giving the subcontractor 65 per cent. of the expedition. You will find that contract on page 400 of the record. Now, if he gave French 65 per cent. of the expedition and Brady from 30 to 40 per cent., say 35 per cent., how much would be kept for us? These gentlemen would have you believe we were going over this country and getting up petitions at great expense, and getting up letters and getting routes expedited and getting additional trips for the mere fun of the thing; the whole expedition exhausted in this case and we have not got a dollar, and Turner is not paid either, because according to this confession Turner was paid, too, and according to their theory he was. Turner has not got a cent. Brady and the subcontractor, according to this argument, have got every dollar of the expedition, and we have got nothing. That is not likely. The first contract with Nephi Johnson, on route 41119, from Toquerville to Adairville, was worse yet. It gave him 75 per cent. of the expedition and Brady 30, so we had to pay 5 per cent. ourselves and still nothing for Turner. John W. Dorsey's contract with Anthony Joseph, on route 38145, from Ojo Caliente to Animas City, was 40 per cent. That you will find on page 922 of the record. That was the lowest rate in any of the subcontracts as to expedition. There was that clause in almost all of them, and the rate ran from 40 to 100 per cent.—in a great many of them 100 per cent.; and then we would have to pay Brady 30 per cent., and pay Turner besides, and have nothing ourselves at all. Now, gentlemen, I say these subcontracts prove conclusively that this statement of Rerdell's is not true. It is not true even as against himself, for the record disproves it. They have introduced indubitable testimony here that shows it cannot be true.

Gentlemen, if you would decide this question properly, you must in imagination remove yourselves from the East to the West. That is, in

all respects, a very different country. It is, geologically, perhaps millions of years younger than the Eastern portion of the country, with its alkaline formation and its peculiar structure, and its light temperature—a temperature in which a man is compelled to breathe three times where he would breathe twice here—with its mountains that pierce the clouds, and its chasms that reach deep into the bowels of the earth; a country that is hard to travel over, that requires force and strength, and energy, and a great outlay of capital to carry the mail. You must consider that country, not this, if you would form a just conclusion as to whether these contracts are exorbitant and extravagant.

Upon that subject, gentlemen of the jury, while one department of the Government is sitting in judgment upon another, it might with the same propriety sit upon another still. There has recently been a bill passed making the appropriation in round numbers of \$18,000,000 for the improvement of rivers and harbors. Suppose every man in that Congress were on trial under an indictment for extravagance and extravagant appropriation, and suppose it was alleged, as it is in this indictment, that such an appropriation was not necessary for the good of the United States and for the public service, as said members of Congress well knew. You could call upon the stand as the first witness the President of the United States, who vetoed the bill, and said precisely the same thing; and yet both branches of Congress passed the bill with speed over his head, and said they had a right to consider that and not the President. Now, gentlemen, taking the country that I have given you a brief, glancing description of, taking the petitions that have been sent forward and the letters that have been sent forward and the recommendations of the representative men of that great country—a perfect cloud of witnesses that surround us in these cases—I ask you if the testimony is not overwhelmingly in favor of the defense? I am not putting it upon the ground that these petitions and letters and recommendations specifically authorize the Second Assistant Postmaster-General to put on this service. I am putting it upon the ground that we had a right to ask for the service; that it was needed; that it was for the public good, and that the public interests did require it, and the statement in the indictment that it did not is a falsehood from beginning to end.

Mr. Ker, in his remarks to the jury, commiserated the condition of John W. Dorsey, and said that his brother had deserted him in regard to counsel. Gentlemen, there is nothing in this record that shows that he ever deserted him. On the contrary, when he lent him money to go into this enterprise, and when he afterwards let him have money and took hold of the enterprise with him when he left the Senate, that shows very conclusively that he was standing by his brother, and backing him, and yet those two facts are brought up here as crimes against Senator Dorsey. The holy affection that exists between brother and brother is arraigned as a deep, a dark, and a damning crime against him. Gentlemen, he has not deserted him, and he will not. And if disaster should come or must come to either, his large and noble heart would rather invoke it to fall upon his own head than upon his pure and good brother. It is not true.

On page 2314 the gentleman, in his opening address, saw fit to submit to the jury an observation that I was pained to hear. I did not think it was a fit observation to make to a jury on the trial of a cause. I cannot think that I discharge my duty to my clients and my duty to the jury, whom I do not personally know, but whose position and character I respect, if I pass it without some notice. The language was this:

That slanderous tongue has gone out with the words spoken that are to throw doubt upon your integrity.

If that means anything, gentlemen of the jury, it means that in some way or other the defendants have corrupted a portion of the jury. I propose to meet all such questions where they are presented to me. My client, Senator Dorsey, has faced death in a thousand forms upon the battle-field. No braver man ever put a sword to his side, and yet I know he has not the courage to approach any man upon that jury with a proposition of that sort. If that slanderous tongue has gone out, from whom did it go? Not from the defense, certainly. We would not make an intimation of that sort. It must have gone from the prosecution, it anybody; and now it seems you are asked to bathe your characters in perjury, to wipe out the stain that the prosecution has thrown upon you. And this is what they call justice. God in heaven, can such things be in a free country? It is in keeping with the whole bulldozing, intimidating spirit of this prosecution. It is an attempt to bully the jury and scare them, and drive them into a verdict against testimony to relieve themselves and to wash out a stain thrown upon them by the prosecution. If any man ever approached a solitary gentleman upon that jury, his honor properly instructed you weeks ago it was your duty to report it to him, and you would have been derelict in your duty if you had not. You know and I know that no man ever did approach you. It is a vile calumny upon the character of the jury. And not content with attempting to asperse the jury, they had to attack a gentleman who stands as high as any man in Washington, the marshal of this court, and drag him into it. He never helped to pack the jury. It would be safer to say that at a distance than here.

Mr. MERRICK. Is there any evidence of this?

Mr. KER. This is going too far.

Mr. CARPENTER. Look at his honor's remarks.

The COURT. There is nothing except some remark which the court made at the beginning of the trial. The court called attention to some articles that appeared in the newspapers.

Mr. MERRICK. That was a matter between the court and the jury, and hardly a matter for the counsel to comment upon as evidence. Still, if we are entitled to go into it I am willing that you may.

Mr. CARPENTER. Do you mean to say that you expect to prove that the marshal was guilty?

Mr. MERRICK. I do not mean to say anything except this: that if it is an issue as to who circulated the report to which the counsel refers, or any other issue of that kind, I am willing to go into it. I do not want it; but I am willing to go into it, and if it is tendered to me I will.

Mr. CARPENTER. What I say, gentlemen of the jury, is that in the very nature of the case it could not have come from us; and what I say further is what the record discloses, that the counsel who opened this argument did say that the tongue of slander had gone out and that your integrity was suspected. What I say now is, that when we placed you in the jury-box we believed you to be twelve honest men. We believed you would decide this case according to the facts submitted to you in evidence. We believed you had the courage of your convictions as well as intelligence enough to decide the case. We believed you would sit here unawed by the frowns and unseduced by the smiles of power, and give us the verdict that the testimony demanded at your hands, and we believe so to-day. We believe that this jury has the courage to face

all such matters as that and to decide upon the testimony. His honor will give you his instructions in regard to the law. That is the domain of the court. The facts are all your own. You are to make up your own mind as to them. No hand can touch them but yours; not even his honor's. It is for you to decide upon the facts, that is your domain and your duty, and nobody in this world has a right to interfere with it in the slightest degree. We were satisfied when you went into the jury-box. We are satisfied to-day. If imputations of that character are to come they must come from some other quarter than from us. I could not pass such an open insult to the jury without some comment. I felt it due to my clients. I felt it due to the jury. I felt it due to justice and to a common manhood to make the comments upon it that I have made. I make them not in anger, but in sorrow. I regretted the remark, and I regret to have been compelled to reply to it.

Gentlemen of the jury, this indictment charges us with having conspired on the 23d day of May, or at some subsequent time. I admit they are not limited to the date of the indictment. The learned counsel who opened the argument for the prosecution said that the date was a matter of amusement. The whole thing seems to have been a matter of amusement. Mr. Merrick said something more than a month ago that this trial had cost the Government a million of dollars. I suppose he intended to include——

Mr. MERRICK. [Interposing.] I said no such thing. I said the frauds had cost the Government——

Mr. CARPENTER. I beg your pardon. Hunt up the record.

Mr. MERRICK. If it is there it is a misprint. I never said any such thing.

Mr. CARPENTER. Nearly a million of dollars.

Mr. MERRICK. I said no such thing.

Mr. CARPENTER. Well, there is the record.

Mr. MERRICK. I tell you, sir, if it is printed there it is a mistake. You never heard me say it.

Mr. CARPENTER. Oh, yes.

Mr. MERRICK. No, sir; you did not.

Mr. CARPENTER. I supposed then and I suppose now that the learned gentleman intended to include the amount that had been fraudulently paid us.

Mr. MERRICK. The frauds have cost more than a million of dollars.

Mr. CARPENTER. Oh, no. The whole thing that you charge us with in the indictment, what you say we had a right to receive, and what you say we had not a right to receive, does not amount to half a million dollars. You know we must stick to the evidence. You have no evidence of anything else.

Mr. MERRICK. The amount ran up to four hundred and odd thousand dollars per annum.

Mr. CARPENTER. All you have in your indictment is the four hundred and odd thousand dollars, including the money we had a right to have, according to your showing, and the money you say we had not a right to have. It would seem to have cost you about as much more to carry on this prosecution. Now, gentlemen, what we have said upon this subject, and what we now say is that there never was any conspiracy about it, but assuming for the sake of the argument that there was, still the verdict of this jury must be not guilty. Of course, I only assume it for the sake of the argument. I deny it *in toto*, and will with my dying breath, whatever happens. These interests that we have shown by the testimony of

the prosecution, as well as by our own, were divided nearly two years before the time they say this conspiracy was made. I propose to go through the record briefly and call your attention to some tables that show that fact. The only positive evidence upon the subject is the testimony of Mr. Vaile. You will recollect that testimony. The old contract between Miner, John W. Dorsey, Peck, and Vaile that was made on the 16th of August, 1878, was terminated the last of March or the 1st of April, 1879. His testimony, then, is that he took 40 per cent. of the one hundred and thirty-four routes that were bid off to them, of which these are only nineteen; that Miner took 30 per cent. of them, and that the others were turned over to S. W. Dorsey for John W. Dorsey and Peck. That is his testimony. Mr. Brewer said, on the stand, that subsequent to that time when Mr. Rerdell called at the office in regard to post-office business he called in reference to the business of Dorsey and Peck, and when Miner called he called in regard to the routes of Vaile and himself. Mr. Tullock stated that Miner had a different box from Rerdell, and the business of these routes was sent to the appropriate boxes, namely, the Dorsey business to Rerdell's, and the Vaile business to Miner's. Now, that is the positive proof upon the subject.

I am next going to show you some indirect proof. They have filed in this case and proven a large number of subcontracts between these parties, every one of which shows incontestably that from the 1st of April, 1879, up to the time of this indictment, Mr. Vaile and Miner had nothing whatever to do with the Dorsey routes, and that the Dorseys had nothing whatever to do with the Vaile and the Miner routes. Vaile and Miner got six of the routes. Those had been expedited. Some of them were expedited in 1878. Vaile and Miner got six, and the Dorseys got thirteen of the routes in the indictment, if you count the two that Sanderson had. Now I say these subcontracts prove incontestably that separation, and continued separation, between these two interests from that time until the finding of this indictment. Nor is that all. They have introduced into this case a statement of the payments. I am going over them to show that upon all these routes mentioned in this indictment, and indeed upon all of the routes that Peck, Miner, and Dorsey bid off, though that is not in proof, Mr. Vaile drew the pay up to the quarter ending March 31, 1879. From that time until the finding of this indictment the record nowhere shows that he ever drew a dollar of money on any solitary route that belonged to the Dorsey combination. Mr. Vaile wrote a letter to the Sixth Auditor. What does he say? "I hold these routes in trust," says he. "What for?" "To pay S. W. Dorsey among others." On the stand he explained that it was money that Dorsey had advanced and money that Dorsey was indorsing at the bank for. The receiver of the bank came here and told you the same story. Mr. Vaile said frankly that the subcontracts for that purpose were antedated. Mr. Ker says it was to swindle the poor contractor. Mr. Vaile and the contract itself say it was done to pay the subcontractors. Those subcontracts were not antedated to affect the subcontractor. They were antedated to meet Mr. Dorsey's drafts that he had. Two nice conspirators indeed. They had no reference to subcontractors and the proof shows they had not.

Now, gentlemen, I want to call your attention to these statements of payment. On page 1509 of this record is the table as to the route from Tres Alamos to Clifton, one of the routes that fell to Dorsey. You will find that the first three payments, that is to say, up to April, 1879, were made to H. M. Vaile. From that time they were made to S. W. Dorsey, John W. Dorsey, and J. W. Bosler; not one cent to Vaile. On page

1513 you will find the statement of payments on the route from Eugene City to Bridge Creek. That also was one of Dorsey's routes. The first payments were made to Wycoff, the subcontractor, and after that were made to Lewis Johnson & Co., S. W. Dorsey, J. W. Bosler, Wycoff, all the way through; not a dollar to Vaile or Miner. Now, take the table on page 1000, on the route from Julian to Colton; this was one of Vaile's routes. You will find the payments made all the way through to Vaile and his assignee; not a dollar to Dorsey. I am speaking of the time from April 1, 1879. Now, on page 1020, on the route from Redding to Alturas; that was one of Dorsey's routes; the first payment was made to Austin, assistant cashier, or B. U. Keyser, receiver of this same bank, and was applied upon these notes in that bank. The second was to Major & Culverhouse, subcontractors, and the third was to H. M. Vaile, and then to Major & Culverhouse and Vaile; then the July payment was made to S. W. Dorsey, then to S. W. Dorsey and to Bosler and the subcontractors throughout; Vaile never got another dollar. On the route from Pueblo to Rosita, page 1054, Vaile got the three first payments up to April, 1879. From that time Dorsey and the subcontractors under him and Bosler drew every dollar of the money. On page 1073, on the route from Trinidad to Madison, which was another of Dorsey's routes, the first three payments were made to Vaile and all the rest to Dorsey and his assignees and to Bosler. On the route from Bismarck to Tongue River, which was Vaile's, the three first payments were made to Vaile and all the rest to him or his assignee, except in one or two cases to Miner; not a dollar to Dorsey.

On page 1187, from Vermillion to Sioux Falls, Vaile and his assignees were paid every payment from the time the contract commenced to the end of it. Not a dollar was paid to Dorsey.

From White River to Rawlins was one of Dorsey's contracts. Wright was paid as subcontractor and Vaile as assignee and Perkins as subcontractor, and S. W. Dorsey, Middleton & Co., and the subcontractors got the money, and so on all the way through until Bosler came in as the partner of Dorsey and he collects part of the money, and Vaile did not get a dollar after that.

On page 1191, the route from Ouray to Los Pinos, Mr. Vaile gets the three first payments, and then Lewis Johnson and Middleton & Co. and J. W. Dorsey, and then Sanderson, the subcontractor, and A. H. Brown. Not a dollar after April, 1879, went to Vaile.

On route 38145 the same thing occurs. Payment is made to Vaile, one to S. F. Austin, cashier of the German-American Bank, on the same Keyser claim, this German-American Bank claim, and the next two to Vaile, and all the rest to Dorsey and Bosler.

On the route from Silverton to Parrott City the first four payments were made to the subcontractor, and then coming down to April, 1879, S. W. Dorsey and the subcontractor and Bosler draw all the money and Vaile not a dollar.

Mr. HENKLE. On what page is that?

Mr. CARPENTER. On page 974.

Now, on page 1401, on the route from Canyon City to Camp McDermitt, Mr. Vaile collects all the money, or his assignees, from the beginning of the contract to the end. Never a dollar was paid to Dorsey.

On page 1419, on route 38150, from Saguache to Lake City, J. L. Sanderson, subcontractor, gets every solitary dollar on the whole route, except one payment to John R. Miner, contractor.

Mr. HENKLE. That warrant was indorsed to Bradley Barlow.

Mr. CARPENTER. The evidence shows that that was indorsed to the

partner of Sanderson, Bradley Barlow. But every other payment he got. Dorsey did not get a dollar of it, and Vaile did not get a dollar of it. Nobody got a dollar of it except Sanderson himself.

On page 1345 of the record, from Mineral Park to Pioche—that was one of Dorsey's routes—Mr. Vaile got the three first payments, and afterwards Senator Dorsey and Bosler until the route was let to Saulsbury, and he got all of it down to the last one, which seems to have been paid to Rerdell.

Now, gentlemen, there it is. If the Government have not disproved the claim they made that these parties had a common interest in these routes, then I do not know how this case can do it, and it is said that figures cannot lie. We have proved that this partnership was ended and a new one formed, and the Government by every subcontract they have put in have proved the same thing; and then they give us tables of payments that show that these payments were made to the parties—to Vaile and his assignees on his routes—disproving this whole thing as to conspiracy entirely.

I had some notes of some legal authorities that I had proposed to present to your honor, but I can hand them to my friend, Mr. Chandler, as well.

Now, gentlemen, there is another aspect in which these expedited routes paid. It is in proof before you that a railroad has now swallowed up the whole route from Bismarck to Tongue River, and it is a matter of fact that it is three hundred miles beyond it. It is in proof before you that the route from Ojo Caliente to Animas City has been covered by a railroad. It is in proof before you that the route from Silverton to Animas city is covered by a railway. Gentlemen, remember these routes were expedited only in 1879, three years ago, and now great lines of railway are built over them. And what is the history of this whole country in regard to that? Why, during the administration of Postmaster-General Key, that great route from Fort Worth to Yuma was expedited at a cost of \$165,000, and a line of railway, the Texas Pacific and the Southern Pacific, runs over every foot of it to-day. And a more remarkable illustration still is the great overland mail route upon which this Government lavished hundreds of thousands of dollars, and what happened then? In a few years after that this Central Pacific Railroad was built all the way to San Francisco. It seemed to follow close upon the establishment of route, and hardly had the horn of the stage driver disappeared in the distance before the shrill neigh of the iron horse was heard as he rushed down to the Pacific slope proclaiming eternal union with links of iron and links of steel between the great Pacific and Atlantic slopes.

Is this not productiveness? Look at our whole country and its policy in regard to these things. We have such a country as no other people on the face of the habitable globe possess. A country possessed of every variety of soil, and climate, and production, with cloud-kissing mountains and mighty rivers that are the arteries of trade and commerce running through the great body of it; washed by two great oceans and by the great inland seas that lie north of us, and yet with such a country, of such dimensions, such fertility and such variety, would we have reached the point that we have reached to-day without the fostering care of legislation? Has it not been the policy of the Government since it was a Government to protect the infant industries of the country, to give bounties to fisheries, to open mail communications? And, gentlemen, one remarkable instance—when that was the policy of the Government we had reason

to be proud of the American Navy. It was the policy of the Government for a long time. We were proud of it. The winds of heaven kissed the sails of our ships upon every ocean upon the earth. That policy ceased and the American Navy is but a name and a myth. That policy of the Government has been shown in regard to the great construction of great railroads, of great telegraphic lines of intercommunication, and the fostering hand of the Government has been seen in all these industries and in all these enterprises opening up new channels of trade and new channels of commerce, and protecting infant industries. The Government has put forth its paternal arm and assisted them in their infancy, until at last we stand fifty millions of people, the most powerful nation upon the habitable globe, and it is but the morning of our existence. I almost tremble to look forward to see what my country will be, for it is written that man shall not approach too near Omnipotence. In a century more three hundred millions of people spreading over the vast continent constituting our ocean-bound republic, the standing empire of the habitable globe. Yes, gentlemen, such has been the fortune and such will be the fortune of our country under this fostering protection of its industries and of its energy.

Gentlemen of the jury; I have spoken to you with the pride that I feel in my heart in regard to our common country. I have wearied your patience doubtless, as I certainly have my own strength. I have felt that it was a duty that I owed to my position in the case, to my clients, and to truth to do so, and I feel that I have your pardon in advance, and I shall not continue these observations to any greater extent except one closing remark.

When I remember, as a matter of political history, that all these charges against my client were bruited in the newspapers of a great political party during a heated campaign, two years before these indictments were found, when I remember that they were canvassed by the press on one side and explained or denied on the other, when I remember they attempted to connect the late President of the United States with the very prosecution to which this indictment refers, when I remember the proud position that my client occupied then as a party man, and as a party leader, I can but be reminded of the evanescent and changeable character of everything earthly. I can but be reminded, gentlemen, that in the near future we must all go from this life; and, prior to leaving it, there will come a moment when memory will unlock all her tablets. She will turn over, page by page, every act of your and my life. May you have the consolation in that supreme hour to call to mind that, unawed by popular clamor, unshaken by prejudice, defying the power of the Government against the truth, you discharged your duty, and rendered, in accordance with the testimony in this case, a verdict of not guilty against these defendants.

The COURT. Mr. Chandler, do you go on now?

Mr. MERRICK. Mr. Chandler follows Mr. Carpenter in the argument.

The COURT. We will go on for half an hour.

Mr. WILSON. I would suggest that if we take a recess now we do not lose any time.

The COURT. Oh, no; it is better to speak a half an hour now than after recess.

Mr. WILSON. If we take a recess now he will have time to get his books arranged.

The COURT. I think he will not turn to the books until after recess, probably.

Mr. CHANDLER. If the court please, and gentlemen of the jury, I do

not wish to incur your displeasure at the outset of this case by intimating that I propose to read these books [referring to books before him]. I shall only briefly refer to them so that my distinguished friends, if they have not thoroughly informed themselves about the law, may have the benefit of the suggestions which I may make. I brought the books here for the benefit of the prosecution. We stand upon such impregnable ground of fact ourselves that we do not need to be supported much by them. I shall expect your good common sense to deliver us from any trouble that they have got us into so far.

Without wearying you with any introduction in this case I propose to discuss briefly, and only briefly, the propositions which I think are involved in the case direct. I hope to be of some little aid to you in applying this evidence, and that is the utmost ambition I have in the case. I do not expect to bewilder you by any fine talk such as will follow in the closing arguments in this case, but in a plain, concise way to present what I conceive to be the facts and propositions involved in it.

Now you will notice that up to this time very little attention has been paid to the indictment. We have hardly heard of this indictment for seven weeks. We lost sight of it in the first week of the trial, and I propose to reintroduce you to the indictment and the allegations that are involved in it. Having strong memories, I presume you recollect that there was an indictment in this case, and I suppose you remember the general theory of it. It was that these parties were guilty of conspiracy, not to commit bribery, not to commit larceny, but to defraud the United States. That is the essential thing that is charged in the indictment—a conspiracy to defraud the United States, to get something from the United States without returning an equivalent in value, and to get that by methods of deception, because there can be no fraud without deception.

Now, at the outset of this case, gentlemen, I wish to call your attention to a principle that you all recognize, that everybody admits the existence of, and that is that a good trade is not fraud. There is a maxim of our law that puts every man who goes into business in this country upon his own resources. He has to look after his own interests. You in trade with him do not have to watch him. The law does not require that of you. There is a maxim called *careat emptor*—everybody shall beware, shall look out for himself. That is the great underlying principle of American law and American justice. If you go to trade with me, you do not have to watch me. There is no rule of equity, of law, or Divine justice that requires you to watch out for my interests. You may make the best trade that you can with me; and the law, and equity in its most refined form, justify you in making that trade. So that I want to impress upon you again at the outset that no matter how good a bargain has been made, if there is such a one made, it is no evidence of fraud whatever. It is sanctioned by the law everywhere. Suppose you have a house to sell and it is worth only five thousand dollars, and I want to buy it. You persuade me it is worth ten thousand dollars; you tell me the city is going to improve, that city property is going to advance, and you persuade me to give you ten thousand dollars. Could you go into any court on earth and secure a hearing about any such fancied injury as that transaction? Why, you would be turned out in the first instance. So that I tell you it is one of the first principles of law that a man has a right to make the best bargain he can anywhere and at any time. Men are not reduced to that condition of slavery yet that they are to account for every dollar they get. In a free country like this you have a right to employ

your superior talent in any avocation of life and make all you can and there is no fraud in it, and it is pure arrant nonsense to talk about any such thing as that. So if these contractors have made four hundred thousand dollars or a million, if that is all there is in it, they cannot be called to account before you gentlemen. They have a right to it. It is their money and you would be doing violence to them and to the law and to your own consciences to let such a fact as that influence your judgment in any degree in determining this case.

Now what are the propositions that are involved in this case? First, it is alleged that there is a conspiracy between these parties respecting these nineteen routes. Now it will not be pretended that they can abandon that alleged conspiracy and pick up a small infant conspiracy hidden away among the allegations of this general conspiracy. They have chosen to describe this conspiracy. They say that it was a joint union of all these defendants about the subject matter of all these nineteen routes. That is the first question you are to try. They cannot substitute for that a conspiracy between any two of these parties, or any three or any four of them, because that is not what is charged. The constitution of the country requires that the charge shall be made explicit in the indictment. That is the first great, dominant, indispensable requirement of criminal proceedings in this country. These gentlemen knowing that, have described this conspiracy. How? They describe it by the number of men, giving the names of them that they say are in it. They describe it by certain contracts, which they say constituted the subject-matter of it, and these contracts relate to certain mail routes mentioned in the indictment. So that the descriptive features of this conspiracy are, first, the men, defendants charged to have been engaged in it—charged to have been interested in it; second, the contracts which have been introduced in evidence, described in the indictment; third, the nineteen routes which are here. Neither one of these elements, gentlemen, can be dispensed with in this case. They constitute all that you have or can know of this conspiracy. Leave out the routes, and you leave out a part of the description. Leave out the defendants, or any of them, and you leave out part of the description. Leave out the contracts, or any of them, and you leave out a part of the description of this offense. So that I shall claim that those things constitute the description of this offense, and that none of them can be dispensed with.

Now, what is a conspiracy, gentlemen? It is a criminal agreement to do certain acts which are criminal previous to the doing of the acts, and you must prove the conspiracy before you prove the acts. You must prove the conspiracy, else you cannot establish the crime charged in the indictment. Now I do not care how much you may be persuaded by the force of any of this evidence that certain parties have done what they ought not to have done, though before I get through with that I will briefly show you that there is not an act in this indictment or in this proof condemned by law—not one. That they do not charge an act. They have not proved an act that you could indict and punish any man for singly on the evidence in this case. And you cannot put together a lot of acts which are indifferent in their nature, which contain no element of crime in their individual essence, and out of the multitude of acts make a crime. But there must be crime in the individual acts that you are going to put together to make the offense. You cannot make a crime out of innocent acts or any number of innocent acts, and there is not an act proved against any one of the defendants in this case, I undertake to say, that is sufficiently charged in this indict-

ment on trial alone or sufficiently proved by this evidence that would authorize you for a moment to convict a single defendant in this case—not one. And you have no right to pick up a little suspicion here and accumulate a little suspicion there and gather a little distrust elsewhere and put the three together and apply them in this case. That is not the way crime is proved.

But what is the conspiracy? Now, these gentlemen have argued to you that the court will instruct you that there need be no meeting of all these defendants in order to show a conspiracy; that is, that the prosecution need not show that these defendants met at any particular place previous to the doing of these acts, and then and there agreed to do them. Now I will, for the sake of the argument, concede that the court will so instruct you. But the court will not instruct you, gentlemen, that there must not be an agreement to do all these things. The court may instruct that there need not be a meeting of parties to make that agreement, but the court will not fail to instruct you that there must be an agreement proved. You can very readily see how that may be done without a meeting. I may send you a proposition to rent a house, and you answer the proposition that you will accept what I propose to give. We do not meet, but the agreement is proved; so that I do not want you to confound the idea of a meeting with the idea of an agreement, because whether there was a meeting or not, there must have been an absolute, unqualified agreement between all these defendants, to use these means charged in the indictment to defraud the Government of the United States, and that agreement must have been proven beyond a reasonable doubt to have existed before any of the acts were done. That is the first proposition.

The next proposition is that the means being alleged in this indictment to be false petitions, false communications, false letters used upon the Postmaster-General to get money out of the United States Treasury, there must be proved beyond a reasonable doubt, first, that these petitions are false; second, that they agreed to get up and present false petitions as a part of the agreement of the conspiracy. No other means are charged in the indictment, gentlemen, and I shall insist now that they having made their bed in these allegations of false petitions shall lie in that bed and die in that bed. They cannot turn their backs upon the allegations of this indictment. They cannot go off on a general discussion of fraud and clamor and uproar and substitute that for the head basis of fact. Having alleged that these petitions for increase were false, having alleged that they were the instruments by which money was to be drawn from the Treasury of the United States, if their allegations fail in that particular their case fails utterly and absolutely.

The next proposition is that, having proved the conspiracy first, having proved that we were to use certain means which were false next, then they must prove that the defendants used these means, and not strangers. It is a principle of criminal law that if a man is charged with procuring money by false representations and false pretenses it must be shown to the satisfaction of the jury, and I want you, gentlemen, to recollect this, because I am stating nothing that cannot be confirmed in the most unanswerable shape, that that money so charged to have been intended to be procured must have been intended to be procured by the acts of the defendants alone, and the moment other influences mingle with theirs; the moment other conduct is introduced into the subject-matter with theirs; the moment that their influence fails and other influences take up the subject, just at that instant the responsibility of the defendants ceases. The defendants

cannot be held responsible for procuring money from an individual by false pretenses unless it can be traced with absolute certainty that his influence alone secured the payment of the money by the other party to him. The moment you mingle his action with the action of other people, the moment you say the man parted with his money with other influence, other recommendations than that of the defendants, just that instant the case breaks in two, and at that instant the defendant's responsibility ceases. So that is another proposition which they must establish beyond reasonable doubt. So that when you retire to your room if you believe that this money was paid when it ought not to have been paid, notwithstanding you may believe that the defendants made some false representation, if you further believe that others interposed their influence in the procuring of this money, their case then and there breaks to pieces.

Then, having established a conspiracy, having established an agreement to use the false means, and that the means were false, then you must go further and ascertain and believe that these influences so created by the defendants were the sole influences which operated upon the Government to procure this money. And after you have got that far in the case then there is another dominant, material proposition that overrides them all, and that is that the means used must have defrauded the United States. I shall claim that there is not in this record one iota of evidence, one syllable of testimony, that would be heard in any court of justice to establish a civil liability against a man to show that the Government of the United States has been damaged or defrauded—not one word. Why what is it to be defrauded? I have already told you it is not to get a good bargain. It is to deceive the party and get more from him by reason of that deception than you gave him. To deceive him alone is not sufficient to make fraud. Legal fraud, the fraud which we are here investigating, is made up of two elements, deception first and injury last; and though there may be deception practiced upon you, if a man gets none of your property by means of that deception, if he gets nothing from you but what he pays for, there is no fraud, and you cannot go into any court of justice on the planet and get a remedy. Now, I shall contend, I hope with eminent success, that the Government of the United States has not been shown in this case to be damaged a farthing.

These, then, are the four propositions which it occurs to me constitute the anatomy of this investigation. You have got to find all four of these propositions in favor of the Government. They have got to be proved to you with such cogency that you cannot resist the conclusion as honest men that the proof has been made out. I shall argue to you briefly, and only briefly, gentlemen, as I do not wish to weary you, that neither of these propositions has been made out; that if you could reduce this to a case where there was nothing but individual rights involved, reduce it to its simplicity as an ordinary controversy you would not hesitate an instant about your verdict. It is magnified by the fact that the Government is involved in it. The Government comes here with all its pomp and circumstance and show of power and inflates its case to an importance which it really does not have, and in discussing it with you, gentlemen, I shall not discuss it from the standpoint of the Government. I shall discuss it as a case that was prevailing or in progress between individuals, and I think we can reduce it to such simplicity in that respect that we will have no trouble in coming to a conclusion about it. If they have made out their case they are en-

titled to a verdict. If they have not made out their case they are not entitled to a verdict, no matter how ambitious they are to secure one.

The COURT. We will now take a recess.

At this point (12 o'clock and 30 minutes) the court took its usual recess.

AFTER RECESS.

Mr. CHANDLER. Gentlemen, as I was saying, I desire to call your attention and that of the court to the degree of proof which is necessary to be made in each of these cases which are presented to you. In support of the doctrine which we shall claim in an instruction or prayer, I cite the case of the United States against McKee, page 566, 3 Dillon :

It is not sufficient in a criminal case to justify a verdict of guilty that there may be strong suspicion or even strong probability of guilt, nor as in civil cases a preponderance of evidence in favor of the truth of the charges against the defendants. But what the law requires is proof by legal and credible witnesses of such a nature that when it is all considered by the jury, giving to it its natural effect, they feel when they have weighed and considered it all a clear, undoubting, and entirely satisfactory conviction of the defendant's guilt. This and this only is required.

Also the case of Chaffee against the United States, 18 Wallace, 545. The Supreme Court of the United States say :

The purport of all this was—

Commenting upon an instruction asked by the prosecution—

to tell the jury that although the defendants must be proved guilty beyond a reasonable doubt, yet if the Government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jury. Their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury in substance that the Government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were all proved guilty beyond a reasonable doubt.

We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. The case of Clifton against the United States, in 4 Howard, cited by the court below, was decided upon a statute which cast the burden of proof on the claimant in seizure cases after probable cause was shown by the prosecution, and therefore had no application. The instruction sets at naught established principles and justifies the criticisms of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury and converted what at law was intended for their protection, the right to refuse to testify, into the machinery for their own destruction.

Now, gentlemen, we claim that those authorities furnish the rule which shall control your finding, that you cannot substitute suspicion for proof or probability for proof, and that even a preponderance of the evidence in a criminal case cannot be accepted by you as satisfactory; but you must pass beyond this and the case must rise into the clear light of proof beyond a reasonable doubt. Unless it has been so presented you cannot find a verdict of guilty. Mr. Ker said very frequently during his argument, "If this is not so let them explain. Why do not the defendants explain it? Why do they not bring some evidence here to explain it?" If the Government has left this case in a condition where it needs explanation, then the Government has made a failure. I take it from the argument of brother Ker that he considers many aspects of this case to be in that state where they need explanation. I say, if it be so, if the Government has closed this case and left it in the condition where, in the minds of the counsel it needs explanation, the

Government has failed in its effort to make out a case. Before you can take away the liberty of the citizen, you must render explanation unnecessary. The Government must establish its case with such explicitness and clearness as that explanation is not needed. That the Government is bound to do with such cogency that no further explanation can be made. If they have left it in such a state of doubt as that the defendants can explain it, it is not a case sufficient to authorize their conviction. I take it this argument of brother Ker can mean nothing else than that in his own estimate of these facts they are in a condition now where an explanation would change the whole character of them. If that be so, it is equivalent to telling the jury he has made no case.

I was calling your attention to the nature of this conspiracy and what it involves. Before leaving that point I wish to refer to what the court has said in this record. [Turning to the court.] I suppose I am at liberty to cite it?

The COURT. Yes. You are laying down the rule by which the jury are to apply the evidence.

Mr. CHANDLER. Yes, sir. [Turning to the jury.] The court upon an occasion where it deemed it proper to speak of the nature of this charge, on page 739, said——

Mr. MERRICK. [Interposing.] If your honor please, if my brother will allow me to say a word, it may save trouble. Where books are read on argument before the jury they are read for the court, as I understand the rule. On a proposition of law books are not allowed ordinarily to be read to the jury at all. I have no particular objection to it, but merely suggest to my brother that these questions of law be addressed to the court and that he cite no more authorities than the court requires.

The COURT. I think that is a correct statement of the rule. You can lay down your propositions of law by which you think the jury are to be guided, and, if you think necessary, you can turn to the court and establish the propositions as the true ones; but you cannot argue a question of law at large to the jury. I think the rules you have read from the two authorities to which you have already referred are undoubtedly the law.

Mr. MERRICK. I think so. I concur with your honor. I think the true rule is the one laid down in McKee's case.

The COURT. It is not worth while to discuss that subject to the jury.

Mr. CHANDLER. Will your honor permit me to make a suggestion. I understood your honor to say when Mr. Merrick proposed to discuss a certain question here, that your honor would hear the discussion of any legal question that had merit in it. Now I propose to argue to this court that the jury are the judges of the law and the fact in this case.

The COURT. The court will have to decide that question.

Mr. CHANDLER. That may possibly be; but I say I propose to argue that question to the court, and therefore I ask the court not to decide the question now.

The COURT. You can argue the question to the court, but the court is not going to allow the jury to decide it.

Mr. CHANDLER. That is a question that I do not want as a matter of course——

The COURT. [Interposing.] I do not think that I will allow that question to be argued at all. It has been the uniform rule, as held in this court for nearly a century, and will be held as long as I sit here, that the law is for the court and the fact for the jury. I will not hear any argument about it. I do not think it is a question that ought to be allowed to be argued.

MR. CHANDLER. I do not, of course, at this stage of the case, desire to be brought into antagonism with the court, but I believe, if your honor please, without any disrespect to the court, that an attorney has the right to judge of the propriety of the argument that he shall make to the court and the jury, so long as the questions are open for discussion. I think that it is the constitutional privilege of this jury and the constitutional right of these defendants that the jury should pass upon every question of law and fact in the case. I believe I can establish that by such authority of respectability in the United States courts, with the assent of Justice Miller, that your honor will think I am not urging a frivolous point, at any rate. If your honor should ultimately disagree with me it is at least a respectable question, and I say it is a question that the Supreme Court of the United States has never decided to the contrary.

THE COURT. If you think it worth while to argue that question you will have to argue it to the court.

MR. CHANDLER. Very well; that is what I propose to do.

THE COURT. As the court has the right to decide even that question, that is, whether it belongs to the court or the jury, I do not know but that the whole matter is involved there, because if the jury is to decide upon the law as well as the fact, why should you not argue that question to the jury, and why should not the jury decide whether the question belongs to them or not?

MR. CHANDLER. If your honor please, in the first place, without wishing to offend the sensibilities of the court——

THE COURT. [Interposing.] Oh, the court has no sensibilities on the subject; but if you are right then the court has no right to decide the question, and you ought to argue the question itself to the jury, and if the jury decide that they have the right to determine the law and the fact, then they can take the question away from the court, and the court has no right to decide it. You can poll the jury on that subject and ascertain whether they are judges of the law and fact, and when they have decided that question then the court will retire.

MR. CHANDLER. That may not be, if your honor please. If it be a privilege that these defendants have, that the jury shall ultimately pass upon all the questions in this case, if that be a question of constitutional right, then the jury has a right to do it.

THE COURT. They have the power to render a general verdict; but they are obliged to take the law from the court.

MR. CHANDLER. Upon that question I would like to be heard, if your honor please.

THE COURT. You can be heard hereafter, may be, some time; but I am not going to allow the jury to settle that question.

MR. MERRICK. My suggestion was simply this, to make it plainer. If the learned counsel wants to be heard on that proposition, like any other legal proposition, he will be heard by addressing himself to the court. My objection was to his reading authorities to the jury in illustration of the principles of law adjudicated by the court, that was all.

THE COURT. But if he is right the jury ought to hear the authorities and decide it.

MR. MERRICK. I agree that it is a very potential argument that your honor submits, and with a very poisonous point as to his proposition; but I merely make this suggestion in order that the argument may proceed.

MR. CHANDLER. The gentleman has interrupted me without any occasion, and is undertaking to take away and forestall my argument. I

asked the court's permission before reading what I proposed to read as to the statements of the court in this case, before the gentleman rose to his feet.

The COURT. Upon what point?

Mr. CHANDLER. Upon the identity of the description with this conspiracy and the construction of this indictment.

The COURT. I see nothing out of order about that.

Mr. CHANDLER. The gentleman had no occasion to interrupt me.

Mr. MERRICK. I beg a thousand pardons.

Mr. CHANDLER. The gentleman has taken the argument out of my hands, and the court has decided it without hearing me.

The COURT. You announced to the court just now that you intended to maintain——

Mr. CHANDLER. [Interposing.] To the court; not to the jury. I addressed myself to the court on that subject.

The COURT. You were addressing the jury, and you announced to the court that you intended to maintain that the jury had the right to decide all questions of law and fact.

Mr. CHANDLER. Yes, sir; I stated that and I adhere to it; and I ask your honor's permission to argue it to the court.

The COURT. You may argue it and take your own time to argue it. I merely suggested that if your position was right that question ought to be argued to the jury.

Mr. CHANDLER. Very well. It may be my fault in not claiming the full measure of my right.

The COURT. If that question is to be decided by the court it is a concession that the court must decide all questions of law.

Mr. CHANDLER. I take it for granted that this court will decide it right. We propose to ask an instruction of your honor, and we shall argue to your honor that the court instruct this jury that in this case they are the judges of the law and the fact. That is what we propose to ask your honor to charge this jury. I say it is far from not being a respectable question.

The COURT. Very well. We will hear you upon your proposition.

Mr. CHANDLER. That is all I asked. Now, so far as the point I was interrupted upon is concerned, which had been settled before the gentleman got up, I was not offering to read law to the jury any further than the court had instructed me I might do in this particular instance.

The COURT. Yes.

Mr. CHANDLER. I do not want to be found guilty of violating the rules when I am perfectly innocent.

Mr. MERRICK. I was not aware that it was this particular case you were going to read from.

Mr. CHANDLER. That is what I was trying to explain to you; but you love to hear yourself talk so well that I was not permitted to do so.

Now, gentlemen, as I was saying, this conspiracy that is charged in the indictment must preserve its identity in the proof and in the wording. You cannot find in your verdict a different conspiracy from that charged, nor can you distort the proof so as in the transmission from the indictment to the verdict to supplant this conspiracy with a lesser one. The conspiracy here charged in the indictment is one that you must verify in your verdict if you find any. You cannot take up a few little straggling conspiracies which may possibly be unfolded to you in this evidence and make those answer as a substitute for the conspiracy charged. The identical one charged embracing all these features is the conspiracy that you must find, or none. Now, the court in this case said:

It is necessary that there should be a conspiracy. If the conspiracy be established as charged in this indictment—

That is what I am talking about—

then it comprehends all these nineteen or twenty different contracts and the service under those contracts. From the relation of the conspiracy those contracts become blended. They are put into the concern as constituting one capital. The law in regard to the overt act in pursuance of the conspiracy requires one overt act, and one overt act by anyone of the conspirators is enough for the purposes of the prosecution, &c.

Further on, speaking of this very point, the court says:

That is the view that I take of this subject. It is a good deal like a joint tenancy at the common law in a piece of land; the parties are seized *per me et per tu* and *per tu et per me*. You cannot divide it as you can an apple amongst several owners, but each one partakes of the character of the whole of all of the other ingredients of the combination. It is one whole made up of different parts, and all the parties according to the scheme of this indictment, in my view, have a legal interest in the whole and in every part.

So that as I understand that definition of this indictment, that construction of it which the court has given in this case, it is that the conspiracy which you are here to try, is a conspiracy composed of all these defendants. It is a conspiracy composed of all these contracts. It is a conspiracy composed of all the service on these nineteen routes. Those are the defining features of the conspiracy. That is the conspiracy, as the court says, that we are here to answer. I want to insist, gentlemen, that that is the conspiracy you must find us guilty of, or you cannot find us guilty at all. The moment you drop out this man, and that man, or the other, the moment you break up these contracts and the solidity of these routes in one common ownership, that moment this conspiracy disintegrates and falls to pieces. Now, is not that a fair statement of what it is under the definition of the court? So, when, in the last hours of this case, when the sense of the innocence of a great majority of these defendants will so press upon the mind of the prosecuting attorney that he will concede he has no case against the great majority of them; when he asks you in the dying throes of the Government's case to catch two or three of these men, I want you to remember that they have no conspiracy charged against two or three. They have a conspiracy charged against all or none.

Now, if your honor please, on this subject at variance, that a conspiracy must be as charged, I wish to read from 3d Day the case of Nathan Smith against Jacob Baker, page 312. It was a case decided by Judge Livingston:

Where the declaration alleged an undertaking in consideration of a contract entered into by the plaintiff to build a ship, and the evidence was of a contract to finish a ship partly built, it was held that the variance was fatal.

Now, upon that principle, gentlemen, there is no conspiracy charged to enter into these contracts. These original contracts, bear that in mind, are conceded to be honest. The conspiracy, if there be one, is a conspiracy to increase the service and expedite it under these contracts. So it cannot be argued to you that there was any conspiracy to enter into these contracts originally; and all this dreary waste of facts spread over and through the suburbs of this case which they have introduced existing prior to 1879, have nothing on earth to do with the case, because on the 23d day of May, 1879, these contracts were entered into, and the indictment charges that the contracts were legal. So that up to the entering into of these contracts there is no act of wrong charged in connection with them, and you do not wish to listen to any argument upon any suggestion of fraud which affects the contracts themselves. That,

I say, is conceded by the spirit and project of this indictment, not to be the case. The contracts are set forth as lawful contracts. Now, that being the case, and the conspiracy, if there be one, relating to the increase of service on these contracts and the expedition of time, that conspiracy must be made out as it is charged, or else you must find a verdict of not guilty.

Here is another case in the same book, which I desire briefly to call to your honor's attention.

The COURT. That was a civil contract.

Mr. CHANDLER. Yes, sir; a civil contract, and I read it for the purpose of showing, both being decided by the same judge, that he held that the rule in a criminal case is more strict than in a civil case as regards variance.

The COURT. But there is this difference: If you sue upon a joint contract you must recover against the whole or none. If your indictment is against several defendants, as here, some may be acquitted, and others convicted.

Mr. CHANDLER. That may be in some cases; but not in this case.

The COURT. It is a question whether this is an exception to that rule.

Mr. CHANDLER. I do not care to argue the question whether it be an exception or not. I say that under this indictment there can be no such finding, because the offense here is described primarily to exist in a joint contract. Your honor, more than once during the progress of this case, has said that a lawful partnership might blossom out into an unlawful conspiracy.

The COURT. I have nowhere said from the beginning of this trial to the present time—I do not remember saying, nor do I think I am reported as saying, that in this case all must be convicted or none.

Mr. CHANDLER. I do not say that your honor has said that.

Mr. MERRICK. Your honor said to the contrary.

Mr. CHANDLER. Your honor has not said to the contrary.

Mr. MERRICK. I have seen it.

Mr. CHANDLER. You are mistaken. You have not seen it. You have read with an inflated reckoning and an inflamed eye. It is not there.

The COURT. If this is a question of law upon which the court is to instruct the jury you had better address the court.

Mr. CHANDLER. Certainly; that is precisely what I was doing. I asked to call this to your honor's attention.

The COURT. Very well. I understood you as reading the authority to the jury.

Mr. CHANDLER. Oh, no, sir. I have tried to be as observant of the proprieties of the room as I can.

The COURT. Oh, I know.

Mr. CHANDLER. I turned to the court and called your honor's attention to it. I am not arguing this to the jury, although I was frank with your honor, and said I believed I had a right to do it. But I am not doing that now. Here was a case where a party was indicted for obstructing the United States mails, and the indictment alleged that the mail was being carried by virtue of a contract, made by the Postmaster-General with the person who was obstructed. In the course of the trial it became impossible to produce the contract, and Judge Livingston instructed the jury to find a verdict of not guilty, because there was a variance between the facts in the indictment and the facts proved. While he said they might have indicted this party for obstructing the United States mail and said nothing about this contract, yet when they chose to describe the nature of the obstruction and

the authority of the person carrying the mail, and that he was carrying it under the particular authority of that contract, then the contract became so material a feature in the description of the crime charged that it must be proved. The decision is very brief. It is the case of the United States against Porter, the opinion is but ten or a dozen lines. I will read from page 286 :

I am inclined to think that an indictment might be so framed as to subject the defendant, without proof of a written contract ; yet as this indictment states a contract which is not impertinent or foreign to the case, he was clearly of opinion that it ought to be proved. The court will be more strict, he added, in requiring proof of the matters alleged in a criminal than in a civil case.

Now, what I am claiming upon that point, if your honor please, is that the foundations of this conspiracy, if it be such, are laid in these allegations of mutual interest of all these parties in these contracts. They have set out the contracts, how they were made, and with whom they were made, and they allege in this indictment that these defendants, after the contracts were made, became mutually interested in these contracts ; therefore that the business by which this conspiracy is said to have flourished is business which is described in this indictment to be mutual, and the description of it is made by the allegation that it sprang out of contracts made between certain parties in which all the other parties subsequently became mutually interested. Now, I say they cannot get away from those allegations. They have consolidated and cemented these defendants in one unity, in one criminal individuality, by their allegations of mutual interest in these particular contracts. Upon that same point I desire to cite, without reading, the case in 43 Illinois, page 320 ; the case in 2 Cranch, U. S. Supreme Court Reports, 419 ; Commonwealth against Hardy, 7 Metcalf, 506 ; Commonwealth against Kelly, 7 Cushing, 473.

Now, if your honor please, if your honor has not decided it, as I thought, still has not the prosecution claimed all the time and has not Mr. Merrick, with that supreme and fervid eloquence which so distinguishes him as an orator, in all forms of words during this case, claimed that the conspiracy might originate in an innocent partnership, and from that take upon itself the criminal qualities of a conspiracy ? So that according to their idea of this case it rests in an innocent partnership. Now, suppose these men were being sued as partners and you proved a partnership by oral proof or written proof which left out one of them, and you had alleged in your petition that they were all partners, and that was the unit, that was the individuality you were suing, would it not fail in a court of civil jurisdiction ? Most certainly. That is not a debatable question. Then, if the beginning of this matter takes upon itself the characteristics of a partnership and there is only something additional brought to it in its subsequent stages, does it lose its identity by having somebody else brought to it ? It preserves all it has to start with and it takes something on in addition in its progress.

The COURT. I may be in error, but my understanding of this indictment in that respect is this: In the first place I will state what I understand the indictment does not charge. The indictment does not charge that each of these defendants, and all of them, were interested in the several contracts. The contracts, as originally entered into, were with distinct individuals. The indictment does charge that at a certain time these defendants entered into a conspiracy, and the subject of the conspiracy was that in regard to all these contracts they were to assist

each other in procuring illegal expeditions of time and increase of service; and that increase of service and increase of expedition was obtained, and that Brady was a party to this arrangement. Now, the conspiracy, although dealing with the separate interests of the parties to it, was one. As to the different parties to the conspiracy, has it not often been held that some may be convicted and others acquitted?

Mr. CHANDLER. Does your honor ask me that?

The COURT. Yes, sir.

Mr. CHANDLER. Yes, sir; I say that it has, and I will very soon indicate the distinction between those cases and this.

The COURT. There must be ground to constitute a conspiracy of course.

Mr. CHANDLER. Yes.

The COURT. And one cannot be convicted of conspiracy alone; there must be at least two. But as long as there are two to be convicted the Government may fail as to all the balance. But if the jury are satisfied that even two are parties to the conspiracy which is charged against them as well as all the rest, the conviction is proper, although the charge in the indictment was against them and many others. That is my impression. I may be wrong about it.

Mr. CHANDLER. Now, if your honor please, I am trying to show that the identity of this charge must be preserved in the verdict. I will admit if there are forty people in partnership you may sue two of them and recover against two of them upon a partnership liability. For instance, in some of the States where they make all contracts joint and several——

The COURT. [Interposing.] But that is not a joint contract.

Mr. CHANDLER. A partnership contract.

The COURT. I say where you sue upon a joint contract.

Mr. CHANDLER. I say if you were suing two partners——

The COURT. [Interposing.] Ah.

Mr. CHANDLER. [Continuing.]—on a contract that showed twenty partners you would have to sue the same partnership, although you might ultimately recover against two, that you would if you sued the whole twenty, because they are alleged to be in a partnership of twenty. Now I will admit if you had two men on trial here, and the indictment charged that twenty men more were in the conspiracy, you could prove your conspiracy as charged, embracing the twenty men and convict the two. But you would have to prove the same conspiracy that was charged in the indictment, to wit, a conspiracy with twenty. Now what I am telling the jury——

The COURT. [Interposing.] No; the jury may absolutely bring in a verdict. In their verdict they convict some by name and acquit others by name.

Mr. CHANDLER. Yes, sir; that is a case where the conspiracy is described to embrace two as well as all, where it is not descriptive of that conspiracy that so many were in it with so many particular contracts. Why, if your honor please, you can indict a man for selling a horse, and you need not prove the color of your horse at all to convict him. But suppose you charge it is a red horse with a white nose, can you convict him on that indictment for selling any other horse than a red horse with a white nose? Nobody would claim that.

Now, then, they have described this particular conspiracy and the description which they have imparted to this conspiracy is one of certain contracts and certain individual interests in it. They have described it by its subject-matter and by the individual names of persons inter-

ested in that subject-matter. They cannot tear themselves away from that description. They have elected, as Judge Livingston says in this case, to describe this conspiracy in a particular way, and having so elected they must stand or fall by that description. If they had made another conspiracy different from this, then another rule would apply. But what I am insisting upon here is, that the gentlemen having availed themselves of certain descriptive matters to identify and distinguish this conspiracy, they are held to it and the court must so instruct. That is my view that I am urging now to the court.

The COURT. That is a different question from the other you were talking about.

Mr. CHANDLER. Well, I may not have made myself understood. I will admit if you charge two men with a conspiracy to burn a barn the description of the crime is burning the barn. You may charge they went into it with twenty men, and if you find that two only did it, the identity of the offense preserves itself in a verdict against the two just as much as it would in a verdict against the twenty. But they have described this other one. They have introduced into this matter certain features which are indispensable characteristics and traits of this particular crime.

Now, in regard to what your honor says in regard to these contracts the indictment on page 14 says:

The said John W. Dorsey, John R. Miner, and John M. Peck, together with one Stephen W. Dorsey and one Harvey M. Vaile and one Montfort C. Rerdell were then and there mutually interested in the said contracts and agreements made between the said United States of America and the said John W. Dorsey and the said John R. Miner and the said John M. Peck.

Now, there were only three men that were interested in these contracts originally with the Government. These other men in a subsequent stage of the contract became interested, and they being mutually interested in these particular contracts went on to do certain things under this supposed combination. Now what authority is there for omitting that description of unity which the pleader has seen fit to resort to? He has brought these men into no union except by that allegation. Now he says he can abandon it; that he need not have any allegation of conspiracy at all. I say that the groundwork of his allegation of conspiracy between these parties rests upon that allegation in the indictment that they became mutually interested, and from that he proceeds to lead them through the whole active process of this business.

The COURT. No; as joint parties under this indictment their liability arises out of the conspiracy.

Mr. CHANDLER. I do not deny that, if your honor please. It must be a conspiracy to do something. It is a conspiracy to do something by means of these contracts.

The COURT. I understand that.

Mr. CHANDLER. A conspiracy to defraud the United States in this particular way, and none other; and if they have been proceeding to defraud the United States in this way, but have proceeded on separate contracts, then whatever liability comes to them comes from their separate relation to the Government, and not from their joint relation.

The COURT. Oh, undoubtedly. Your position is right, if I understand it, that if the jury should be of opinion that whatever money was paid to officers of the Government was paid by the separate members of this defense in their separate character, without regard to any confederacy between them, but each one or each partnership paying for itself, that there is an absence of proof of confederacy, because, although the crime

would be the same as against law and morals, for each one to enter into such an arrangement as that has to buy up the officers of the Government in order to have his service expedited and increased, yet if there was no conspiracy with others for that purpose, he is answerable alone.

Mr. CHANDLER. That is what I am trying to show.

The COURT. It is no conspiracy.

Mr. CHANDLER. Yes.

The COURT. But that is not the scheme of this prosecution. The scheme of this prosecution, if I have not mistaken it entirely, or misunderstood it, rather, is very different from that. It is the converse of that; that, although these parties were severally interested in contracts, yet that they entered into a confederacy by which they made common cause for the purpose of procuring increased service and expedition and allowances.

Mr. CHANDLER. Certainly; that is just this scheme exactly, and the indictment says——

The COURT. [Interposing.] Now, did I understand you to contend further that if the conspiracy should be shown as to some of these contracts and others should not be embraced in the terms of the conspiracy, that there can be no conviction as to those who conspired together so far as they went?

Mr. CHANDLER. Yes, if your honor please, I do contend that exact thing.

The COURT. That the whole conspiracy must be proved as alleged or it all falls to pieces?

Mr. CHANDLER. It all falls to pieces like melting snow.

The COURT. That the failure as to one route is equally as fatal a failure as to all. Is that what I understand?

Mr. CHANDLER. I say so. If your honor please, I am not going to faint at the consequences of my own logic. That is precisely what I claim, and to support that I cited the case of *The King against O'Donnell*, which was read here in the earlier stages of the case, and which I thought your honor acceded to at the time, where an indictment was against a multitude and the indictment was held to be good and the jury found a verdict against some of them for conspiring generally under that indictment; and, then, in their verdict further found that certain groups of them had conspired to do certain parts of what was charged in the indictment. Now the indictment was good, and there was the verdict finding just what the several groups had done. They took it up to the House of Lords and reversed it on the ground that the verdict was void.

The COURT. That is a very important question and by no means a clear question in my mind yet. Of course I shall hear you with pleasure on that subject.

Mr. CHANDLER. I do not wish to perplex the court beyond reason.

The COURT. It is a very different question from the other. The other is this: That the indictment well describes the subject of the conspiracy, but that some may be convicted and others acquitted. But this differs from that in this respect: that according to that proposition the subject of the conspiracy is not made out at all as described in the indictment.

Mr. CHANDLER. Not at all; not the slightest approach to it.

The COURT. That there may be two or three conspiracies, for there are nineteen subjects of the conspiracy, and that when you break up the conspiracy in that way there can be no conviction on either part or the whole.

Mr. CHANDLER. Certainly; that is what I claim exactly.

The COURT. That is an important question in the case.

Mr. CHANDLER. Now I hold, if your honor please, if I may be permitted further for a few moments, that any allegation in an indictment which is material is binding, no matter to what feature of the charge it relates. Now in the case in Day it was not necessary to make out an offense to charge that the party was carrying the mail under a contract. But they did charge it, and the court held that that being so charged and being material any variance from it was fatal. Now they charge a conspiracy here and coming together of these defendants upon the subject-matter of these nineteen routes. They descend to indicating in the indictment the particular way in which they were brought together. They do not content themselves with generally saying they came together, conspired, and combined, but that they were brought together by reason of a mutual interest, which they then and there acquired in these nineteen contracts. Now, having brought these persons together under the cementing power of that allegation, and it being material, they cannot depart from it; it sticks in their flesh. They have brought them together in no other way in a criminal union, except by that allegation, and having elected to so present them as conspirators to this court and this jury, they are bound by it. That is the proposition that I make.

Now, without wearying the court any further with that subject, I shall argue, gentlemen, to you that that is the interpretation of this indictment. These men have elected to say just how these parties came together, and they have told you in the language of this charge that they became mutually interested in all of these contracts. They have not said they were interested, or expected to interest them in any other way in the subject-matter of this conspiracy. They do not charge their participation in this matter for any other reason or motive than the joint interest which they acquired in it. And having staked their whole case upon that, that these parties subsequently became jointly interested in these contracts, if that fails this prosecution disintegrates, becomes rarefied, and passes off in broken fragments. And when you take this indictment to your room look at its language carefully under whatever instructions may be given, and see if that is not the correct interpretation of it. Inasmuch as you are sworn to verify this indictment, if you verify anything you have got to verify that allegation in it, and if you cannot on your oaths verify that you can take no step further.

Now, gentlemen, there is another proposition which I wish to briefly present to you. This charge is in the nature of getting money from an individual under false pretenses. Suppose a man comes to you and wants to get your watch, and he tells you that he is wealthy, that he has \$50,000 in property, or that he is related to certain persons, and that he has good credit and has money in bank. You let him have the watch on the strength of those statements. You indict him for getting money under false pretenses. Why? Simply because you were influenced to let him have that piece of property by reason, and that reason alone, of those false representations. Now two things have to be established before you can go into a criminal court and convict him, and the rules of law are no different when the Government undertakes to prosecute a party. When the Government comes into court it cannot pervert the rules of law and establish one system of justice for itself and leave another system for individuals. You would then have to prove, first, that the pretenses that he made to you were false. You would next have to prove that it was by the operating cause of those pretenses that you gave up your watch.

Suppose, for instance, precisely the same case now, and instead of the man coming to you alone, he came to you with credible persons, with whom you were acquainted, with men on whose word you relied, and they told you nothing false, but told you what in their opinion was true, that this man if you would let him have the watch would pay for it; that he was a good man, would live up to his word, and he had made now these false pretenses to you. These other men coming up afterwards in person when he made the false pretenses had no part in them. He had not got the watch, and these other parties told you to let him have it, that he was a man who would fulfill his obligation, and that he would pay whether he had any property or not, and you let him have the watch on the strength of what they said. Could a criminal prosecution be maintained against that man for getting your goods under false pretenses? I say no. That where other causes intervene, disturb the identity of the influences of the defendant, supplant it, become the dominating and controlling influence, then his criminal responsibility ceases. And upon that subject I wish to read from 1st of Wharton's Criminal Law, section 160:

The interposition of concurrent wills, in pursuance of a common plan, makes each confederate liable for the action of his associates. It is otherwise, however, when responsibility is based, not on intentional, but on negligent injuries. As to these the rule is, that casual connection between negligence and damage is broken by the interposition of independent, responsible human action. I am negligent in a particular subject-matter. Another person moving independently comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to the party whom my negligence leads into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative. We may expand this rule still further, and hold that a defendant, no matter how wrongful may have been his conduct, is not responsible for the acts of independent parties performed on the objects of the crime without his concert.

Now, I say there is not a single order made here on the unbroken case of these defendants. Petitions have intruded themselves into this controversy by the multitude; petitions of men who were not in concert with these defendants; petitions of men of the most honorable character, and it is upon these petitions that these orders have been made. Now I say you have got to trace the responsibility of the defendants through all parts of this case before you can hold them liable. It cannot be controverted, or will not be, I think, that petitions were filed in these respective cases by persons not in concert with the defendants.

Now I might cite other authorities. Here is one in 10th Metcalf which holds this:

It seems to us that when money or other property is obtained by a sale or exchange of property, effected by means of false pretenses, such sale or exchange ought to be set forth in the indictment, and that the false pretenses should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be.

Now I say that this is charged to be a conspiracy by which these men were to use their joint influence to procure money from the United States. Does the proof establish that proposition? Does it establish that a dollar of money was ever paid upon the influence of these defendants alone? Not at all. Nobody will pretend that. But there has been introduced into this matter the influence of Senators, of members of the House, of Cabinet officers, of bankers, of business men, of modest and ordinary residents of the country, men acting and living in every relation and every

capacity of life, before the Postmaster-General to procure the payment of this money finally upon these contracts. And I say that it is a rule of law that these gentlemen cannot controvert, that before they can hold that there was an intention to defraud the United States out of this money they must show such a series of acts as would culminate, if not interrupted, in defrauding the United States. These men in a criminal court, being held responsible only for their personal conduct, not being chargeable with the influences which co-operated with them, if those influences were independent of them, for results brought about by such combination of influence, being responsible only for what their influence did, you must show a case where their influence alone, if uninterrupted, would have brought this money. I say the Government has made no such case. It has destroyed its own case on that very principle. It commenced with the first route, introducing petitions of responsible, intelligent, patriotic, and far-seeing men, introduced them by the multitude, addressed to this very subject-matter, asking the Post-Office authorities to do this very thing. Now what I say is that that is an independent influence. That influence was not begotten by the defendants. It was not controlled by the defendants in any measure except merely in one or two instances which do not break the current of this argument respecting other matters. It is shown that some of these defendants wrote some petitions and letters, which somebody else afterwards signed, and I say that is a fact that is too imponderable to receive notice from anybody. We are not arguing the effect of that. I will not insult any man's intelligence by claiming that there is a difference in responsibility, legally or morally, if you sign a letter written yourself and sign it written by me. When you sign it you adopt it. It does not matter what mechanical force was employed in constructing it. When it is signed by you it is yours. So that this talk about certain parties here having written certain petitions, and all that sort of thing, amounts to nothing in my mind, and, therefore, I shall not weary you with talking about it.

So to return to the proposition, I say it is unanswerable that where the influence of independent parties intervenes in accomplishing a result, that a party on trial cannot be held responsible for the effect of that independent influence. And where the influences of the defendant and the influences from those independent sources co-operate, and it is impossible for an intelligent man to distinguish between the force of the two influences, where one began and the other left off, in that state of case you are in such a confusion of mind that you must acquit.

But here it seems to me there can be no confusion about it. Can you find otherwise as honest men? Now I put it to you, would you take a dollar out of a man's pocket on the proof that these defendants procured the order to be made increasing the trips and expediting the time on the Tongue River route? It is just as well to simplify this case and take one route as a sample case. This Tongue River route was the one which was held up to you by Mr. Bliss, when he opened the case, and by Mr. Ker as the highest type of turpitude in the case. Here was a route they both proclaimed every tissue of which was full of fraud. The secretions of original sin were in all parts of it from its conception until its final consummation, so that you are justified in taking this Tongue River route and measuring all the other routes by that. Now, suppose that was the only route in this case, and you on your oaths were to find what influences procured the expedition and increase of service on that route. Now can there be any question about that? Would you not have to find that the petition of the Board of Trade of Saint Paul, of Minneapolis, the petition of General Miles of all the military authorities, the busi-

ness interests at Bismarck, and all these other interests which have been shown in this case and have been addressed to the accomplishment of that thing—would you not have to yield to the invincible force of that, and say that that is what accomplished it? And if you must say that, you must acquit. You have got to preserve the influence of the defendants as distinguished from the influence of others which was introduced into this case to the final result, and if you are not able to point that proposition to the effect which the influence of the defendants had upon the Post-Office Department, then you cannot say that they got this money by reason of their influence if their acts did not operate upon the mind of the Postmaster-General in paying this money. Recollect the Postmaster-General is not implicated; he is not charged with fraud. The only charge here about the Postmaster-General, which I will speak about briefly in a moment, is that he was deceived. Omitting that mention of the Postmaster-General, there is no intimation in this indictment that he did anything of wrong in this case. Now, it is conclusively proved that not a dollar of money could have got out of the United States Treasury by reason of any of these orders without that money was drawn on a draft signed by the Postmaster-General; that this order of Brady was simply preparatory in its nature. It was no final order. It was an order that finally was laid before the Postmaster-General and he approved it, and when he approved it, and only when he approved it, did it ever have any binding force as authority upon the auditor to take money out of the United States Treasury.

But leaving that order in a state of dispute as to its effect, take the strongest case the Government can make, there is no pretense here that Brady had any authority to sign any warrant. I do not say that he had not a right to make an order, and all that. He could not sign any warrant to draw money out of the United States Treasury. That had to be signed by the Postmaster-General and by the auditor, and by that means alone could money be got out of the United States Treasury. So I say that all these influences which led up to the accomplishment of this fraud, or which could be utilized to accomplish the fraud, were influences which ultimately and finally focalized in the authority of the Postmaster-General. He approved Brady's order. He drew the warrant and paid the money. He signed the contract. He approved all the orders of increase of expedition and increase of trips. So that the sum of power which finally directed this thing rested in the Postmaster-General.

Now can you on your oaths say that the power of the Postmaster-General was controlled by these defendants, independent of the influences that were brought to bear upon him by personal interviews and by written appeals and applications and letters from this multitude of men anxious to secure this result? I say you cannot, as honest men, find that fact. It is not in the case. It is disproved, and unless you can find it, this case breaks down.

Were there a conspiracy, were there an attempt to deceive, you must deceive. They make a play upon words and say that you can convict of a conspiracy to deceive without the actual deception. But you have got to intend to defraud the Government of the United States. The only difference between an attempt or a conspiracy to commit a crime and the commission of it is, that in the one case you agree, make up your mind to commit the whole crime, and you take some step towards its consummation. The other case is, you go on and commit the whole crime.

Now, in this indictment, if they have alleged anything, they have al-

leged that the crime was committed, was consummated—every fraud that these men intended was by these influences accomplished. Now, if the influences as actually shown did not operate, or if the influences of the defendants did not operate to accomplish this fraud or this payment of money—I will not call it a fraud, because I think I can show you in fifteen or twenty minutes that there is no fraud either contemplated or consummated, but to do what was done—if the influence of the defendants cannot be traced from its beginning to its end, and this result assigned to that influence as its effect exclusively, then they have no case, and I say they have disproved that. They have proved that he made these orders on the Tongue River route by virtue of these petitions. Now, they cannot say that these petitions were got up for a colorable purpose; that they were true petitions and got up as a mere matter of form, but that the individual influence of the defendants did finally operate to control this matter, because they have not alleged that. They have alleged that this property and money was got by these petitions, and not by the defendants' individual influence outside of the petition. They do not build up two channels by which they approach this result. They do not go over two routes to reach it. Their indictment says that this money was to be procured, and was finally procured, by means of these petitions, not by means of anything the defendants did independent of the petitions, but they rest their case upon the allegation that these petitions were the cause of this money being paid, and in order to charge the effect of the petitions upon the defendants in the indictment, they allege the petitions were false. That was the only way they hoped to reach the defendants. They did not pretend to reach them in this indictment in any other way over and above these petitions—outside of these petitions. That is not their allegation. The allegation is that the defendants by means of these petitions, which they said were false, procured this money to be paid. They cannot now say that the money was not paid by means of these petitions, because they have alleged it was. They have planted their case upon that proposition.

Now, then, there is only one element left. Are those petitions false? If not false, the money having been procured by means of them, then the money was not procured by false representations, but procured by truthful representations made by other people than these defendants. That utterly swallows up this case, unless we are to go in on this general plan of convicting these parties, or some of them, because of some supposed great necessity, some great moral effect that it is going to have upon this and coming generations—unless that is to be substituted for the indictment. If we are going to add here to this charge and its logical effect, then we have got to prove that this money was got by these petitions that they have charged in this indictment. They have got to take a step beyond that, and show that these petitions which procured the money were false petitions. Instead of that they have proved them to be absolutely true.

Now, it will not do, and I do not want you, gentlemen, to yield your judgment to any such seductive argument that they will make, that these petitions were a mere matter of form. Why, my friend Ker, when he opened this case, after looking over these petitions for eight weeks with all that penetrating power of scrutiny which he possesses, told you in the first five minutes of his argument that these petitions individually were as innocent as sleeping babes; not as innocent as waking babes, which is a tolerably high degree of innocence, but actually as innocent as sleeping babes. But he

said if you put them all together there is a craft in them. Well, I never knew before that you could put forty thousand or five or ten acts just as innocent as sleeping babes together and distill a crime out of it. Is not that new? Did you ever hear of a man's mind undertaking to be mocked by any such illogic as that? Now, that looks absurd to me. I am not as penetrating as my brother Ker, but so far as I can look into a subject it seems to me if you start with innocence and have innocence all along the line and terminate with innocence that you have not much criminal foundation. And Mr. Merrick, who will try to persuade you that the foundations of the Government are disturbed by the gravity of this offense before he gets through with it, had occasion to bestow freezing notice on these petitions some time ago. If I could turn to Mr. Bliss's opening speech, although I do not want to read too much to you, you would see and you may recollect that Mr. Bliss said this whole piece of supreme wickedness rested on these petitions, these false petitions, these forged petitions, these fictitious petitions. That is where Colonel Bliss started. Now, here are two volumes and four or five more to come, I believe, but after we get through the second volume and reach the 1690th page Mr. Merrick under a high state of inspiration arose and said solemnly:

I attach but little importance to those petitions anyhow. What if Senators did sign them? What if men distinguished in office did sign them. Brady was put in his place as the trusted officer of the law to learn and know the facts, and not to be an automaton in the hands of a member of Congress to spend public money at his bidding. It was Brady's official duty, and he violated his trust of office so frequently, so plainly, so palpably, &c.

Now, when they start out in the indictment with laying the foundations of this crime in these alleged false petitions, and when Mr. Bliss, in opening the case to the jury informed them that these petitions were infected with fraud and falsehood from beginning to end, that they were forged, that they were fictitious, that they were untrue in statement, he conceded something. He conceded the fact that in his mind and in the ambition of the prosecution they must rest conviction upon proving that state of affairs. That is all the means for getting the money that they had which were fraudulent. They do not say that we went personally to the Second Assistant Postmaster-General and told him falsehoods, but they say that Brady agreed beforehand as a part of this conspiracy that these orders should be made by means of these false petitions.

Mr. KER. If your honor please, I do not like generally to interrupt counsel, but it seems to me in this case, when he has undertaken to argue from the indictment that is the foundation of this charge, that he certainly ought to argue from the state of facts mentioned in the indictment. I call your honor's attention, and I call my friend's attention, to the fact that the indictment states plainly and specifically that these petitions were to be gotten up by different people, that they were to be untrue petitions, and that they were to be filed in the department, not as the basis of an order for obtaining money from the Government, but as a means of deceit to deceive the Postmaster-General at the head of that department. The matter that is mentioned in the indictment upon which the orders were to be made is the oaths. Those oaths were to be untrue and Brady was to make the order for the increase in accordance with the false oaths. I do not think Mr. Chandler wants to misstate this case, and I do not think I ought to sit quietly by and allow him to assert that this is in the indictment, which is nowhere contained in it. There are two separate allegations, and reading them together they are very plain and very specific. The first one is on page 15, which states that they were to get up these false petitions, and the next allegation

in regard to them is that these petitions were to be filed in the office, and by means of the said false and fraudulent petitions and applications for additional service and increase of expedition on and over the said post-routes so to be made [reading from indictment]—

and signed and filed in the said office of the Second Assistant Postmaster-General, as aforesaid; and the said false and fraudulent oaths and statements of the number of men and animals necessary and required to carry the said mail on and over the said post routes with increased speed and by a schedule of a less number of hours, so to be made, signed, and filed in the said office of the Second Assistant Postmaster-General as aforesaid; and the said false and untrue dates so to be marked upon the said petitions and papers as aforesaid; and the said false and untrue brief statements and descriptions of the contents and subject-matter of the said papers to be inclosed in the said envelopes, covers, and jackets, and so to be indorsed and written upon the outside of the said envelopes, covers, and jackets aforesaid, thereby fraudulently to deceive the said Postmaster-General as such head of the said Post-Office Department and superintendent of the business of the Post-Office Department.

Now, in a separate allegation it mentions the oath that was to be false and was to be out in the jacket, but was to be used as the basis of calculation upon which the order was to be made. They are separate and distinct, and I think when my friend says they were the basis, or we have urged they were the basis, upon which the order was made, that he is laboring under a mistake, and ought to be corrected.

Mr. CHANDLER. Of course I am glad to be corrected by my brother Ker. He has been very kind in keeping us in a proper state of information as to the case from the beginning; but I have become so imbued with my own notions that I really will have to stick to what I have said. Now, does not he say just what I say in effect? He says that these petitions were first to be gotten up and then they were to be filed, which was another step with the petitions, and then they were to go into jackets, and then there were to be certain indorsements on the jackets, and through this process of incubation they were to go until they finally reached the Postmaster General, and they were to overwhelm him with deception because they were fraudulent in their inception. Now, this indictment says that these parties conspired then and there fraudulently to write and sign and cause and procure to be written and signed a large number of fraudulent letters and communications and false and fraudulent petitions and applications to the Postmaster-General for additional service and increase of expedition on each of the routes as aforesaid. That allegation is the first allegation of fraud in the indictment. It is true that he tries to trace the effect of that fraud through several other allegations, but all the fraud complained of has its root and seminal principle in that allegation that these were to be false letters, communications, and papers.

Now, unhappily for this great and compassionate Government it turns out that its most respected citizens got these up, and they are true. That ought not to be a disappointment to the Government. The Government really ought to be happy over this result. When the truth has been disclosed to them, and all this deep burden of fraud which has rested on the mind and in the apprehension of the distinguished counsel here has been dissipated by one clear, strong flash of truth, they ought to be pleased, instead of looking sad, and they ought to take a step further and dismiss the case. I suppose before they get through, after we have sufficiently indurated these facts into their minds, so that they appreciate the strength and righteousness of this matter, they will dismiss the case, although my friend Ker does not look much like it now. I am willing, gentlemen, that you should take this indictment, and if you do not say on your oaths as intelligent men that the spring and foundation of this so-called fraud is located in these

alleged false petitions, then my argument will have no effect upon you. That is the way the indictment looks to me, and if I have so misconceived it I am not capable of aiding you in coming to a proper conclusion.

Now, as my time is almost up, I will leave that branch of the subject, with the consciousness that I am right about that being the origin and commencement of this alleged fraud. You have got to find that they agreed together before it was done—not that it was done, that these parties did introduce in the course of this business certain papers that were not accurate in all respects. That will not do. You have got to find that General Brady and Mr. Turner and these parties, whether they met at some place or not, did agree that false petitions should be gotten up to promote this business, that those false petitions should be the means, and should be used in the hands of the conspirators as the means to defraud the Government. You have got to find that agreement and to find that the petitions were gotten up by them and not by others, because the indictment does not charge the petitions to have been gotten up by others. They were to use petitions gotten up by them. Then you have got to take the next step and find that they were fraudulent, false, fictitious, and forged. Then you have got to find that they operated to take this money out of the hands of the United States, and then you have got to find the additional fact that the Government of the United States was defrauded. The Government has got to prove all these things. Now let us look at this question of fraud a minute. Suppose I come to you and I tell a highly-colored story about my wealth and my relations and my ability to pay, and want to buy a horse of you. You sell me the horse. I do not pay for it. You are injured by my misrepresentations. I have committed a fraud on you by making the false representations first, and then by getting something of you for which I give you no value. Both have to exist in order to make the fraud. If I come to you another time and tell you precisely the same story and want to buy your horse, and you do not ask but a hundred dollars, and I pay you the hundred dollars, you are not defrauded. The false statements and false pretenses are precisely the same in both cases, but you cannot go into any court and have any redress against me for the misstatements, simply because it did not operate to do you any injury. Therefore they cannot lug in these false petitions and go no further. They have got to prove that they operated to take money from the United States, and they have got to prove that the money that was taken from the United States there was nothing rendered for, no equivalent of any value. If the United States got the value of all it paid, the false pretenses amount to nothing, the false petitions amount to nothing. It must be defrauded and the intention must have been ultimately to defraud, that is to get something without paying an equivalent, and the Government has got to prove that. Now take this Bismarck and Tongue River route as a sample. They have got to prove that the service on the Bismarck and Tongue River route as actually rendered was not worth what the Government paid for it. Upon that subject there has not been one grain of proof; not one particle of proof. Are they to leave you here to guess that the Government was defrauded? Are you going to speculate upon that subject? If that be a vital question in this case, and that is left to your speculation, then the verdict instead of resting upon proof rests upon your speculation and upon your guessing. The law is that all the facts necessary to make out the charge must be proved beyond a reasonable doubt. All the conditions of crime must be proved beyond a reasonable doubt.

They cannot prove a part of them and stop there and leave the rest to the guess-work of the jury. To simplify this matter I will say that it needs the same kind of proof to establish an injury against the Government or a contemplated injury as it does against an individual. There is no difference. Suppose a party made misrepresentations to you about a piece of property and got you to buy it, and after you got the property you found it was worth all that he said it was worth and more, would that amount to anything? Could you go into a court and get any redress? The misrepresentations were made but you must have received an injury. This is decided in 13 Wallace, with explicitness. It applies to equity law, and common law, and criminal law. Every branch of the law rests upon that principle. There cannot be a case maintained in a court of equity, which is a court of conscience, without two things concurring: first, the fraudulent representations, and next, the injury resulting from them; nor can you go into a court of law or into a criminal court and make any kind of a case against a man on the ground of criminal fraud, unless you show the deception that was practiced upon you, and that you let your property go in consequence of that deception, and that you are injured. Now, why did they not put some man on the stand to tell you whether the carrying of the United States mail was worth less to the United States, under the circumstances which the evidence showed it was carried over the Bismarck and Tongue River route, than it cost the United States to carry it? I say they are bound to do that before they can make any case. If in this conspiracy to defraud, the parties are charged with using certain means to do a certain thing, it must be shown that if they had used those means, and if they did those things, fraud would have resulted. Did they ask anybody what it was worth to carry the United States mail the number of times that it was carried from Bismarck to Tongue River? Has anybody been sworn on that subject? Not at all. How do you know that the Government was defrauded by carrying the mail on the Bismarck and Tongue River route?

Mr. MERRICK. We offered the evidence, but the court would not allow its introduction.

Mr. CHANDLER. You did not offer it.

Mr. MERRICK. Oh, yes, we did.

Mr. CHANDLER. No, sir. If the court did not allow it, it was because they only had evidence so remote from the issue that it would not tend to prove the fact; and if they have lost the last end of their case in the wilderness of impossibility it is not our fault. That is where this case does end. It is an awfully expansive case on the ground. It is full of atmosphere. It is terribly rarefied in appearance; but when you reduce it to some substance under the condensing influence of a few well-settled principles of law it really collapses into smaller size than the structure of my friend, Mr. Ker.

Mr. MERRICK. The court said that question was not in the case.

Mr. CHANDLER. I am coming to that. The court said that whether this route ought to be expedited or not for the public good was a question you could not prove. That is what the court said. That the court would presume that the public good required it to be expedited and increased. Now, then, that question being taken out of the controversy, it being presumed that the expedition and increase of service was for the public good, the only remaining question is, was too much paid for it?

The COURT. No. You misunderstand. The court said that it would presume that every officer did his duty.

Mr. CHANDLER. Very well. Has that presumption perished in the progress of this case, or does it still reign supreme over the case at this hour?

The COURT. Suppose they prove that the public officer who ordered the expedition of the route had been bribed, what would become of the presumption?

Mr. CHANDLER. I will answer the court in this way: This is not a conspiracy to bribe anybody. It is a conspiracy to defraud the United States, to get something for nothing. Now if your honor will permit me to answer your honor's suggestion—

The COURT. [Interposing.] The bribery of the Second Assistant Postmaster-General was part of the conspiracy.

Mr. CHANDLER. Very well. Let us put that in to make weight at this exigency. The conspiracy finally was to defraud the United States, no matter by what means it was to be accomplished, bribery or false oaths, or anything else. Now the point I am pressing on the attention of the jury and the court is that if all these means had been used and a certain result reached, that result must work fraud upon the Government of the United States; and if they show everything they have claimed, and then it appears that the Government of the United States instead of being defrauded was benefited, I say they cannot turn the current of this great case off into the little sluice of bribery. They have got to stand on their indictment.

The COURT. Then if the Government owes you a thousand dollars and you cannot get it, and you counterfeit a bond for a thousand dollars and do the work well and circulate it and get the thousand dollars, the Government has not sustained any loss? The Government owed you the thousand dollars and you have got it, although in an irregular way to be sure. I do not suppose you would take that to be wrong.

Mr. CHANDLER. I will answer that by asking your honor this question, because I would like to be very candid with your honor: If four or five of us were indicted for conspiracy to defraud the United States, and it did not turn out that we had defrauded the United States, would your honor have me convicted on that indictment, because they had shown in the course of the trial that I had forged a bond on the United States? If so, then I am answered. If not so, I am not answered.

The COURT. I do not think it is any answer on the part of a public officer who has entered into a conspiracy to violate his oath and duty of office to say that in pursuance of the conspiracy he did not do anything but what he as an officer ought to have done.

Mr. CHANDLER. I do not say it is an excuse, if your honor please, but what I do say is this: That if ten men or forty men are charged with conspiracy to do anything, and if from the whole evidence of the case the proof is that only one of the forty did an act which he might have been punished for under other circumstances, that that fact does not tend to prove the conspiracy.

The COURT. I am assuming that the conspiracy is established.

Mr. CHANDLER. So am I, if your honor please.

The COURT. That the conspiracy to do the act is established. I say, if that is established, then the fact that the public received benefit from the expedition and increase of service is no defense.

Mr. CHANDLER. If your honor please, I differ with the court most radically upon that subject, and I shall claim the right to argue that question.

The COURT. I say that is my present impression.

Mr. CHANDLER. Certainly; and I propose to change it by the persuasive argument of which I am capable, if your honor please. [Laughter.]

The COURT. You have got us into a good mood now.

[Mr. Chandler here took his seat.]

The COURT. Do you wish to adjourn?

Mr. CHANDLER. [Rising.] I understood the court to intimate that it wished to adjourn, because Mr. Merrick was in a good humor. What few remarks I have to make, I would as soon make now as at any other time.

The COURT. I hope you will not close to-day.

Mr. CHANDLER. I do not think your honor ought to make me an object of satire now. I have been reasonably modest in this case, and have not said half as much as my friend Mr. Merrick.

Mr. MERRICK. You are one out of twelve, and I am only one out of three.

Mr. CHANDLER. Yes; but they keep their principal counsel in the shade and under cover. The brains of this business are outside. [Great laughter.]

The COURT. [To the audience.] We must have no such outbursts.

Mr. CHANDLER. Now, if your honor please, the point which I think is unanswerable, yielding to every suggestion which the court has made, is that when parties are charged with a conspiracy to defraud the United States, all they can be held to is this: That if they had succeeded it would have defrauded the United States. The only difference between charging the crime in its inception and the crime in its consummation is this: When the crime is finally matured and concluded, then it is a fraud upon the United States. The statutes are full of condemnation of fraud against the United States. Now the statute has taken up crime in its inception, but it is the same kind of crime in its inception as it is when it is fully consummated; and the intent of the conspirators must have been to do that which, if done, would have been denounced by the statute which punishes fraud in its consummation.

The COURT. Do you not know that one of these provisions of the Revised Statutes—I know you are acquainted with it—makes it a crime for any officer of the Government to accept money for allowing a claim or for facilitating any claim against the Government?

Mr. CHANDLER. Certainly.

The COURT. I suppose it would be a crime for that officer to enter into a conspiracy with any person to allow claims of that character. Suppose such a conspiracy should be proved in court, could the defendant be acquitted if he could show that the claim was a just claim against the Government; that the Government ought to pay that claim; that policy and justice demanded that the claim should be paid? I do not think it would affect the case at all. Now, in regard to this matter of expedition upon these routes. That may have been very well in view of public policy. It was manifestly the opinion of General Sherman that it would save the Army a good deal of trouble in certain cases, and did, as the Post-Office Department established a picket-line through the Indian country. Well, in that view of public policy it was right that the increase of service and expedition were ordered. But suppose it was shown to the satisfaction of the jury that the officer who made that order for expedition was in the pay of the contractors, and that there was a conspiracy prearranged by which such expedition and increase of service were to be allowed, is the benefit which the public

derives from picketing these lines to acquit the conspirators? That I understand to be the drift of your argument.

Mr. CHANDLER. Will your honor let me say what I think about it?

The COURT. Yes.

Mr. CHANDLER. I will be pleased to do so. Let me put a question which I think illustrates this principle: Suppose I have a claim against the Government of the United States which ought to be paid, and which is audited and I go to an officer and I tell him I will give him a hundred dollars if he will allow that claim and he takes the hundred dollars, where is the violation of law? It is here. He is indictable for receiving a bribe and I am indictable for giving a bribe. There is no conspiracy between us at all to collect a false claim. Recollect, if your honor please, that the animating principle of this charge is that it was to collect a false claim. Now, if I were indicted for conspiracy with the officer to whom I have given this money to allow a just claim; if I were indicted for a conspiracy to collect a false claim, would it not be necessary for the Government, having elected that criminal ground to stand upon, to prove that the claim was false? If they had indicted me alone for offering a bribe I will admit I could make no answer that the claim was good. If the officer were indicted for taking the bribe he could make no such answer, because the law forbids him from taking money to influence his judgment in any way, and it is not an element in the case. The single question is, did he have a matter pending before him which he had a right to act upon officially, and did he take money to do it? But if they charge me and that officer with conspiracy to defraud the United States by collecting a false claim, I say by all the rules of law they must prove the charge that they make against us. That is the distinction.

The COURT. I will turn you over to Mr. Merrick for reply.

Mr. MERRICK. As your honor suggests, I am to reply, I prefer that there should be a broader foundation laid for my benefit, and I ask that brother Chandler may reflect on it overnight and improve it a little.

The COURT. We will give him a chance. Adjourn the court.

At this point (3 o'clock p. m.) the court adjourned until to-morrow morning at 10 o'clock.

THURSDAY, AUGUST 17, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. CHANDLER. [Resuming.] If your honor please, and gentlemen of the jury, I called your honor's attention yesterday to a case which I would like again to mention, reported in the 12th of Clarke and Finney, page 236, O'Connor and others against Queen:

Upon the second question [ante, page 231] we all agree in opinion that the findings of the jury upon the first, second, third, and fourth counts of the indictment are not supportable in law. With respect to the first and second counts, upon the ground that the jury not only find the eight defendants to be guilty of a joint conspiracy charged in each of these counts, but also find a certain number of those eight defendants to have been guilty of separate and distinct conspiracies under the same counts. With respect to the third count—because they find three of the defendants guilty of a conspiracy to effect part only; and Thomas Tierney a still smaller part of the objects mentioned in the third count. And a similar objection, in point of principle, applies to the findings upon the fourth count, on which all are found guilty of the whole of the charges except Mr. Tierney, who is found guilty of part only; and the reason and

ground for such opinion is this: That as each count of the indictment charges one conspiracy or unlawful agreement, and no more than one, against all the defendants in such count, so the jury could find only one conspiracy or unlawful agreement on each separate count, for though it was competent to the jury to find one conspiracy on each count, and to have included in that finding all or any number of the defendants, yet it was not competent for them to find some of the defendants guilty of a conspiracy to effect one or more of the objects stated, and others of the defendants guilty of a conspiracy to effect others of the objects stated; because that is, in truth, finding several conspiracies on a count which charges only one. The case of *The King vs, Hempstead, [s.]*, is strong in support of this principle when applied to the case of larceny. The indictment contains one charge: the jury cannot find more than one.

We therefore agree that the findings of the jury on the first four counts of the indictment are not authorized by law, and are incorrectly entered upon the record.

Mr. MERRICK. If my brother Chandler will allow me, in order that I may understand more distinctly than I now do, the question which he raises upon the indictment in connection with the remark just made, I would ask where in the indictment it is found that all these parties are charged as mutually interested in the contracts specified in that indictment?

The COURT. You have your reply.

Mr. MERRICK. I only wanted to know. I will say to my learned brother now, that the charge, as stated in its breadth, is not in the indictment.

Mr. CHANDLER. Very well. I am glad the gentleman interrupts because I want to see the drift of their minds in this case. I want to see if possible the principle upon which they rest this prosecution. Now, the gentleman says that that is not in the indictment.

Mr. HENKLE. Allow me, Mr. Chandler, to read that for you.

Mr. CHANDLER. I know where it is. It is on page 14 of the indictment.

Mr. MERRICK. Read it, Mr. Henkle.

Mr. HENKLE. [Reading:]

And that thereupon and thereafter, to wit, on the said twenty-third day of May, in the year of our Lord one thousand eight hundred and seventy-nine, at the county and District aforesaid, and within the jurisdiction of the said court, the said several contracts and agreements so made between the said United States of America and the said John W. Dorsey and the said John R. Miner and the said John M. Peck as aforesaid, were in full force, effect, existence, and operation; and then and there, to wit, on the said twenty-third day of May, in the year of our Lord one thousand eight hundred and seventy-nine, at the county and District aforesaid, and within the jurisdiction of the said court, the said John W. Dorsey, John R. Miner, and John M. Peck, together with one Stephen W. Dorsey and one Harvey M. Vaile and one Montfort C. Rerdell were then and there mutually interested in the said contracts and agreements made between the said United States of America and the said John W. Dorsey and the said John R. Miner and the said John M. Peck for carrying and transporting the said mails on and over the said post-routes numbered 46132 and 46247 in the said State of California; and routes numbered 38113, 38134, 38135, 38140, 38145, 38150, 38152, and 38156 in the said State of Colorado; and routes numbered 44140, 44155, and 44160 in the said State of Oregon; and route numbered 34149 in the said State of Nebraska; and routes numbered 40104 and 40113 in the said Arizona Territory; and routes numbered 35015 and 35051 in the said Dakota Territory, and route numbered 41119 in the said Utah Territory, as aforesaid; and were then and there mutually interested in the money to be paid by the said United States of America to the said John W. Dorsey, John R. Miner, and John M. Peck for carrying and transporting the said mails on and over said post-routes in accordance with the said contracts and agreements as aforesaid; and the said contracts and agreements were then and there held, owned, and used by the said John W. Dorsey, John R. Miner, and John M. Peck, for the mutual and pecuniary benefit, interest, advantage, gain, and profit of them, and the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell, as aforesaid.

Mr. MERRICK. You observe, your honor, that Brady and Mr. Turner are not mentioned. That is in the inducement in the indictment, and there has been a misapprehension prevailing about it for a long time.

When you come to the charging part of the indictment you then perceive what Brady and Turner were to do in order, through this property owned by Dorsey, Peck, and Miner, to defraud the United States. I throw that out for my brother's benefit.

Mr. CHANDLER. I am glad he has thrown it out, because it is better to understand what each is contending for. Now, then, I understand that it rests upon this concession, that if it did so state this mutual interest in all these parties, then the proposition I make would be correct.

Mr. MERRICK. Oh, no. In the first place, even if it did, I deny that the proposition would be correct. I will show from this very case of O'Connor, from which the gentleman just read, that the proposition he stated is erroneous. But the proposition he stated was not founded upon the facts stated in the indictment, and that is what I called his attention to.

Mr. CHANDLER. Then I understand him, in the first place, to say it is not so alleged, and in the next place to say if it is so alleged it does not amount to anything?

Mr. MERRICK. Yes.

Mr. CHANDLER. It is either so alleged, or it is not. If it be so alleged that these parties were all mutually interested in these contracts, then that allegation is the statement of the Government of the method by which these men were brought into this unity, into this criminal relation of conspiracy. Now, the proposition which I made yesterday was, that where a party descends to a particular description of an offense, touching any substantial matter in that offense, that he is bound by that particular statement. Now, instead of stating in this indictment that these contractors—using that allegation as far as it goes and no further—that so far as that allegation is used as a statement under what circumstances these contractors and subcontractors came together in their interest in the subject-matter of this conspiracy, to that extent the Government is bound by it, and they cannot detach themselves from it. It is not an immaterial allegation. It is an allegation of fact that these contracts being made by the Government put them in a position where they could have dealings with the Government. Why, if your honor will pursue the logic, the theory, the scheme of this prosecution, it is this. This is not a charge that certain persons came before the Government to present claims without any color of right, that they came before the Government to get money on no contracts and on no claims, but it is a description of the circumstances under which they came before the Government for this claim, and this indictment presents these parties before the Government making this claim as contractors with the Government. The foundation of this whole proceeding is laid in this indictment upon the allegation that these parties had these dealings with the Government, and, therefore, the Government had to rely upon their statement. That is why these things are put in this indictment, to make it possible to deceive the Government of the United States.

Why, if a man goes before the Government and presents a claim where he is not shown by any record to have any dealings with the Government and to have no claim filed before the Government, it would be a perfect piece of idiocy to say that the Government was defrauded voluntarily in paying him on a claim that he did not have. Therefore, in order to lay the foundation for this alleged false claim, they state that he had a righteous claim, and they describe that claim to consist in these contracts in which these parties were mutually interested. That is the manner and method by which they are presented to the Govern-

ment to make this claim and collect this money, and that is the way they are presented to this court for getting a false claim. So I say, gentlemen, again, that they can no more disconnect themselves from this allegation of mutual interest between these contractors than they can stand up before you and shed their flesh. That is the muscle, the sinew of this charge, and they cannot get away from it. It is very poor pleading to say that it is not in there, and if it is in there it don't amount to anything. They ought to have sufficient courage and chivalry to say one thing or the other. Let us admit it is there, if it is there, and then say it does not amount to anything. But do not deny both. I say it is there, and it is there as one of the definitions or descriptions of this offense, and they cannot get rid of one part of this offense without abandoning it all.

Now, they lay the foundations for this alleged conspiracy in these contracts, and then hope to bring Mr. Brady and Mr. Turner into these contracts by their official action; because you will notice when you come to read this indictment in your room that they allege after stating the mutual interest of all these parties in these contracts, that is, the subcontractors and contractors, that Mr. Brady and Mr. Turner made these increases of pay under these contracts for the mutual gain of Brady, Turner, and all the rest. So that they start out with the allegation that the contractors and subcontractors are mutually interested in all these contracts, and then undertake to introduce Mr. Brady and Mr. Turner into that mutual interest by saying that their official action was done for their benefit with the others under these contracts. So that they do, by their allegations, cement all the defendants together in this mutual interest in these contracts.

Now, I do not want to state that these gentlemen do not understand their case. In a loose expression yesterday I said that the brains of this prosecution were out of sight. I ought not to have said that in politeness to the gentlemen who represent the Government, and I regretted having made such a remark carelessly after I did make it. The brains of the prosecution are here, and they are giving you the best reasons for maintaining this prosecution, and they are no reasons at all.

Now, gentlemen, I want you to keep in mind this clear principle of this case that ought not to be turned aside from or the force of it broken. It is the spinal column of the case, and if you find any case at all you will find it arranged around and supported by this principle that I speak of, to wit, that this is a charge of a conspiracy to defraud the United States by collecting false claims against the Government. You see the labor which these gentlemen have imposed upon themselves to disclose to you in the indictment the falsity or alleged falsity of these claims. It is no conspiracy to bribe anybody. Bribery has no more to do with it than one of the Psalms of David. It is a distinct offense. The offense that is charged here is a conspiracy to defraud the United States by collecting false claims. Now my distinguished friend, Mr. Merrick, said yesterday, as I understood him, that they could not prove that this service was not worth to the Government what the Government paid. They were not allowed to prove that. If not, gentlemen, then this case stops, because you cannot indict a man and convict a man for conspiring to collect a false claim against the Government without you show the claim is false.

Now there is a principle of fraud which everybody recognizes, and I only want to call your attention briefly to it, because I do not intend to talk but a few minutes longer, and that is this: In order to defraud a man the man must stand on terms of inequality with you. If I come

to you to sell you a horse and I tell you the horse is perfectly sound, and you see a bunion on his leg, and you see that he is not sound, the unsoundness of the horse is unfolded to your observation just as well as it is to mine, and my statement that he is sound amounts to nothing, because the evidence of unsoundness is there, presented to you at the time I tell you that he is sound.

Now I say that there never can be any fraud perpetrated by one man upon another man unless there are circumstances of inequality between the two; where the facts are not as open to the observation of one party as they are open to the observation of another. That is a rule no lawyer will question. Now here is said to be an effort to defraud the United States. Not any particular officer, not any particular department, but to defraud the United States. Now I ask you what system of observation does the United States have over the subject-matter of carrying the mail, over the subject-matter of whether it is desirable that a mail shall be increased and the time shortened or not? Why the Post-Office Department represents a system of intelligence that is gathered from the experience of the people since the Government was formed. Its methods of doing business have been improved, refined, and perfected year after year. It has its inspection division. It has its special agents who go over the routes. It has its varied organized instruments of vigilance that discover every fact connected with the operation of the mail. And to come here and to tell me that these parties could deceive the Government of the United States about facts equally open to the observation of the United States is simply ridiculous. Remember getting a good trade is not fraud. Fraud is only perpetrated by deception, and deception can only prevail where the other party has not the means of knowing.

Let me call your attention to the law in this connection, reported in the Postal Laws and Regulations:

A report of all allowances made to contractors within the preceding year above the sums originally stipulated in their respective contracts, and the reasons for the same, and of all orders made whereby additional expense is incurred on any route beyond the original contract price, giving in each case the route, name of the contractor, the original service provided by the contract, the original price, the additional service required, and the additional allowance made therefor.

That is a section of the law that is mandatory upon the Postmaster-General to report to Congress each year each one of these facts.

Now, the Constitution of the United States, by special provision, reposes the subject-matter of the mail and its carriage with Congress. That by constitutional assignment is put with Congress. Congress is the primary and supreme power over the subject of carrying the mails and the disbursement of the public money therefor. Not a dollar can be paid out of the Treasury of the United States except it be paid in pursuance of some appropriation made by Congress.

Now, then, these contracts run for four years. At the end of each year the Postmaster-General is required by law to report to Congress the increase of service, the name of the contractor whose contract has been changed, the reasons for the change, and the extent of the change. That goes each year to Congress upon an application of the Post-Office Department for money to defray the expense of carrying the mail.

Now recollect that this is not an indictment charging a conspiracy to defraud the Postmaster-General, but a conspiracy to defraud the United States. That is what it is. So that these agencies, not one of them but all of them, having charge and legal control of this subject-matter, must be deceived before there could be any fraud perpetrated upon them.

Now Mr. Key said, as I recollect his evidence, that he did report this to Congress each year. There is an unanswerable presumption of law that he did in the absence of evidence. At any rate, he is presumed to have done it. I understood him to say that he did report the increases of service and the name of the contractor in whose favor the increase was made each year, and Congress having the subject matter of that report before it appropriated this money to pay it.

Now let me put the question to you. Suppose I had dealings with you. Reduce this down to a mere individual transaction, and do not keep it in the air roaring and thundering so far above our heads that we have no conception of it. Bring it down within the application of a few principles of law, and see what it amounts to. Suppose he had an agent, and he had been doing business for you year after year with these contractors, and that agent had under the power that you gave him the discretionary power to increase these contracts, decrease the speed, increase your liability immensely for doing the business which you had intrusted to him; that he had made contracts under your authority for four years; that those contracts were reported to you, and you found no fault with them; that he had power to increase the contracts, to vary them, change them from time to time in the due course of the business, that he did do that, he reported that to you, and each year he made out an itemized statement of just what he had done, the increases and changes that he had made on these contracts, the reasons why he had changed them, in whose interest he had changed them, and you took the money out of your pocket and paid the parties with whom he dealt, is there a man under the American flag so stupid as to say you could recover that money back, or that you could go into any court on earth, and maintain any suit or pretense of a suit for fraud? It does not, of course, strengthen anybody's argument to use epithets, and characterize the case as ridiculous; but does it not really look so?

Take it right home to yourselves as an ordinary business transaction, and you stood in the place of the Government; you had these multiform agencies; you had your subordinate agencies that watched over this business and went over the routes, and reported to you; that you had your inspection division, you had your other methods of getting information on the subject, and all these methods were used and employed by you to keep yourself informed about your own business—there is no pretense here that the inspection division perpetrated any fraud or anything of that sort; that all these agencies furnish to you the knowledge which they were required under your appointment to furnish you, and after all that was done in the course of that business, at the end of each year your principal agent, who has the supervision of all the subordinate agencies, came forth with a written, itemized, clear statement of just what he had done, and you looked it over and paid your money on it, then afterwards you undertook to sue to recover it back, or to prosecute the parties who got it from you. Now I say that that is to my mind ridiculous. It seems to me it is absurd, and unless we are going to have two systems of justice in this country, or rather one system of justice to the people and a system of justice to the Government, they cannot make any such claim as that. The Government when it comes into court is governed by the same rules of evidence that govern individuals, the same rules of contract. When the Government makes a contract, that contract is to be interpreted as though it were made between individuals. The liability of the Government springing from that contract is precisely the liability that would attach to an individual under the same circumstances. The knowledge which the

Government gets about its business while it is being transacted binds and affects the Government just as that same knowledge would bind and affect an individual. Therefore, I say that element of fraud is wanting in this case. To say that the Government with its multiform agencies, with its organized system of vigilance which spreads all through this matter, which embraces every feature and trait of it, did not stand on equal terms with these men is absurd.

Now, they may say that Mr. Brady was a part of the Government, therefore he gave these parties an opportunity that they would not have had had he not been in it. But there is no proof here in this case, gentlemen, that I have heard, not one syllable of it, that General Brady acted otherwise than in accordance with the settled rules and practice of the Post-Office Department. The inspection division worked up these preparatory facts touching the deductions and fines and their remission, just as the Post-Office Department and the inspection division had done for fifty years before. Every step taken in the course of this service and its decrease, its management under General Brady, was taken in precisely the same measure as it was taken under the operation of the Post-Office Department for fifty years before. So that there is nothing in this case that shows that they have perverted the usages and customs of the Post-Office Department. They have been kept intact. They have pursued their ordinary course, and now they claim that these men, unfamiliar with the business of carrying the mails, one of them as they choose to characterize him as "a scrub from Vermont," had no knowledge of this matter.

Mr. MERRICK. Who is that?

Mr. CHANDLER. Mr. Bliss, if I recollect, said that John W. Dorsey was a scrub, and not only that, but a scrub from Vermont.

Mr. MERRICK. Yes?

Mr. CHANDLER. Yes, sir. Now, here is a scrub from Vermont——

Mr. MERRICK. [Interposing.] I think Colonel Bliss said that that was an error; that is, it was in the report, but that he used no such language. I think the colonel said it was reported that he used the word scrub. It was a mistake in the report. [Mr. Bliss here entered.] Here is Mr. Bliss. He can speak for himself.

Mr. BLISS. No, sir; I never used the word scrub, or anything like it.

Mr. CHANDLER. My recollection is different, but I accept the statement of Colonel Bliss, of course; therefore, I will say nothing on the subject of scrub.

Mr. McSWEENY. The whole thing is a scrubby affair, so go ahead.

Now here is Mr. Miner; Mr. Ker was guilty of very great malpractice, I will say, in alluding to Mr. Miner's personal appearance. Now I think that that was decidedly unfair. Mr. Miner is not my client. I am not bound to answer anything that is said against him, but Mr. Ker must know that when he enters upon the subject of the discussion of faces, he is getting upon very uncertain ground. Now, we are not all as handsome as Mr. Ker, and why he should exert the tyranny of his superior looks over us I do not know. It occurred to me that Miner was a handsome man, and I think that that remark is the premature fruit of an exaggerated idea.

Now, then, gentlemen, these parties are brought together. Now they come here before the Government with its experience in mail matters. The Government has had its agencies organized, had them maturing, had them accumulating accessions of information and truth for the last fifty years, and it presents itself in possession of the highest possible

information on the subject, and the most perfect preparation to defend itself against any imposition.

It has been said by the prosecution, I think, here that the Government is preyed upon a good deal. You heard that a good deal. I do not think really that is so. A man may stand on the steps of the Treasury of the United States with a thousand dollar claim that is just as honest as any one ever had on earth, and starve with it in his pocket. I do not think the Government of the United States is in a position to parade its superior sense of justice upon the matter of contract. These contracts themselves do not look like it. The Government holds the whole power of paying this money and of revoking these contracts at any time it sees fit. So you see the Government is not taken at a disadvantage, and I say that is one of the elements in determining the question of fraud. Is the Government shown in this case to be at any disadvantage? On the contrary it has every advantage. It can annul contracts and carry the mail on rigid time. It can deduct for just what damage it thinks it has suffered because of the failure of a trip or failure of an hour's time; then if the contractor fails to observe the time they can annul the contract. So I say that there is no position of inequality here so far as the Government is concerned, but it is all the other way. It was not proved in this case up to the hour that Walsh went on the stand, and it was not pretended to be proved that General Brady had used his official authority for any purpose other than that of honesty. I say this record shows that up to that hour there was no such proof. I am not going to discuss the testimony of Walsh, I will leave that to others. I only want to call your attention to one or two matters and then I will leave the case so far as I am concerned.

Now, suppose General Brady were on trial for bribery. If he were on trial for bribery and nobody else with him, for receiving 20 per cent. of the contract prices for carrying the mail under these identical contracts, and that was the issue instead of conspiracy to defraud the Government—that is not the issue and has no relation to it whatever—but suppose it was the issue and he stood here alone and all the testimony that bore upon that issue was the statement of Walsh, what would the court do? The court would instruct you to acquit, simply because it is not permitted to prove the body of the offense of the bribery by any supposed confession. Suppose you believed everything Walsh said. Suppose that there was no criticism of it because of its improbability and no contradiction of it. Suppose it was a flat-footed statement, and instead of being that he got 20 per cent. from everybody it was that he got 20 per cent. from these identical contractors and that was all the testimony there was on the subject of bribery; the court would instruct you to acquit him on that evidence of that crime.

Now, if your honor please, there is a case which I wish to cite to support the proposition I have made here in regard to the sanction of this matter by Congress. It is the case of the people and others on the relation of Murphy against Kelley, decided in 5 Abbott's New Cases, page 450. It is a New York report, whether inferior or superior, it does not make much difference.

Mr. BLISS. The decision was made in the court of appeals.

Mr. CHANDLER. They discuss at great length the question whether the bridge built from Brooklyn over to New York City was a nuisance or not. The evidence showed that the bridge did obstruct navigation, after the construction of it was entered upon by the bridge company, under the plan which the bridge company had adopted, and which had been sanctioned by the Secretary of War, the act of Congress authorizing

the bridge to be built having authorized the Secretary of War to settle upon a plan. The same law provided that the bridge should not obstruct navigation; that such a bridge should be built as would not obstruct navigation. The Secretary of War passed upon the plan of the bridge, and the bridge was begun, and after it had progressed considerably so as to develop the effect that it would have upon commerce, this suit was brought to enjoin the further construction of the bridge on the ground that it did obstruct commerce, and the single question was whether the law itself, having confided the whole matter to the Secretary of War to fix the plan, and the city of New York had appropriated certain money after that plan was entered upon, and Congress, having by certain laws made further appropriations after it was begun under that plan, the structure thus being sanctioned by the State, could be unlawful; and they held that it could not be unlawful; that whatever is sanctioned by the State is lawful.

I asked your honor's permission yesterday to read some authorities on the subject that I then mentioned, and I would like very much to do so briefly. The proposition which I maintain, if your honor please, with all sincerity, is that a jury, under the Constitution of the United States, is the judge of the law and the fact in a criminal case. Your honor remembers that it is decided in 91 United States, I think it is, and 4 Howard, that in a civil case the court shall be careful to instruct the jury that the opinion of the court upon the facts should not govern the jury in coming to a conclusion; that in a civil case the jury are supreme in the domain of fact. Now the question is what is the rightful office, not the exaggerated office, of the jury; not what they may capriciously do or wantonly do, but what it is right and what it is just that the jury should do under our system of law. That is all we want. We do not and would not ask this jury to act differently in this case from what we conceive a jury has a right to act, and what it is your duty to do in all criminal cases. Now, it is conceded at the outset of this argument on this branch of the case, as I understand, that a jury has the power to find a verdict of acquittal, no matter what may be the instructions of the court. I think that is conceded as a matter of law, not as a matter of wantonness, but a matter of legal power, that the Constitution of the United States has conferred upon the jury the legal power to find a general verdict of not guilty. Now, can it be said that a tribunal or an officer endowed by the highest law of the land with a power has not the legal right to exert that power? It seems to me that it is frittering away the power when it is conceded to exist to undertake to attack the right of the use of that power. The Constitution of the United States has reposed in the jury the power to find a general verdict of not guilty, no matter what may be the opinion of the most enlightened, impartial, and intelligent court before whom the case is tried.

The COURT. The jury has the power to find a general verdict of guilty, too.

Mr. CHANDLER. Yes, sir; as a matter of course.

The COURT. Suppose it finds a verdict of guilty and overrules the court on a question of law, would not the court set aside the verdict?

Mr. CHANDLER. Now, if your honor please, if that question ever comes up, I shall be happy to argue it; but inasmuch as this question is what I prefer to grapple with, I will confine myself to it.

The COURT. Well you are dealing with half of the question.

Mr. CHANDLER. I want to deal with that half of it first at any rate, if your honor please. I do not ask to go any further than the authorities go.

The COURT. I will follow the authorities wherever they go; that is, if they are good authorities.

Mr. CHANDLER. They seem to me to be very good. I do not know, if your honor please, whether they are or not.

The COURT. In what I have just said, I refer to authorities which the court will recognize as obligatory.

Mr. CHANDLER. It is not pretended by me that the Supreme Court of the United States has ever affirmed the proposition that I am contending for. I read from 23 Vermont, page 19:

This is an indictment for dealing in the selling of distilled spirituous liquors without license, on which the respondent was found guilty in the county court, and the case is brought here by bill of exceptions.

The first objection made to the ruling of the court has been disposed of in favor of the verdict by our decision in the case of the State *vs.* Smith, 22 Vt., 74, and I have nothing to say in regard to it. The other question is of much importance, and deserves serious and careful consideration.

The court, upon the request of the respondent's counsel to charge upon the point, charged the jury, in substance, that, in determining the case submitted to them, they were not the judges of the law, but of the facts only; and that they were bound to consider the law as laid down by the court to be the law of the case, and were bound to be governed by it in rendering their verdict. We are now to inquire into the propriety of the charge. It is not denied by those who would sustain the charge of the court, but that the jury, in all criminal trials, have the power to disregard the law, as laid down to them by the court, and to render a verdict of not guilty, contrary to it. Nor is it pretended that there is any power in the court, or any other tribunal, to set aside the verdict for any difference of opinion between the court and the jury in regard to the law, or in any manner to call the jury to account for rendering it. It is, however, insisted that the jury are nevertheless legally bound to take the law of the case from the court, and that by departing from it they would both violate a principle of law, and be guilty of a moral wrong.

On the other hand, it is claimed that the power, which a jury may in such cases exercise, in rendering a general verdict, of determining the law and the facts in the case submitted to them, is a legitimate and legal power; a power which a jury, acting under their oath and governed by a sense of duty, may rightfully and properly exercise, although it be in contradiction to the law stated to them by the court.

It must, I think, be conceded, that the opinion of the legal profession in this State, from the first organization of the Government—certainly until a very recent period—has been almost, if not quite uniform, in favor of the now controverted right of the jury. From the earliest date, the Supreme Court, while they held jury trials in bank, were, as I have always understood, in the habit in criminal cases of charging juries, that they were rightfully the judges of the law, as well as the facts; and I think the same has since been the general practice by the judges of the Supreme Court at *nisi prius*.

The question in regard to the right of the jury was also incidentally before the Supreme Court in 1829, upon a charge of one of the judges at *nisi prius*, which it was contended, on the part of the respondent, was to be construed as having denied such right. It was conceded in the argument, that if the charge were liable to such construction, it could not be supported. The charge was held unobjectionable in that respect; but Prentiss, J., in delivering the opinion of the court, remarks upon the question as follows: "There is no doubt, the jury are judges of the law as well as the fact. This is the true principle of the common law, and it is peculiarly applicable to a free government, where it is unquestionably both wise and fit, that the people should retain in their own hands as much of the administration of justice as is consistent with the regular and orderly dispensation of it, and the security of persons and property. This power the people exercise in criminal cases in the persons of jurors, selected from among themselves from time to time, as occasion may require; and while the power thus retained by them furnishes the most effectual security against the possible exercise of arbitrary power by the judges, it affords the best protection to innocence." *State vs. Wilkinson*, 2 Vt., 480. This opinion of a former chief justice of this State, of acknowledged legal ability and integrity, may be justly entitled to high consideration by this court.

The right as well as the power by juries in criminal trials to resolve both the law and the facts by their general verdict was also a favorite doctrine of the early jurists and statesmen throughout the United States, and continued such, as will be shown hereafter, until the contrary doctrine was broached by Mr. Justice Story in 1835, in the case of the United States *vs.* Battiste, 2 Sumn., 240, since which time the lead of Judge Story has been followed by the supreme court of Massachusetts in the case of

the Commonwealth *vs.* Porter, 10 Met., 263, and perhaps by judges and elementary writers in some of the other States.

It is, however, worthy of remark that in both the opinions of Judge Story and of the supreme court of Massachusetts, the principal reason for the establishment and maintenance of this right of juries—the preservation of the liberty of the citizen and the protection of innocence against the consequences of the partiality and undue bias of judges in favor of the prosecution—is wholly overlooked. Even in the labored opinion of Chief-Justice Shaw, in Porter's case, covering some twelve pages, it is not once even alluded to. The whole question is treated as resting on the comparative knowledge of judges and jurors in regard to the law, and in the supposed violation of the harmony of the legal system, which an admission of the right of jurors would occasion.

These matters are doubtless worthy of consideration, but that which has been disregarded appears to me to be of no less importance. Judge Blackstone in his Commentaries (vol. 4, p. 349) thus speaks of the trial by jury: "The antiquity and excellence of this trial for the settling of civil property has before been explained at large; and it will hold much stronger in criminal cases, since in times of difficulty and danger more is to be apprehended from the violence and partiality of judges, appointed by the Crown, in suits between the King and subjects, than in disputes between one individual and another to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier of a presentment and trial by jury between the liberties of the people and the prerogatives of the Crown."

Now here is a case lately decided in the supreme court of Pennsylvania by Chief-Justice Sharswood. It is the case of Kane against The Commonwealth, 89 Pennsylvania, 524. Chief-Justice Sharswood, in delivering the opinion of the court, said:

None of the specifications of error are sustained except the fourth and ninth, the refusal of the court to charge as requested in the third point, and the instruction in the charge on the same subject. We have no doubt that the court were right that the word "day," as used in the eleventh section of the act of April 12, 1875, pamph. L, 42, includes the whole twenty four hours of the day upon which an election is held.

We are of opinion that the learned judge committed an error in declining to affirm the defendant's third point, that the jury in the case were judges of the law and the facts. He admits that the law was as stated in the point until the constitution of 1873, and the legislation in pursuance of it, gave the defendant in criminal cases a writ of error to the supreme court. We cannot agree that in consequence of these provisions the reason which led to the adoption of the doctrine ceased, and that it has ceased therefore to be the rule.

I do not propose an elaborate examination of the question. I find it done to my hand in a very learned and exhaustive opinion of Mr. Justice Hall, of the supreme court of Vermont, in the State *vs.* Croteau, 23 Vt., 14, who traces the doctrine historically, and cites and comments upon all the cases, both English and American. There is a great variety of opinion in the courts of the United States and of the several States. While all concede that under the provisions of the bill of rights no man shall be twice put in jeopardy of life or limb for the same offense; that when the jury find in favor of the prisoner a verdict of not guilty, it is final, it not being in the power of the court to grant a new trial on the motion of the commonwealth and against the prisoner's consent, or of any higher court to reverse the judgment. It has been strongly contended that, though the jury have the power, they have not the right to give a verdict contrary to the instruction of the court upon the law; in other words, that to do so would be a breach of their duty and a violation of their oath. The distinction between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No court should give a binding instruction to a jury which they are powerless to enforce, by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them to receive and follow their instruction, but beyond this they have no right to go. The argument in favor of their taking the law from the court is addressed very properly *ad verecundiam*. The court is appointed to instruct them, and their opinion is the best evidence of what the law is. For my part, I consider the following passage from the charge of Mr. Justice Baldwin in the United States *vs.* Wilson, Baldwin, 99, as a model to be followed by other judges when called on to instruct the jury upon the subject: "We have thus stated to you the law of this case under the solemn duties and obligations imposed upon us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case, but you will distinctly understand that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court. You may judge for yourselves, and if you should feel it your

duty to differ from us, you must find your verdict accordingly. At the same time it is our duty to say that it is in perfect accordance with the spirit of our legal institutions that the court should decide questions of law and the juries of fact; the nature of the tribunal naturally leads to this division of duties, and it is better for the sake of public justice that it should be so. When the law is settled by a court there is more certainty than when done by a jury; it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject. By taking the law as given by the court you incur no moral responsibility; in making a rule of your own, there may be some danger of a mistake."

No one acquainted with the life of the founder of this commonwealth can entertain any doubt of his opinion or that of his friends and followers. In 1670 William Penn with George Meade was tried under an indictment for seditiously preaching to a crowd in Grace Church street before the recorder of London, who charged the jury that the court was the sole judge of the question of sedition, and that all they had to do was to find whether the defendants had preached or not. As this was not denied, it was a binding instruction to find for the Crown. The jury, however, acquitted the prisoners, and the court, considering it as a contempt, set a fine of forty marks on each of the jurors. Edward Bushel, one of them, refused to pay the fine, and being arrested sued out a writ of habeas corpus before Lord Chief-Justice Vaughan, who, without hesitation, discharged him from his illegal and arbitrary imprisonment. Vaughan's Rep., 135. In 1735, on the trial of John Peter Zenger, for a libel against the government, before Chief-Justice De Lancey, of New York, Andrew Hamilton, of Pennsylvania, certainly the foremost lawyer of the colonies, in a forensic effort in defense of the prisoner equal to that of Erskine afterwards, in the case of the Dean of St. Asaph, not only took the ground that the jury had a right to say whether the publication was a libel, but added in the most emphatic language, "I know that they (the jury) have the right, beyond all doubt, to determine both the law and the fact; and when they do not doubt of the law they ought to do so." (17 State Trials, 675.) The jury in that case, contrary to the charge of the court, returned a verdict of not guilty. The corporation of the city of New York passed a vote of thanks to Mr. Hamilton for his able and eloquent defense of "the rights of mankind and of the liberty of the press," and the freedom of the city was presented to him in a gold box. When Lord Mansfield and his associates, in *King vs. Woodfall*, 5 Burr., 2661, and *King vs. Shipley*; 3 T. R., 428 N, undertook to enforce a similar doctrine in England, Parliament, by a declaratory statute (Mr. Fox's bill), 32 Geo., 3, chap. 60, settled the law to be that it should be competent for the jury in all cases of indictment or information for libel, to give a verdict of guilty or not guilty upon the whole matter put in issue, but that the court should, according to their discretion, give their opinion and direction in like manner as in other criminal cases. It was in view of this controversy that the framers of the Constitution of 1790, in art. 9, sect. 7, expressly declared "that in all indictments for libel, the jury shall have a right to determine the law and the fact, under the direction of the court, as in other cases."

In the judicial system of this commonwealth, from the earliest period to the present time, the tribunals invested with criminal jurisdiction, with few exceptions, have been composed of a majority of judges not required to be learned in the law. That this majority can overrule the president upon questions of law have never been doubted. And there is more than one case reported in our books in which they have done so and been sustained by the court. If the doctrine now contended for be sound the jury in a criminal case are absolutely bound by the opinion of the two associate judges, though contrary to their own clear conviction and that of the president.

The power of the jury to judge of the law in a criminal case is one of the most valuable securities guaranteed by the bill of rights. Judges may still be partial and oppressive, as well from political as personal prejudice, and when a jury are satisfied of such prejudice, it is not only their right but their duty to interpose the shield of their protection to the accused. It is as important in a republican as any other form of government, that, to use the language of the Constitution of 1776, "in all prosecutions for criminal offenses," a man should have a right "to a speedy public trial by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty." The provision of the constitution of 1873, that "in all cases of felonious homicide, and in such other cases as may be provided for by law, the accused, after conviction and sentence, may remove the indictment, record, and all proceedings to the Supreme Court for review." Art. 5, sec. 24, is evidently a very inadequate substitute for the constitutional guarantee expressly declared and reaffirmed in the same instrument, art. 1. sects. 6, 7, 9.

Here is a case that was decided in 1882 by Judge McCrary, of the circuit court of the United States:

The single question to be determined is, whether in such a case as this the court may direct a verdict of guilty? It is insisted on the part of the Government that the

facts being admitted or settled beyond dispute, the question of guilt or innocence depends wholly upon a question of law, which the court must determine, and that, therefore, the court may direct a verdict either way in accordance with its opinion of the law. This is the view which was taken by the court below. In so holding, the learned district judge was no doubt largely influenced by the ruling of Mr. Justice Hunt in the case of the United States *vs.* Anthony, 11 Blatch., 200. I find, however, upon an examination of the subject, that, with this single exception, the authorities are with entire unanimity against the right of a court in a criminal case to direct a verdict of guilty.

The Constitution guarantees to every accused person "the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed."—Sixth amendment. This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous.—State *vs.* Mann, 27 Conn., 281.

It is very difficult to see upon what principle it can be maintained that an accused person has had a trial by an impartial jury within the meaning of the Constitution, in a case where the court has directed the jury, without deliberation, to find him guilty. It would seem that such a trial is, in substance and effect, a trial by the court quite as much as in a case where a jury is waived by consent of the accused.

The Constitution does not deal with the form, but with the substance, the essence of the trial, and therefore requires a submission of the case to the jury for their consideration and decision upon it. There can, within the meaning of the Constitution, be no trial of a cause by a jury unless the jury deliberates upon and determines it.

It is doubtless true that in a certain sense, and to a limited extent, this doctrine makes the jury the judges in criminal cases, of both law and fact, but this is the necessary result of the jury system, so long as the absolute right of the jury to find a general verdict exists; for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both. It has accordingly long been well settled that, while the court is the judge of the law, and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the jury to render a general verdict, and thereby decide on the law as well as the facts. It has never, to my knowledge, been claimed that if the jury disregard the law as laid down by the court, and render a general verdict of not guilty, the court can set it aside; and if this cannot be done by an order after verdict, how can the court do substantially the same thing by an instruction before verdict? The action of the court is, in effect, the same in either case; it is, in effect, a decision by the court upon the law and facts, that the accused is guilty. The court must determine both the fact and the law, whether it directs a verdict of guilty or sets aside a verdict of not guilty. It may be going too far to say broadly that the jury have a right to disregard the instructions of the court upon questions of law, although many courts have gone to this extent, but it is quite clear that the right to render a general verdict includes the power to decide both law and fact and therefore necessarily the power to decide independently of the court.

In view of this, courts have usually gone no further than to say to the jury that, while they may, by a general verdict, determine both the law and the facts, it is their duty to receive the law as laid down by the court. In the case of the United States *vs.* Wilson, 1 Baldw., U. S. 108, the court, by Justice Baldwin, in charging the jury, commented upon the subject as follows—

The COURT. That is the same case that you have read before.

Mr. CHANDLER. No, sir; this is another decision of Baldwin adopting the same doctrine, but I want to read it.

The COURT. It is the United States against Wilson.

Mr. CHANDLER. It is a different page.

The COURT. It is the same case.

Mr. CHANDLER. It is the same case. Of course this case was simply where the court instructed the jury, the testimony, in the opinion of the court, being overwhelming, being undisputed, being uncontradicted, to find a verdict of guilty. Now, the justice, in closing this case, says:

I have also consulted Mr. Justice Miller, who authorizes me to say that he concurs in the conclusion which I have reached, which is, that the district court erred in charging the jury to find the defendant guilty, and in overruling the motion in arrest of judgment.

Now, if your honor please, I do not care to enlarge on those decisions, only I say that the law places the supreme power with the citizens to take away the liberty of a citizen, and while every one feels a restraint in alluding to the oppression which any court or courts may have been

guilty of in the past, it is certainly believed by the enlightened sentiment of the world, I think, that continued exercise of power by the most conscientious and enlightened men does contain within it an element of danger to the citizen; that long-continued power does possess an element of unsafety, and I believe that it was upon that philosophy that the constitutional provision securing to the citizen a right of trial by jury rests.

The COURT. The Constitution secures the same right of trial by jury in civil cases where the amount in controversy is over \$20.

Mr. CHANDLER. Certainly. I understand that, but your honor will not say that the right of a jury in a civil case is held by the authorities to be the same and identical with the right of trial by jury in a criminal case?

The COURT. I merely referred to that as the answer to a good deal of the constitutional argument.

Mr. CHANDLER. This is only the assertion of what is believed to be a correct principle of justice. Now courts are temporary, and while it might not be acceptable to jurists at one period, it is put into the Constitution for a lasting principle, and the courts of this time pass away and leave that principle to have its effect. Now, if there is any permanency in constitutional government, if there is anything in the sanctity of the rights which are secured to citizens by the Constitution, it is worth while to preserve them. Now if it be true that the Constitution in its wisdom, and this Constitution reflecting the highest enlightenment of the civilized world up to the time it was made, has reposed as the sum of its wisdom the supreme power in a jury to settle a case independent of the instruction of the court, then it cannot be wrong legally or morally for a jury to exercise that power which the people preserved to themselves.

The COURT. But the Constitution does not confer any such authority upon the verdict of the jury. The law provides—the decisions of the courts are all so, too—that if a verdict of acquittal be the verdict of the jury the court cannot set it aside, because it does not know upon what grounds the jury has acted. But if the jury have disregarded the opinion of the court and found a verdict of guilty, unquestionably the court has power in a criminal case to set that aside, has it not?

Mr. CHANDLER. Yes, sir.

The COURT. For departure from the instructions of the court.

Mr. CHANDLER. Yes; and that is simply upon the theory that every redress of humanity is preserved to the prisoner. If the jury go outside of this and disregard his rights, then the fairness and intelligence of the court is preserved to him.

The COURT. There is another thing which seems to me in all these opinions to be entirely overlooked, and it seems to be by far the more threatening danger in criminal cases. This case that you have read from, 23d Vermont, enlarges and insists upon the danger to the liberties of the people from the action of the court as representing the Government, and that is the only danger which seems to have occurred to the learned judge. According to my observation and experience there is far more danger to the liberty of the citizen from the clamor of the populace than from the oppression of the Government. And if the clamor of the populace is the danger, who is to protect the defendant? The jury belongs to the people; they partake of the feelings that pervade society, and who is to stand in the gap and protect the liberty of the citizen in a case like that? And is not that your case, too?

Mr. CHANDLER. I admit we are assailed from all points, and that is

the reason that I appeal to the intelligence of the judge and the jury. I do not want any innovation upon the law. I say that this clamor that has beset the court and the jury is outrageous.

The COURT. If the court is to abdicate its powers as judge of the law and commit that authority to twelve men who are not lawyers, not trained to the law, and allow them to decide what is the law when they do not know it, what in the world is to protect the liberty of the citizen in times of excitement?

Mr. MERRICK. How will the defendant get his bill of exceptions if the case goes at large on the law to the jury? Although I have no objection to its going at large, and I am perfectly willing that your honor should send it there.

The COURT. The decision in the Pennsylvania case would have no effect at all. I do not know whether I am going to take extreme ground in this case or not. I have heard your points argued. The practice here ever since I have known the court has been, and the position from the foundation of this Government is, that even in criminal cases the judge of the court has to decide the law. The fact that the jury may find a general verdict of acquittal, and we cannot tell whether that verdict is based upon the facts or the law, does not seem to me to meet the question at all. In criminal cases the plea of not guilty is like the general issue in an action of trespass or trover. There the jury has a right to find the general verdict. They have the power to find the general verdict, and is it to be said that they, having the power to render a general verdict, are the judge of law and fact both in trover?

Mr. CHANDLER. In that case your honor can set it aside.

The COURT. Well, the court can set aside a verdict of guilty, and upon what principle does it do that?

Mr. CHANDLER. That is an additional guarantee that the law has given to the prisoner. Now, I certainly cannot be reproached for presenting these authorities.

The COURT. I do not say that you are to understand me in that sense at all. I am obliged to you for referring to these authorities, and I may say in regard to this controversy between Judge Story upon one hand and Judge Baldwin upon the other, that it is a history that I have known something about for many years—from the time that it sprung up. Judge Baldwin never paid much respect to Judge Story's opinions, because Judge Story, he says, wrote books. He never wrote any books. He was an able judge, and few in the common law were greater masters than Judge Baldwin. But he was not a man of the cultivated literary taste and education that belonged to Judge Story; and I happen to know that he did not esteem Judge Story's opinion upon that subject. I shall study as impartially as I can with my prepossessions the questions you have raised.

Mr. CHANDLER. I have no doubt of that.

The COURT. And will examine all your authorities.

Mr. CHANDLER. I can only say that these authorities come here with very great strength, being from the States of Pennsylvania and New York. It is conceded, I believe without controversy now, that those two States lead in the great race of intelligence in the country, and so acceptable was the doctrine of one of these decisions to the people of New York, that they presented the liberty of the city of New York in a gold box—

The COURT. [Interposing.] That was before the Revolution.

Mr. CHANDLER. I suppose we have as many rights since the Revolution as we had before. That is what we revolted for—to get more rights.

The COURT. It was the splendid eloquence and ability of Mr. Hamilton in a libel case, where he contended the judges were judge of not only what was libel but the publication, and in that he agreed in opinion with the legislature in passing Cox's bill. But at the common law the law was different. Cox's bill changed the common law on that subject.

Mr. CHANDLER. Yes; and we only contend that the Constitution changed the common law and gave us that right.

The COURT. I really do not think that this is going to be a very practical question in this case, because whether the power of the court on a question of law is authority or whether it is merely advisory, I suppose the court will have the right, at least, to give advice to the jury.

Mr. CHANDLER. Yes; we do not deny that.

Now, I have taken more time than I had expected, and taxed the patience of the jury more than I thought I would when I began, and I am ready, so far as I am concerned, to submit the case.

Mr. BLISS. May it please the court, and you, gentlemen of the jury: It is one of the bar stories prevalent in the jurisdiction in which I am accustomed to practice, that a counsel commencing to address a jury at the close of a long case, and occupying somewhat the relative position that I do, commenced his address somewhat in this way. He said, "Much be-talked and much to be-talked fellow-citizens, much pitied and much to be pitied fellow-citizens, it is my duty to render you still further objects of compassion." And it is my duty to inflict upon you gentlemen some remarks in connection with this case, and in so doing I shall seek to reply neither to the questions of law raised by the counsel who has just closed, nor to any of the outside matters which were brought into the case by the gentleman who preceded him. He seemed to be of the opinion that these defendants were too much troubled; that on the one hand the whole power of the Government was being exercised to crush them, while on the other hand the Executive was alleged to be in such relations to some of the defendants that he did not wish them convicted. Now neither of those things is in the evidence in this case, and if I were permitted to refer to matters outside of the evidence, I humbly think that I could make statements that would gain your credence quite as much as anything that has been said. But I propose to confine myself strictly to the evidence. I shall endeavor, gentlemen, to group the facts together which bear upon and which seem to me should convince you of the guilt and criminality of these defendants, and having done that to leave the questions of law to be disposed of by the gentlemen who are to follow me.

Now, gentlemen, we have nineteen routes in this indictment which represented originally twenty-seven hundred and ninety-six miles of service, reduced by the striking off upon one of them before the service commenced of a certain amount, to twenty-six hundred and seventy-five miles. The original compensation which the Government agreed to pay for mail service on those whole twenty-seven hundred and ninety-six miles was \$41,135 a year. It was increased within an average of less than two years from the commencement of the service to \$448,670.90. There were made upon these routes, and there are in evidence as made upon these routes, fifty-six orders for increase or expedition, counting increase and expedition when included in one order as two. These defendants, other than Brady, Turner, and Rerdell, admittedly were interested in some, or all, of these routes, and participated in the profit.

Now, the first question for you properly to consider, gentlemen, is this: Was this multiplication of the original compensation by ten, increasing it from forty-one thousand to four hundred and forty-eight thousand dollars, an honest, or was it a corrupt exercise of power, using the word corrupt as meaning something procured by improper influence, or caused by improper motives—by some motive other than the motive of the public good?

Now, I do not believe it will be contended with any great earnestness by the gentlemen who are to follow me on the other side, that looking at the facts, as they now appear, the greater portion of this money thus taken from the public Treasury was taken for an adequate cause, and that an adequate return was rendered for it. As to this question of adequate cause or return we admit broadly, and at the outset, that every pioneer in the Western States, whether on the prairies or in the mountains, is entitled to a reasonable extent of mail service. We do not go as far as Secretary Teller, who claimed that every mining camp of twenty men was entitled to daily mail service, because in the most thickly settled States of the Union, the majority of the post-offices do not get any daily mail service to-day. We claim that while they are entitled to adequate mail service, when there comes to the Second Assistant Postmaster-General an application for the increase either of speed or trips, he is bound to look at it as the representation of the parties in the locality who naturally, honestly, squarely, overrate their claims relatively to those of other portions of the community, who, when they are seeking to get service from the public to be paid for by taxation imposed in the largest measure upon others, naturally do not stop to consider of whether what they are asking is beyond what is their relative right, because they naturally assume, and must assume that in passing upon that question the officer to whom they make the application judges of the whole question.

Now in this case, gentlemen of the jury, if I seem to go a little into detail, if I seem to weary you in going a little into detail, you must bear in mind the extraordinary mass of minute evidence that there is in this case. You have sat here for some forty odd days, I think, hearing testimony taken—about fifty days of testimony, I think, and during that time I think I may claim, on behalf of the prosecution, that we put in our testimony with reasonable promptness. We thought we had made a pretty clear case. The counsel for the defense however took it up. They occupied about two days in supplementing our case by the examination of Buell and Vaile. They occupied about a couple of days more in proving how reckless Congressmen would be occasionally in asking for the increase of expenditure without knowing what they were asking about; and about a couple of days more in offering inadmissible testimony. And then they stop. And if we may judge from the addresses which have already been made they are seeking to escape not upon the evidence, but upon technicalities. I do not blame them, gentlemen. It is their right. Perhaps if I were in as tight a place as I think they are I should resort to the same practice. It is their right just as much as it is their right to leave unexplained matters which it seems to me would have been better attempted to be explained if they could be explained. But they stand before you unexplained, and therefore we must take this testimony up in its details.

We have had in this case, gentlemen of the jury, proved, and there are upon the records 957 separate exhibits, I think a larger number than ever have been known to be proved in a case, certainly within our time. All of those, or a large portion of those, have got to be brought to your

consideration or to be referred to. Therefore, if I seem to go a little into detail I beg that you will believe that it arises in a great measure from the necessities of the case. We say that these orders for expedition and increase in the first place were many of them utterly unnecessary and improper.

Now, on route 46247, from Redding to Alturas, on the 2d of December, 1878, five months after the contract went into effect, an order was made adding three trips and reducing the schedule time from one hundred and eight hours to seventy-two hours and adding to the existing pay of \$8,982 the sum of \$26,946.66, making a total of \$35,928.66, of which \$17,964 was for expedition; the balance was for trips. Seventeen thousand nine hundred and sixty-four dollars was for expedition. The nominal result of that order was to increase the speed from one mile and sixty-five one-hundredths an hour to two miles and fifty-eight one-hundredths an hour. Now Peck was the contractor on that route, and Major & Culverhouse were the subcontractors according to the subcontract on file. They ran a line of stages and they carried a large amount of passengers and mail, and it is, gentlemen of the jury, the uncontradicted evidence before you, that that mail, before the order for expedition was made for all the time during that contract, and, I think also, for the period preceding the contract, that mail, for which the order was made to pay \$17,964 for expedition to seventy-two hours, was being carried in from forty-one to forty-four hours in summer, and sixty-five hours in winter; that it was so carried before the order for expedition was made, and it continued to be so carried after the order for expedition was made. In other words, that Mr. Brady by the order took from the Treasury \$17,964 a year, under the pretense of ordering the mail to be carried in seven hours longer than the longest time it had ever been carried in, and *that* you are asked to believe, gentlemen, is an honest and a provident order for a man to make. That is the uncontradicted evidence sworn to by Mr. Major, one of the contractors, sworn to by Mr. McCormack, the postmaster. In reply to the question which your foreman put to him, he stated that his returns to the Post-Office Department made before the order of expedition was granted, showed the fact that the mails were carried in less time than Mr. Brady ordered them to be carried in. He made that statement on page 1014 of the printed record.

Now it has been said somewhere that after all, this was a matter of kindness on the part of the contractor in carrying the mail on that schedule of time and that he might at any time have put it up to the regular schedule, and that therefore this order was a proper one, as thereby the Government obtained security that it should be carried in that time. Gentlemen of the jury, has there been any evidence before you to lead you to think that these subcontractors, Major & Culverhouse, who were carrying the mail and who were carrying passengers and freight, and who, by the necessities of their private business were running at a less schedule than seventy-two hours—is there any pretense anywhere that it was ever intimated that they were going to stop doing that and that the Second Assistant Postmaster-General had got to come in with his liberality as to the public money, and, for the purpose of securing and preventing them from abandoning the practice which they had voluntarily adopted and continued during the whole time, pay them \$17,964? No, gentlemen; not pay *them*; that he was to pay Peck & Co. \$17,964 a year for that service, when in point of fact the subcontracts of the party who were doing that business, filed in the department, show that though the contractors were to get \$35,928.66, the subcontractors

were bound to do the work for \$23,000; and they were glad to do it for that sum. So that this \$17,000 which was put on, and the addition of the \$9,000 which was made for trips coincident with expedition, in other words \$26,000, was added for trips and expedition of which \$17,900 was for expedition, and yet these contractors, Major & Culverhouse, who were then performing the service in from forty-one to forty-four hours in summer and sixty-five hours in winter, were to get for doing all that but \$23,000. It may be arithmetically established that that money paid for expedition was a clean present out of the Treasury of the United States not to the people who were doing the service and carrying the mail but to the people who were sitting here in Washington and "gunning" the business. If you say you must pay them without reference to the matter, that you must pay these subcontractors arithmetically the amount which their original subcontract relatively bore to the contractor's original price, still you would then pay them only \$10,000 for expedition where Brady ordered \$17,900. Now, suppose Mr. Brady had allowed for expedition nothing, or suppose he had allowed only a small sum, do you think the mails would have ceased to be carried by the same men who were then carrying them? It is an insult to your intelligence to say on the evidence you would believe that. Would they not have continued on their passenger business to carry the mails as they were then carrying them in forty-four and sixty-five hours, and would they not have continued to pocket their \$23,000 a year and have been entirely content with it? Was there any danger that they would in technical phrase "throw down" the mails? Of course there was not. But suppose these contractors here in Washington, these Pecks and Miners and Dorseys here in Washington—you will perceive, gentlemen, that I am arguing on the assumption that expedition was proper, and that increase of trips was proper—had said "true, the people carrying the mails will continue to get their \$23,000, but inasmuch as Mr. Brady has chosen to make only a nominal allowance for expedition there is not much left for us here for reasonable expenses, and therefore, we, as the contractors, will throw down the service." Suppose they had done it. Have you any doubt that the subcontractors would have promptly come in under the law and made the proposition to take the mails and carry them on the time ordered for the \$23,000? It is perfectly clear. Major & Culverhouse were satisfied with their \$23,000. They were getting a good thing out of it. There was not any pretense of necessity, there was not any pretense of justice, there was not any pretense of decency in taking that \$17,900 out of the Treasury for expedition, even assuming that the additional trips were necessary, and assuming that the expedition was necessary.

Now again, gentlemen of the jury, take the route from Kearney to Kent, No. 34139. On the 10th of July, 1879, an order was made reducing the schedule of time from Kearney to Loup City, which was about half way on the route, to thirteen hours, the schedule time having previously been sixty hours over the entire route. On that order \$22,000 was allowed to the contractor Vaile. The evidence, gentlemen, is undisputed that in fact the mail had always been from the commencement of the contract carried from Kearney to Loup City in thirteen hours, and they continued to be carried in thirteen hours and continued to be carried by the same subcontractor. Mr. French, the subcontractor, though he knew that the schedule of time had been changed, never got any information that the Government was paying for the expedition or was doing anything except paying its original contract price, until this investigation was set on foot, which has resulted in this prosecution. An inspector of the Post-Office De-

partment was the first person to inform him that the Government was paying \$2,200 for expedition, and then it was that he saw how he had been fooled, because in his subcontract on file in the department there was a stipulation that he should have 65 per cent. of any money that was paid for expedition, and yet these parties had, quarter after quarter, been remitting to him the original pay that he had agreed to take on his subcontract, as to which I shall have something to say directly, and yet never had intimated that there was any expedition.

Mr. HENKLE. The evidence, as I understand it, is that that subcontract was not placed on file until February of the present year.

Mr. BLISS. The subcontract was not placed on file until a considerable time after the order was made, and therefore, so far as Mr. Brady is concerned, he may say he knew nothing of the subcontract. But your client, who agreed to pay 65 per cent. of the expedition, your client who got up the petitions, your client who forged the petitions to get this expedition, knew perfectly well that there was no necessity for paying that \$2,200 out of the Treasury, and he knew perfectly well that he was not only defrauding the Government by taking that money from the Treasury, but he knew also that he was cheating the subcontractor by failing to pay him the 65 per cent. of any money that the Government had paid for expedition.

Now, the service, gentlemen, on route 34139 was run up from its original pay, \$868, by the addition of trips and expedition, to \$4,302.65, and of that amount French, who performed the service, and did it on the expedited time before and after the order, got \$1,800, and these gentlemen got \$2,400 for sitting in Washington and making the arrangements. By French's contract he was to have for one trip going over the entire route \$700 a year, and for two additional trips \$1,100, or in all \$1,800. He was to have for three trips \$1,800, and for six trips \$3,300, with a provision for 65 per cent. of any allowance for expedition. They kept all the allowance for expedition, and they gave Mr. French the \$1,800. For that \$1,800 he carried the mail in thirteen hours, for which the additional \$2,200 was specially paid. Therefore the contractor got a nice little profit sitting here in Washington, and Mr. French lost his money and the Government lost theirs. If they had wanted to procure expedition, and had been looking to what was for the benefit of the public, would they not have made some inquiry to find out what it cost to carry the mail over that route, and to find out whether it was necessary to pay \$2,200 for carrying mail on an expedited schedule of thirteen hours when, in point of fact, they were paying \$2,200 and were not getting the expedition of a single hour?

Now, there were other cases, gentlemen of the jury, where orders for expedition resulted in practically no advantage to the Government. On route 38135, from Pueblo to Greenhorn, Mr. Sears, the postmaster, says that before expedition the mail went inside of the schedule time, arriving at from 1 to 4 o'clock, and the claim was that farmers, as I recollect it, desired that the mail should arrive at some regular hour, and therefore this expedition was paid for on a schedule which did not require it to arrive until between 3 and 4 o'clock in the afternoon. After they paid for expedition upon that route \$2,630 they succeeded in having the mail going north arrive at Pueblo just after all connecting mails had left. The result was that all that was gained by expedition was, at most, not that they arrived at the two termini at a time prior to which they had ordinarily arrived, but there were two small intermediate stations—one so small that it was abandoned during the pendency of the contract, which were benefited. There was \$2,630 paid for that expe-

dition (which was not expedition) which, in fact, benefited nobody except the contractors here in Washington. I shall have occasion to show you directly how the work was done by the subcontractors out there, who were benefited in no sense by the expedition.

On route 38156, from Silverton to Parrott City, there was \$10,549.51 paid for expedition. The result of that expedition was, that so far as the terminal points were concerned, the mail arrived at each terminal point and laid over night before it could go any further, and therefore there was practically nothing gained except to the way stations. So on route 38140, from Trinidad to Madison, there was no immediate connection made after expedition with any other route at either end. The mail arrived at Trinidad and arrived at Madison and there was no direct connection with anything and they did not connect with anything. To show you, gentlemen of the jury, that Mr. Brady did not consider that this matter of expedition upon this route was very important to anybody except Miner, Peck & Co., I refer to this very remarkable transaction, that while the contract time was thirteen hours he added Raton, claiming that it made twenty-three miles additional distance, and he allowed for that six hours, making nineteen and three-quarter hours as the basis of time after he had added Raton, and yet, on the 6th of January, 1879, after he had added Raton and nominally made the schedule time nineteen hours, he approved a schedule which made the time thirty hours. The question of time upon that route did not seem to interest Mr. Brady very greatly until it came to a question of an order for expedition, which should put money into the pockets of the contractors.

Now, gentlemen, so much for those orders to which I have called your attention. There are others like them upon other routes where the result was that the Government got nothing for its money. The expedition was already obtained before they undertook to pay the additional sum. There is another class of routes where I submit to you the undisputed evidence is that the orders made by Brady for expedition were in their nature so improvident that you cannot believe when you consider them in connection with the other things in this case that they were honestly made. Take route 40104, from Mineral Park to Pioche. On the 24th of December, 1878, less than six months after the contract commenced, an order was made adding two trips, and reducing the time from eighty-four to sixty hours, and adding to the original compensation of \$2,982 the sum of \$19,318. On the 23d of July, 1879, four more trips were added, of course, on the expedited time, so that the original compensation of \$2,982 was carried up to \$29,733.39. I shall have occasion to show you, gentlemen, that that increase was made in spite of information given by the postmasters along the route that the original schedule was faster than the necessities of the people required; but that is not what I desire at present to call your attention to. That route, 40104, is the route which has been spoken of in letters on file, and, I think, spoken of in orders made, certainly spoken of in the remarks of counsel here as being the great through mail route passing from the Southern Pacific to the Northern Pacific Railroad, those railroads being several hundred miles apart. I believe it was urged—and I shall have occasion to call your attention to that point directly—that there ought to be an increase upon that route because of its relation to these roads. Now, what are the facts? Mr. Krider, postmaster at Mineral Park, where every bag that passed over the route was opened and changed, swore that from the north, coming from Pioche down to Mineral Park, there were constantly no papers and no letters in the mail, there was absolutely noth

ing there; and as if that was not sufficient, as if it needed anything more than that, I call your attention to these mail bills which I proved, which, by a stupid mistake, but a fortunate mistake, of the postmaster gives us some very interesting information. The mail bills are intended to show how many pouches left a given place and arrived at a given place. The postmaster could not imagine the idea of there being any question as to there being more than one pouch on that route, and when he got the mail bills he went to work and for thirty-nine days made his statement of the letters departing and arriving. We have here those mail bills covering the period from November 19 to December 24, 1879. What do we find as the result? In eighteen of those thirty-nine days the mail started from Mineral Park on this "great through mail route" connecting the two railroads, without a letter, a paper, or a postal card in it. It had only the mail bill. On five of the same identical days it arrived at the other end without a letter, a paper, or a postal card in it. It had gone over that entire route, and yet had not picked up a particle of mail matter. During the remaining twenty-one of those thirty-nine days there were carried over some portion of the route north nine postal cards and twenty-nine letters, every one of those letters on that great through route stopping at a way station before it got to Pioche. There arrived at Pioche during that time one hundred and thirty-three letters, papers, and postal cards, and inasmuch as there had started from Mineral Park, the other end, no letters which went beyond Saint Thomas, no letters which went so far as Pioche, the letters which arrived at Pioche on this great through mail route all must have started from way stations between Mineral Park and Pioche. That is the route which was expedited at an expense of \$9,318, two trips being mixed up with it. It was increased from \$2,982 to \$29,733.33. Now, there seems to have been, at some time or other, a little information on file in the department to show on what principle and for what reason Mr. Brady made that order for increase. But first, gentlemen, I will correct an error. I said the amount was carried up from \$2,982 to \$29,733. I did Mr. Brady injustice. It was carried up from \$2,982 to \$49,051.33, \$19,318 having been added for the first expedition and two trips, and then \$29,733.33 more having been added for the addition of four trips. Gentlemen of the jury, upon what basis was the addition of twenty-nine thousand and odd dollars made? It was made upon a single letter which I will read to you, a letter which does not apply to this route, a letter which, if it did apply to this route, I have already shown you is, in its reasons, a bald lie, a letter which Mr. Brady had in his possession the means of knowing was a bald lie. It is the letter written by Sidney Dillon, president of the Union Pacific Railroad; as if he was interested in having mail connection through to the Southern Pacific Railroad, which was a rival route.

I read from page 1307:

SIR: The Utah Southern Railroad will in a short time be completed to Frisco. From that point to Pioche, Nevada, there is already established daily mail service, which will be rapidly taken up by our advancing railroad. From Pioche to Prescott there is running a tri-weekly mail service on slow schedule. It is important that emigrants and capital from the East should have a more direct line of intercourse with the richly developing Territory of Arizona than the present circuitous route by California and Southern Pacific Railroad. I therefore respectfully ask that the service between Pioche and Prescott—

Prescott being on a route starting from Mineral Park, south of Pioche, and going some three or four hundred miles—

be increased to a daily, thus giving us a continuous daily service from the U. P. R. R. to Southern P. R. R. at Maricopa Wells.

It is superfluous to add that the States and Territories yielding the precious metals would to-day be half a wilderness, except for the intercommunication established by the P. O. Department.

He might have added :

And the civilizing influence of Miner, Peck & Co.

You will perceive, gentlemen of the jury, that this order taking \$29,000 out of the Treasury was based solely upon that letter of Sidney Dillon, representing the necessities and importance of a through daily connection on that route. Why, I have shown to you by the official mail bills that there was no necessity for anything of that kind, and that there was practically no mail needed on that route. Now, gentlemen, there is connected with this matter some further evidence. On the 21st of August, 1880, as showing that the effect of expedition had not been to develop business, a letter is sent, with the stamped signature of Brady, to each of the postmasters, asking this question. To the postmaster at Pioche :

Q. What is the average weight each trip of the mails transmitted and received by you over route 40104, from Mineral Park to Pioche ?—A. The mails departing average five pounds, consisting mainly of papers and packages. The mails received average five ounces, consisting mainly of letters.

The other postmaster answers to the same question that the mail would probably average going out about three letters and about three to five papers, and coming in it will average about ten letters and about six to eight papers.

That is the notice which the postmasters in January, 1880, gave to Mr. Brady as to what service was required upon that route; and yet, so far as any evidence in this case exists, and, I believe, so far as the fact is concerned, after that time and after that notice from those postmasters Mr. Brady left this sum of \$49,000 a year to be taken out of the Treasury of the United States for carrying that "great through mail."

It may be said that these papers were in the inspection office, and therefore Mr. Brady did not know anything about them. In the first place, the mail bills are in a jacket, which bears Mr. Brady's own signature; but, further than that, Mr. Brady knew all about it. In some way or other, and for some reason or other—perhaps there may be somebody who can believe it was a spasm of virtue which overcame him—he seems to have thought at one time that something ought to be done, and, therefore, on the 22d of January, 1880, he made an order. These mail bills stopped on the 29th of December, 1879, and the Dillon letter is dated the 20th of May, 1879. The order on the 23d of July, 1879, based solely upon Mr. Dillon's letter, was an order to add \$29,000. On the 21st of January, 1880, we have this condition of things: Mr. Brady, in what, so far as I know, is the longest piece of paper written by himself that appears in the files of this case, issued the following:

Mineral Park to Pioche.

The mail bills received by the inspection division showing little mail matter passing over this route, as per files of mail division, and that the service is most irregularly and inefficiently performed:

Ordered, That service on said route be reduced from the 1st day of February next to what it was at original letting, both as to trips and speed, without 1 mo's extra pay.

BRADY.

JANUARY 21, 1880.

At one fell swoop he cut that \$49,000 down to \$2,982. He did that by a paper in his own writing, dated on the 21st of January, 1880, in which he based it upon the mail bills; those mail bills which are shown to you here. In a jacket dated the 22d of January, 1880, an order is made to carry out this direction of Brady, and that order is signed by

Brady. Now, they might say, gentlemen of the jury, if that had been left in that condition, that Mr. Brady had been imposed upon before in the order he made. But what do we find? On the 28th of January, six days after the date of the jacket, seven days after the date of Mr. Brady's own recital that the mail bills showed there was no mail matter on that route, and after, in this fit of indignation, he had cut off all expedition and increase of trips, and had refused to give them even the month's extra pay, which they claim the law gives them, he signed the jacket, which reads thus:

An order was issued bearing date January 22, 1880, to reduce the service from 7 to once a week. In view of the fact that this route forms a part of the direct line of communication between the Central and Southern Pacific Railroads, it is deemed advisable to maintain three times a weeks service.

1st. Rescind order bearing date January 22, 1880 (number 633).

2nd. From February 1st, 1880, reduce service four trips per week, and deduct from contractor's and subcontractor's pay \$29,733.33 per annum, being pro rata, without one month's extra pay on service dispensed with.

BRADY.

In other words, having reduced the pay to \$2,982, six days afterwards he put it back, and having reduced it on the ground that the mail bills showed there was no mail matter, he put it back on the ground that it was part of a through mail route over which his own recital and the mail bills showed no through mail ever went. Gentlemen of the jury, why did he do that? I have a right, I suppose, to refer to the fact, and I think I shall be able to show you by some other matters in connection with this case that there seems to have been about that time some disagreement between Mr. Brady and the contractors who were having occasion to deal with the department. It may have been that, gentlemen, or it may have been this: This order was made on the 21st of January, 1880. On the 12th day of January, 1880, Mr. Brady had been compelled to appear before an investigating committee of Congress to account for his acts in connection with the expedition of the mail service and the increase of speed. He had been required to appear before that committee, of which Mr. Blackburn was chairman, and he had been subjected to a long examination, not then concluded. He had been required to produce a schedule of the condition of the service; and I think we have a right to believe that Mr. Brady saw the condition in which this put him, and that he made a rush back to his office and wrote this paper, cutting off at one fell swoop all that he had done in the way of increase of service or expedition on that route. But when he sat down in coolness to think it over, it must have occurred to him that if he did that in that way there was upon the record a bald confession of his own inefficiency and improvidence and criminality, and he deemed it necessary to go half way and put the thing back to about \$22,000, and leave it there until he went out of office.

Now, gentlemen of the jury, on that record is it possible that any man can say, that looking at the matter from the present stand-point, that order was a provident one? I do not care on what papers it was obtained; but I shall have occasion to show you that while the \$29,000 order was made upon the letter of Sidney Dillon, the other increases were made upon a forged petition in which—it stands in this record uncontradicted—words were written in by Rerdell and Miner, respectively, so as to make forged petitions. Those petitions were signed by persons living at Signal, one hundred miles south from the southern terminus of this route. Thirteen of the names only are known. By looking at the petition you will see that the signatures were made by about twenty people, and that about a dozen of them were made by one man. The thirteen signatures

that can be recognized are those of people living at Signal, and the postmaster at Mineral Park tells you that over the route from Pioche to Mineral Park he is confident that there never passed a letter intended for Signal. He had to examine every letter that came over the route, and you see it was not a very heavy labor, gentlemen. The expedition was had upon the petition signed by these parties, and upon a petition in all respects a duplicate, signatures, erasures, and everything else. On the same day that expedition was ordered on the route from Mineral Park to Pioche, expedition was ordered on the route from Mineral Park to Ehrenberg, and on that route also these parties were contractors. I shall have occasion to show you that besides that petition there is one letter—I think only one, but there may be two—which is misrepresented in the order upon the jacket directing the increase.

At this point (12 o'clock and 30 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. BLISS. [Resuming.] Upon that route, gentlemen of the jury, upon which as I stated the cost to the Government was run up to \$49,000, then jerked back to two thousand and odd dollars and then put up again to \$22,000 and left there, so far as Mr. Brady was concerned, for the balance of the contract term, upon that route, taking in every office upon the route, the net revenue for the year 1879 was \$761.39; for the year 1880, under the fostering influences of expedition, it degenerated to \$597, and in the year 1881 it recovered to \$653.67. And if you take the post-offices which were not upon some other route, Mineral Park being upon three other routes and Pioche upon four other routes, and Pioche being upon a railroad route—if you take the post-offices which were not upon any other route and therefore were dependent for their entire mail matter upon this route the net revenues for those post-offices together were less than \$50 a year, and for that route which I have shown to you by mail bills was not a through route, but was a way route emphatically, Mr. Brady made orders which made that service cost nearly \$50,000 a year.

Now if you take the route from Kearney to Kent, No. 34149, both the termini of that route were upon two railroads running substantially east and west and this route connecting them from north to south [taking up map and indicating]; one railroad being there, the other being here, and this being the route connecting. If you take that route we find the most considerable place on it, other than Loup City, got its chief mail matter, as the evidence affirmatively shows, by another route. The mail going from Kearney was always larger than that going from Kent. The mail going from Kearney was never over a hundred pounds, and of that hundred pounds all but ten pounds was delivered before it got thirty miles from Kearney, and the remaining mail going over that route was an average of not exceeding ten pounds, and for the service upon that route Mr. Brady, not content with the original one trip at \$868 a year, added first two trips and added \$1,122.41, making three trips. As to those three trips we take no exception in this case, but having got the three trips he then went to work and paid \$2,200 to expedite the schedule to thirteen hours when they were all the time, as I have already told you, making the time in thirteen hours, and that was all done upon the pretense of a mail which in its largest weight was only one hundred pounds when it started and after it got thirty miles out dwindled down to ten pounds.

The COURT. I thought you stated it started with a hundred and fifty pounds ?

Mr. BLISS. A hundred pounds at first. The entire revenues of that route, excluding Kearney and Kent, which took their revenues from the railroad, in different years varied from \$227 to \$513.

Mr. HENKLE. I think the witness said the mail was from one hundred to one hundred and fifty pounds.

Mr. BLISS. No, sir ; if there is any question on that subject we will go right to the record. I refer to page 445 :

By the COURT :

Q. I was astonished at your answer in regard to the quantity of mail ; that it would take a two-horse vehicle to carry the mail from Kearney to Sweetwater, because of the weight of the mail ?—A. No ; I said it would probably weigh about one hundred pounds when I started. That would be too heavy to put on a horse with a man, and I said it would take two horses to carry it.

Q. You said that from that on it would not weigh more than ten pounds ?—A. Probably it would not.

There is nothing in that about one hundred and fifty pounds.

Mr. DICKSON. [The foreman.] Who is the witness ?

Mr. BLISS. Mr. French, the carrier ; and it is on page 445 of the record.

Mr. HENKLE. Did he not speak on the subject on cross-examination ?

Mr. BLISS. I cannot say. I read from the answer to the question by the court, and I do not think that he said anything inconsistent with that in the cross-examination.

Mr. HENKLE. I do not want to interrupt you ; go on.

Mr. BLISS. I am very confident that there is no statement anywhere to that effect, but we will make you a present of the other half hundred.

Again, on route 41119, Toquerville to Adairville, sworn to on the record as not being a through route, as starting from a place and going into the mountains, going nowhere, so completely nowhere, that after a time the Post-Office Department discontinued the terminal office at Adairville, and Mr. Brady, according to the record, did not find it out for six weeks after it was discontinued, and he was so ignorant of it that he proceeded to allow the contractor three or four thousand dollars for performing the service on the discontinued end of the route.

Now that was pretty thoroughly not a through route ; upon that route when they were running three trips a week the evidence is that it started with a hundred pounds and dwindled down to ten pounds. By the time that it got to Konab it had dwindled down to I think the witness said ten pounds. But from Konab to Pahreah it did sometimes go as high as twenty-five pounds, though the average was between five and ten pounds on that end of the route going that way, while going the other way the amount was stated to be much less. Yet upon that route \$12,718.22 was paid to reduce the time from sixty hours to thirty-three hours and \$7,008 was paid to add six trips to the original one, which cost \$1,868, and the result therefore was that when Mr. Brady got through with his manipulation of that route for the benefit of these defendants, on that route which had started in at \$1,168 as the contract price, the Government was paying \$19,311.33, and the net revenues, deducting Toquerville, Virgin City, and Konab, which are upon other routes, varied from \$767 in one year to \$386.50 in another year and \$497.46 in another year, the revenues diminishing as the expedition increased. The gross revenues in the year 1880 of all the offices including those on other routes was \$1,042.57, while before the expedition it was \$1,585.47. And yet we are told, gentlemen, that these orders for expedition and these orders

for increase of service were made to develop the great West, and that is the kind of development by bringing population in on that route.

On route 44145, The Dalles to Baker City, he reduced the time from one hundred and twenty hours to seventy-two hours on three trips, and \$18,648 was added for expedition, and then to make the trips up to seven—of course all of this is on the expedited time—\$41,440 more was added, making a total of \$72,520 upon a route which originally started at \$8,288. Now, the largest mail ever carried, the mail from Baker City to Canyon, about half way—the largest portion of the route with reference to mail matter—on one occasion was five or six hundred pounds of mail, mostly public documents, I presume documents franked by Senator Mitchell and the other gentleman who got the route expedited, that is, from The Dalles to Canyon. I spoke of Baker to Canyon, I got it wrong. From The Dalles to Canyon perhaps there was an average starting from The Dalles and going towards Canyon of four or five hundred pounds. That is, at the outside. But between Baker City and Canyon the largest ever carried was two hundred pounds, and the smallest from thirty to forty pounds, and the average was, I think it is stated in one place, at not over twenty pounds. I think at page 726 it is stated as twenty pounds. That is the route on which the service was made \$72,520.

Now it is stated by Postmaster Hall, at Canyon City, that from Baker to Canyon, from the east end towards the west, the mail was very light; that what eastern mail there was from beyond Baker coming to Canyon, came over that route, but it was very light; that there was no through mail; that the mail from Baker City going to The Dalles did not go over that route. It was testified to also by Mrs. Wilson, the postmistress of The Dalles, that the mail not only did not go over that route—the through mail—but that it started from Baker, went north by Pendleton, and came around by another route to The Dalles; and not only that, but that that other route was so much better, that when they had a letter from Auburn, the first station west of Baker City, to go to The Dalles, they did not send it over this route, they sent it east fourteen miles to Baker, and then from Baker around by Pendleton and around to The Dalles. And it was testified also, I think, that from the first station east of the other end The Dalles, the same thing was done. A letter going from the first station out of The Dalles coming to the east went to The Dalles west and then ran by Pendleton, so completely was that from Dalles to Baker a way route. There is no pretense of a through mail anywhere, except in the florid indorsements placed upon the jackets in the case, and for that way mail, as I have said, being of the size that I have stated, Mr. Brady ran an original expense of \$8,288 up to \$72,520.

The entire revenues of all the offices on that route, including The Dalles and Baker City—and Dalles is an important place, located upon a series of other routes—averaged from \$3,716.91 to \$5,638.35, and if you exclude The Dalles and Baker City the revenues in no year under this contract term from all the offices amounted to \$700. They averaged from \$629.62, the first year, to \$685.48 the next; and then under the fostering influence of expedition they fell off to \$601.64. And yet you are asked to believe that that expenditure was necessary, and that it was an expenditure for the public good; that it was not an expenditure for Miner, Peck, Vaile & Co.

On route 38134, from Pueblo to Rosita, the original pay was \$388 for one trip. Six trips were added at a cost of \$2,328. Then it was expedited from fifteen hours to ten hours at a cost of \$5,432, and the evidence is—and mind you, gentlemen, this evidence I am stating is all

uncontradicted—they have not contradicted any portion of our evidence upon these or other subjects. They have, on cross-examination, asked the witnesses, “Don’t you know that so and so did so and so? Didn’t you know that so and so did so? Don’t you know that Mr. Williamson bought so many horses, and that those were added? Don’t you know that this happened?” and Mr. Williamson sitting right there as they asked the question, as they pointed him out, and the witness said “No, he did not,” and they have not ventured to put Mr. Williamson or any of those parties upon the stand. There is no statute that interferes with my referring to that and asking you, gentlemen, to draw a presumption from it.

Mr. HENKLE. I desire the court to interpose in this matter. We have had that question up once or twice before. He refers to the other defendants, your honor.

The COURT. Williamson is not a defendant.

Mr. BLISS. No, I have not referred to the other defendants. I state distinctly that I did not.

Mr. HENKLE. I thought you did.

Mr. BLISS. You are very sensitive that there should be some criticism upon some of the other defendants in this case.

Mr. HINE. Mr. Williamson is not a defendant, but he refers to defendants not being put upon the stand.

Mr. BLISS. I said those other parties, pointing to those sitting there. I was careful not to use the phrase defendants.

The COURT. He referred to Williamson by name and other parties.

Mr. BLISS. I said that there was no statute that forbade me referring to it. Of course that shows I did not refer to the defendants.

Mr. HINE. I will take exception, then, to the remark of counsel, inasmuch as the court does not admonish him not to refer to parties in this connection.

The COURT. Have I not decided over and over again that no lawyer can take an exception except to the ruling of the court?

Mr. HINE. We will take the exception.

The COURT. Take an exception to the remark of counsel?

Mr. HINE. To the remarks of counsel; yes, sir.

The COURT. I never heard of such a thing as that.

Mr. BLISS. The difficulty is that the practice is catching. Your honor cannot conceive that counsel can take objection to the remarks of counsel. Before this case the public would not conceive that any mail contractor could take \$72,000 out of the Treasury on a mere local route in this way, but it appears to have been done. There are new things under the sun for the defendants in this case. Your honor ought to excuse the counsel if they discover a few new things.

Mr. HENKLE. We will ask to have our own apology taken if it is wanted.

The COURT. Before I leave this point I want to understand. I am not making any captious remark to Mr. Hine. He asks the court to make a ruling. A court does not rule as to remarks of counsel. He has a right to except to the ruling of the court, but he has made no request for the ruling of the court. He excepts to the remarks of the counsel.

Mr. HINE. My request was for the court to admonish counsel not to make remarks in that way, and that not being done, I take an exception.

The COURT. The regular way would be to take an exception to the silence of the court. But you do not object—you have not objected.

If there is anything improper in the remark the court, on proper request, would instruct the jury to disregard it.

Mr. BLISS. If, gentlemen, my language has been understood by you from the use of the words those parties, as referring in any way to the defendants in this case, it is a mistake. I supposed it was perfectly clear by the selection of the word parties in connection with Williamson that I did not refer to the defendants in what I said, and I do not intend to refer to them, and I do not believe any of you understood me as referring to them.

I was talking to you of the route from Pueblo to Rosita. I showed you that that was carried by addition of trips and expedition from \$388 to \$5,432. I shall show you directly where that \$5,432 went. Now, from Pueblo to Rosita Greenwood was the chief office, and I think the only office on the route. No, there was another office. From Pueblo to Greenwood the evidence is that the mail weighed from forty to sixty pounds; and the witness, obviously thinking that that was a pretty considerable mail, added that "beyond that it was light." The mail to Rosita, the terminal point, went by railroad. The through mail by this route the witness testified was usually a mail bill and three or four letters. Greenwood also had a mail supplied by railroad, and at times, therefore, over this route Greenwood got only two or three letters. Now, that was the mail matter over that route. Rosita got its mail almost entirely by another route; Greenwood got it in part by another route. And that \$388 of original contract price, agreed to be paid by the Government after a free and open competition by public advertisement, was by Brady's order privately and without any opportunity for competition increased to \$5,432. The entire revenues of that route, excluding Pueblo, which is the leading town of Southern Colorado, and which was on the railroad, were \$2,179.77, and under the fostering influences of expedition they depreciated to \$1,572.49.

On route 38140, from Trinidad to Madison, the original pay was \$338. Two trips were added at an expense of \$1,021.50. Then it was expedited. Then Raton was put on. I shall have occasion to call your attention directly to Raton. Raton was added and an elbow made on the route, and after that the original schedule of thirteen hours was carried up to nineteen and three-quarter hours. Having then, by the addition of Raton, a fraudulent addition, as I shall show you directly, got it up to nineteen and three-quarter hours, they proceeded to expedite it to twelve hours, being one hour less than the original time, and they paid \$2,758.05 therefor, and the mail on that route averaged about twenty pounds. John W. Dorsey, in his letter asking for this expedition, writes that the mails are heavy. We know now what these defendants mean by a heavy mail. They meant a mail of twenty pounds, which can take \$2,758 annually out of the Treasury.

On route 38113, from Rawlins to White River, the original pay was \$17,00. Two trips were added and \$3,400. In May, 1879, the time was reduced from one hundred and eight hours to forty-five hours. I shall have occasion to call your attention to that reduction. Eight thousand six hundred dollars and twenty-five cents was allowed for that, and coincidentally four trips were added and \$18,275, making a total of \$31,981.25. Now, that mail starting originally at \$1,700 ran up thus to \$31,981. It is testified without contradiction that before the Ute outbreak, which occurred in the fall of 1879, the mail weighed twenty to thirty pounds when carried three times a week. After the Ute outbreak it weighed from one hundred to three or four hundred pounds, and in the years 1880 and 1881, after the soldiers had in a great meas-

ure gone away, it fell off to one hundred and fifty pounds. By the very indorsement upon the jacket over Brady's signature it is stated that this mail route is not a through route, but is kept up to meet the wants of the military at Meeker. The Ute outbreak was September 29, 1879, and these orders for increase cannot be said to have been caused by the Ute outbreak as the gentlemen desire to assume, because the original order was made on the 1st of May, 1879, five months before the Ute outbreak. If that was based upon a knowledge that the Ute outbreak was coming, and ten or twelve companies of soldiers were to be marched there, it was a better foreknowledge than John W. Dorsey had when he told Pennell, in July, 1878, that the route from Bismarck to Tongue River was to be expedited and would be expedited in two hitches and told him what the speed would be in each hitch. John W. Dorsey knew that months beforehand. We can conceive how he might have known that it is a little difficult to conceive how the order of May 1, 1879, for an increase of the route from Rawlins to White River could in any way have been predicated on the Ute outbreak, which did not come until the following September. But, gentlemen, we had General Sherman on the stand here, who testified as to the order of March 8, 1881, the last order, the order as to which Rerdell wrote in February to White River that if he could get petitions here before the 1st of March he could get an increase to seven trips. That order stands indorsed as recommended by the military, and yet the witness said here, and the petition shows also, that when he went to get the military he could not get the commander, and finally succeeded in getting only two officers. That petition which General Sherman was brought here to back up on the ground that it was necessary for military reasons, and everything of that sort I shall have occasion to call your attention to. It recites that they need an increase of mail, not for the military, but for the development of the business of the country. It was not needed for the military. The Ute outbreak was over nearly two years previously—a year and a half previously—and they do not pretend to base the claim for that expedition upon that ground. You will bear in mind, gentlemen, that that order for increase of service was made three days after Mr. James came into office, and he directed Mr. French to revoke it. Mr. French communicated the direction to Mr. Brady, and Mr. Brady came and talked with Mr. James about it, and yet that order never was revoked, but remained in force and the money was drawn from the Treasury under it until Mr. Woodward, some time in September or October following, discovered the fact. Now, all the offices upon the route from Rawlins to White River, terminal and all, produced a revenue varying from \$1,245 to \$1,724. Excluding Rawlins, which is on the railroad, we find this condition of things, and this shows you just the increase coming from the development of the country, excluding Rawlins \$79.89 in 1879; \$305.29 in 1880, and \$301.51 in 1881. That is the entire revenue of every office except Rawlins upon that route, and yet, for carrying twenty or thirty pounds of mail for the first portion of the time and afterwards from one hundred to three hundred pounds of mail, the entire expense was run up to \$31,981, and they ask you to believe under these circumstances that that order was a fair, honest, provident order for a public officer to make, and that the parties who obtained it were acting fairly and squarely.

Again, on route 35015, from Vermillion to Sioux Falls, the original pay was \$398. A trip was added and \$408.90 added, a post-office had been added and \$10.90. Four trips were then added and \$1,135.60, and expedition was ordered from fourteen hours to ten and \$3,680 was

added for that, so that the original pay of \$398 was carried up to \$6,133.50; there were no intermediate towns on the route. Both the termini were on railroads. Excluding the revenues of the termini the net revenues on that route were, in 1879, \$261, and in 1880 \$420, and in 1881 \$240. Under the fostering care of expedition there, too, the revenues finally fell off. In all these cases bear in mind that when I come to a later portion of my argument I am going to call your attention to this fact, that not only were these large increases made for this inadequate mail matter, but that the men who performed the service did not get the increases to any great extent. The money went into the pockets of these contractors sitting here in Washington or sitting in their orchard in Missouri.

On route 44160, from Canyon City to Camp McDermitt, the original pay was \$2,888. Two trips were added and the time was reduced from one hundred and thirty hours to ninety-six hours, and \$18,662 was added, and then four trips and \$28,666.66, carrying the total up to \$50,166.66. The evidence is that the mail going north was the largest mail, and yet going north from the railroad the average mail was ten or twelve pounds. Once there was one hundred and fifty pounds of merchandise. The total revenue varied from \$681.14 in 1879, and \$1,370.24 in 1880, to \$935.42 in 1881. Upon that route, gentlemen of the jury, you will bear in mind that Mr. Vaile said upon the stand there was a profit to the contractors of fifteen to twenty thousand dollars, and that profit was made by running up an original pay of \$2,888 to \$50,166.66 to carry a mail which averaged ten or twelve pounds.

On route 44140, from Eugene City to Mitchell, the original pay was \$2,468. Two trips were added and \$4,649.86. Then came the reduction from one hundred and thirty hours to fifty hours, and \$14,486.10 was added, running up the route which started at \$2,468 to \$21,460.89. That mail started out from Eugene City with a full pouch, and there was sometimes a canvas bag also. It was, most of it, disposed of in the first fifty-six miles, and afterwards, going over the mountains to the other end of the route, the mail did not average two or three pounds; though, occasionally, in the summer, there was ten pounds of merchandise. For the carrying of that two or three pounds on all of the route other than the fifty-six miles, and the carrying of the pouch on the fifty-six miles, the Government was made to pay \$21,460. Omitting Eugene City and Prineville, both of which were on other routes, Eugene City being on the railroad, and Prineville being at the head of two or three other routes, the revenues were in 1879, \$284.10; in 1880, \$194.49, and in 1881, \$184.95. You see, gentlemen, how, almost uniformly, expedition in some way or other decreases the amount of the revenues. The aggregate pay of all the offices, including Eugene City and Prineville, was \$1,700, \$1,900, and \$1,700, respectively, in the different years.

To avoid tiring you, gentlemen, by going over other routes, of which I have a memorandum, I will pass them and will call your attention to one case, where, owing to accident, we are able to make a comparison. We were excluded from having this opportunity in other routes. On the route from Julian to Colton, the original contract was for one trip at \$1,188. Two trips were added, making the amount \$2,376. It was then expedited at an expense of \$5,346, making \$8,910; and the witness on the stand, who has the contract for the four years, commencing the 1st of July, 1882, told you that he got the contract, and was satisfied with it, at \$3,488; for what Mr. Brady was paying eighty-nine hundred and odd dollars for.

Now, gentlemen, with these facts before you, and stopping right here

at this stage of the case, bearing in mind those cases to which I have called your attention, in which expedition was ordered where no expedition was needed, because the mail was always carried in the expedited time or in less, bearing in mind these cases where I have called your attention to the uncontradicted evidence as to the amount of mail matter passing over the route, they make a great deal of question, and say that productiveness is very deceptive. But the uncontradicted evidence is here as to the mail matter that passed over the route, and the record of productiveness bears that out. Bearing in mind all these things, can you, or any one of you, sitting here now and looking back, say upon your oaths that in your opinion those orders were wise and provident orders; that they were orders which any honest man seeing the result would make or defend? Can you believe, gentlemen of the jury, that they were orders which were made by any man competent to fill the position of Second Assistant Postmaster-General—competent to pretend to fill it—when he was guided solely by a regard for the public good? I submit, gentlemen, that if the case stood right there, with no other evidence, you must say that Mr. Brady in making those orders was not actuated by the motives, and the only motives, which can actuate an honest public officer. By these orders, gentlemen, such as I have called your attention to, there was, so far as Brady had the power to do it, taken from the Treasury \$407,000 a year for a period of three years. Then there came in a power which changed that to some extent. I think there is some evidence to that effect, but we have no right to refer to the subsequent administration. I will say, however, that if it ever was changed, it was changed after Thomas J. Brady ceased to be Second Assistant Postmaster-General.

But there are a series of orders, gentlemen, which throw a light, and a lurid light, upon this whole business of the mail contracts in the Post-Office Department; orders which, in connection with others, I think will satisfy you, and must satisfy you that the motives which actuated the Post-Office Department as administered by the Second Assistant Postmaster-General were motives not for the public good; that there were dishonest considerations; and that the men who had the power and the influence to get these orders from the Second Assistant Postmaster-General were united with him in a corrupt attack upon the Treasury. These orders to which I am now going to call your attention did not take from the Treasury so large a sum of money, but they are important in showing the spirit which actuated that department and the understanding which these parties had of what could be done with that department. For instance, on route 35015, from Vermillion to Sioux Falls, we find made a petty allowance originally, but when you come to put on the geometrical proportion of expedition it runs up to a considerable sum. It was to add two miles for Brighton, though the route always ran right through Brighton. Postmaster, contractor, and everybody tells you they always ran to Brighton. But when after this the office at Kidder was moved so as to diminish the distance on the route three miles, there was not a cent taken off. You will find, gentlemen, the oversights were always against the Government, the accidents were always against the Government, the miscalculations were always against the Government. You will find one where they took by a little clerical error \$5,000 a year, and it remained for somebody after Mr. Brady went out of office to correct that error and to get that money back by stopping it from the pay of the assignee of these parties.

Mr. HENKLE. How much was added for Brighton?

Mr. BLISS. I do not remember.

Mr. CARPENTER. Ten dollars and ninety cents.

Mr. BLISS. Quite likely so; and when you come to expedition I think it runs up to one hundred and thirty-seven dollars and odd cents, which I think is about as much as any of these jurymen will earn for two or three months of work. I do not call attention to it on account of the petty steal. I do not wonder that these gentlemen, interested as they were in the larger steals, do not regard the immorality of the petty ones; but I call your attention to the fact, gentlemen, that they could see all these points in their favor, as, for instance, two miles in distance for Brighton and an addition of \$10.48 probably to help fertilize that orchard out in Missouri, but they could not see that by the change of Kidder three miles were saved, and that they ought to have taken, therefore, less from the Government. They could not see that.

So on route 38140, from Trinidad to Madison, Postmaster De Busk on the 18th of September, 1878, wrote a letter stating that there was a railroad within ten miles, and a post-office on it within twelve miles, and asking for communication. That letter with that recommendation was indorsed by one of these gentlemen, who, because their names were on the back of any petition, according to the theory of these defendants, can shelter an officer of the Government from every corrupt act. It was indorsed by Senator Teller. Senator Teller recommended that they have that service. The postmaster asked for it and said they could get it in ten or twelve miles, and he testified on the stand that the cost of one trip would have been in that way \$100, and the cost of three trips would have been \$200, and he also testified that that was the way in which service was now rendered to Raton. But what do we find? [Exhibiting map of route to jury.] Instead of connecting Raton, which is in this valley [indicating], as the postmaster asked, with the post-office here [indicating], they took that route and wrenched it way around in this way and put Raton on here [indicating]; and they said that that added twenty-three miles, and therefore they added \$172.75 to the original \$338. That additional twenty-three miles is claimed in consequence of statements made in distance circulars which they sent out. I call your attention to these distance circulars because they are a little significant. It is another case of remembering to have an accident against the Government. There were two distance circulars sent out. One of them is dated the 26th of September, 1878, and it comes back signed by one of the postmasters who inserts his name three times.

He says:

The distance from Trinidad to Barela is fifteen miles.

The distance from Barela to San Jose is thirteen miles.

The distance from San Jose to Madison is seventeen miles.

Then that is footed up forty-five miles. The other distance circular received at the department November 11, 1878, addressed by the Second Assistant Postmaster-General to John R. Miner, was signed by three of the postmasters on the route, and it is as follows:

The distance from Trinidad to Barela is fifteen miles.

Which is just what the other circular says.

The distance from Barela to Raton is ten miles—

Raton having been put on the route.

The distance from Raton to San Jose is eighteen miles.

Those two, of course, do not appear upon the other circular.

The distance from San José to Madison is twenty-five miles.

The other one stated the distance from San José to Madison at seventeen miles. Now they go to work and take these two circulars. On their face one or the other of them must be wrong, because one of them states the distance from San José to Madison to be seventeen miles, and the other to be twenty-five miles. They get the twenty-three miles that they add for Raton by deducting the footings of the one from the footings of the other. There it is done right on the face of the circular. They got twenty-three miles added for Raton by that course of procedure, when the uncontradicted evidence on the stand is that Raton, even jerked around as it was in that way, added but fifteen miles to the distance; and that statement of the fifteen miles substantially corresponds with the misstatement which is made here as to the distance from San José to Madison. They get at their twenty-three miles by the deduction. They take the distance of seventeen miles from San José to Madison, and the distance of twenty-five miles between the two places, deduct one from the other, which gives eight miles additional distance, add that to the fifteen miles for Raton, and that is the way they figure it. Gentlemen, I do not propose to go into a discussion of the legal question here now, but I think I may state broadly that the allowance for Raton of any such sum as was allowed there, was a violation of the law with reference to the amount that could be paid under the statute for putting a new office on the route. The law provides that there shall be allowed two-thirds of the compensation of the postmaster, and the postmaster at Raton was at that time receiving almost nothing for compensation and two-thirds of that sum did not amount, of course, to any such sum as is named. But it is claimed here that that statute has no application. Gentlemen, there is a very significant little piece of evidence in connection with another route to which I desire to call your attention, and that is that when they came originally to treat Agate in the same way, they issued an order that the expense of putting Agate on to a route should not exceed two-thirds of the compensation of the postmaster, recognizing in the case of Agate that that law did apply. But when they came to twist this route around and to put Raton on in violation of the request of the postmaster and at a greatly increased expense, they paid no attention to that provision of law. The result of putting Raton on in that way was that the original schedule of thirteen hours for the forty-five miles was increased to nineteen hours for the alleged sixty-eight miles, and really sixty miles, and the \$2,758 which was paid for expedition to twelve hours was practically paid for putting Raton on, nothing else. The time before expedition was thirteen hours without Raton. They could have taken Raton in at an expense of \$100 on the route the postmaster recommended. Instead of that they twisted it around and got up a supposititious addition of twenty-three miles instead of fifteen, and then to get the service back again to a day service added \$2,758, which was practically simply to correct the rascality they had been guilty of in connection with Raton. If you will look at the petitions you will find that the petitions for expedition from Trinidad to Madison are based entirely as I recollect upon the desire that the mail shall go through in one day and by daylight. It was going through in one day and by daylight before they put Raton on. When they put Raton on and carried it up to nineteen and three-quarter hours then came petitions to bring it back, and there was paid \$2,758 for that purpose.

Again, on route 38135, from Pueblo to Greenhorn, Agate was added on the 11th of October, and \$328.80 was added for it, I think. In Sep-

tember the postmaster, acting under the instructions which required him to get service there for two-thirds of his compensation, had written back that he could not get any service, because two-thirds of nothing would not run the mail. Now, the service was added, as I have said, in this way. In a subsequent letter the postmaster notified the department that if they could have once a week service it was all that was needed, and that the distance was only increased three miles. In spite of that notice they put the post-office on to the route from Pueblo to Greenhorn, ordered six or seven times a week service, and then, on a representation made by somebody that it added eight miles, took it off. There never was any service to Agate. They paid first for the time when they ordered it on the route, although no service was performed. Then they paid for the month extra, discontinuing a service that never had been commenced; and in that way they ran up a comfortable little steal; only a few hundred dollars, gentlemen, but it would support you and me for awhile, though it would not run a Second Assistant Postmaster-General.

Mr. HENKLE. How much was it?

Mr. BLISS. I cannot tell you. As I have said, these were little steals, little things which they arranged in the interludes between larger operations. These were the things which they meditated upon, not out in their orchards, but when sleeping, perhaps, in a railroad car or something of that sort.

In this connection there is another set of orders. I refer to them as evidence, not as matters for which Mr. Brady is responsible, but which affect these contractors. There was Fitzalon added on the Kearney and Kent route with a payment, and it did not add a mile to the distance. There was Animas City added on the Silverton and Parrott City route with a payment, and it did not add a mile to the distance. There were on file three separate statements from the postmaster, and the distance circulars signed by the postmasters on the route, that Animas City was and always had been on the route, and yet those orders were made to pay additional sums. In the case of Animas City it becomes a considerably additional sum when you get the expedition on. The mail had all the time gone to Animas City and been opened there and it did not add an inch of journey. I only refer to that order in this connection as showing what was done in that department at that time for the benefit of these contractors. I do not refer to it in connection with Mr. Brady, for these are orders with which Mr. Brady apparently had nothing to do on the record except that when he came to expedition he took the addition of a hundred or two dollars that Fitzalon or Animas City made on the original pay and multiplied it with his geometrical ratio of ten or twelve to one, and the result was a good large plum for the contractors, relatively speaking—relatively speaking to what you and I would consider large—not large relatively speaking as contractors on the inside under the administration of Brady would consider.

In the same way on route 41119, from Toquerville to Adairville, on July 8 an order was made adding four trips over the whole one hundred and thirty-two miles, and allowing \$4,672 for it. At the same time the schedule was reduced from sixty hours to thirty-three hours, by jackets which I shall show you were fraudulent, and \$12,718.22 was added for that. The result was that the total allowance was \$17,390.22, and the original pay was only \$1,168. Those orders went into effect by their terms on the 1st of August. They were made on the 8th of July. On the 14th of July another order was made taking off ten miles at the end of the route, from Pahreah to Toquerville. It was taken off for the very

good reason that the First Assistant Postmaster-General had given notice that on the 14th of June, a month previously, the office at Toquer-ville had been abolished, and there was no possibility of delivering any mail matter beyond Pahreah after the 14th of June. On the 14th of July French made another order taking off ten miles for Pahreah, but they had to allow the month's extra pay. In the first place they made that order to take effect the 1st of August. Why was it to take effect then when they had notice from the First Assistant Postmaster-General that since the 14th of June there had been no post-office beyond Pahreah, and no place for mail matter to go to? Why did they not make it to take effect at once? The reason is very obvious. They made it take effect on the 1st of August, because then when they came to the month's extra pay to be allowed, they made a month's extra pay, not on the original pay of \$1,168, but on the expedited pay of \$18,490, and, gentlemen, a jacket that was prepared in that case is significant. That jacket is dated July 14, 1879, when the order was made:

Length of route, one hundred and thirty-two miles. No. of trips per week, three. Contractor, John M. Peck. Pay, \$3,504.

I said \$1,168. I was wrong, because there had been two trips added. This jacket is made up on the basis of \$3,504 for pay. That is crossed out, and there is put below it the additional pay \$20,894.22. Upon that it is that the order was made with the month's extra pay. It shows, gentlemen of the jury, that the fact to result was called to the attention of the officer in the Post-Office Department, and he chose to go on in that way. That, gentlemen, as I said before, is an order signed by French, and not an order signed by Brady. But it is an order for the benefit of these defendants.

Mr. HENKLE. French ought to have been indicted.

Mr. MERRICK. We will get rid of these first.

Mr. BLISS. I am very glad to agree with you once, Mr. Henkle.

But, gentlemen of the jury, not only were the orders so improvident that I say you must draw from them the inference of corruption, but they were on their face excessive. They were such that no honest officer, I submit, could fairly make them. I will now read the provision of the statute on the subject:

Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service.

It shall not be in excess of the proportion which the original compensation bears to the original service. That is the origin of this phrase you have heard read to you so often, "pro rata." It means, as they construe it in the department, and as it has been construed by the witnesses on the stand on cross-examination, that if one trip cost a thousand dollars two trips shall not cost more than two thousand dollars, and three trips shall not cost more than three thousand dollars. In other words, that is a limit beyond which they shall not go. Now, gentlemen of the jury, does that call upon the Second Assistant Postmaster-General in every case to allow the full limit? Does it even, I submit, authorize him to allow it? We all know, and I think the court will take judicial notice of the fact, that two trips do not cost twice as much as one. There are expenses which are not increased when you add trips. We all understand that. It is necessarily so. Brady, as Second Assistant Postmaster-General, was bound to make the best arrangements he could for the Government. He was bound to get the service as low as he reasonably could, giving the contractor adequate pay for his services. It is not the duty of the Government to cut the contractor down to a los-

ing rate; I do not pretend that. That the expense was not proportionately increased by addition of trips was known to these defendants, and known to Brady, and was placed on record by these defendants, placed under Brady's eyes by these defendants, asserted in effect by Brady over his own signature. On route 34149, from Kearney to Kent, French's subcontract is for one trip he was to be paid \$700; for two trips, \$1,300; for three trips, \$1,800; and for six trips, \$3,300. That contract of French's was placed on file, but not until Brady went out of office. It was filed quite recently. But there was the recognition in the contract, made by John W. Dorsey, that the addition did not increase the expense in that way. Do you want any more evidence of that? Let me refer you to the letter written by John W. Dorsey to French, which is found on page 416 of the record:

DEAR SIR: Your favor of the 17th instant is received, and we would say in reply that we regard that your bid is too high, as it is more than we are giving for it. There were four or five bids put in at the Post-Office Department lower than yours. We expect to go to your place as soon as we are through here, which will be the last of May or first of June. But if you wish to bid again, we would be pleased to receive it and be glad to close the contract with you. Other things being equal, we always give the present contractors the preference. Whoever we contract with we reserve the right to prorate, if the service is increased, and pay you 75 per cent., if expedited, of the increased pay.

Hoping to hear from you again soon, we remain, yours, truly,

J. W. DORSEY & CO.

That letter is sworn to have been written by John W. Dorsey. Those were the terms which French put into his subcontract and so they certainly recognize the fact that an increase of trips does not involve a proportionate increase of expense. On route 38113, from Rawlins to White River, the subcontract of Perkins, which was filed on the 7th of February, 1879, provided for one trip, at \$2,500, two trips at \$4,000, and three trips at \$5,100. That is the subcontract which was made by Rerdell out there when he had the conversation about influence in Washington. On the same route prior to that, Wright's subcontract, filed I think on the 1st of October, 1878, provides for one trip \$1,500; two trips, \$2,850; three trips, \$4,065; six trips, \$8,317. On route 38155, from Ojo Caliente to Parrott City, Joseph's subcontract provides for one trip \$2,350; two trips, \$3,800; three trips, \$5,400.

On route 46247, Redding to Alturas, for two trips it was \$5,500; for three trips, \$7,500; for six trips, \$15,000; for seven trips \$17,000. That contract is on file. Now, there is the evidence, gentlemen of the jury, that these parties themselves recognized the self-evident fact that the increase of trips does not involve a proportionate increase of expense, and yet in this case there were proved twenty-nine orders for additional trips. Of these twenty-nine orders twenty-six are on their face declared to be pro rata. They just multiply the original compensation by the number of trips added, and Mr. Brady orders the Government to pay that additional amount in twenty-six of the twenty-nine trips, and the other three of the twenty-nine are cases in which Mr. Brady, in violation of usage if not of law, mixed up expedition and trips and ordered a gross sum to be allowed for expedition and trips, and he states that in the aggregate it is less than pro rata. But when we come to go into the details upon those three routes and see how it is figured out upon the jackets themselves, we find that in two of those three routes, I think, the allowance for increased trips was pro rata, and in other words that of the twenty-nine orders made for increase of trips, twenty-eight of them are made up to the extreme limit of the statute, in violation of what these parties themselves show and show particularly by subcontracts on those routes on file in the department before

Brady, in violation of what were the necessities of the case and of what were the proprieties of the case, and yet you are to be asked to believe by the eloquent gentlemen who will follow me that that action of Brady's in that way was an honest or provident action, dictated only by a regard for the public interests, and not dictated by sinister motives and a desire to benefit others, if not himself.

Now, when you come, gentlemen, to expedition, the language of the law is this:

No extra allowance shall be made for any increase of expedition in carrying the mail unless the employment of additional stock and carriers is made necessary.

That is essential to the allowance of a cent.

If additional stock and carriers are necessary, the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution.

In other words, there is a limit to be ascertained by the facts, certainly at one end by facts, to wit, the number then necessarily employed, and at the other end by the number that may be believed to be necessary for the increased service. It is a limit, a limit not to be gone up to in every case, but it is a limit not to be exceeded.

It is a little difficult in these cases to get at what is called pro rata, or whether a given order on expedition is in excess of pro rata, because Mr. Brady always figured his pro rata upon the basis of the statements made in the oath of the contractor who was to be benefited. And if he allowed a sum less than what the contractor stated would be the proportion between the number of men and horses then used and the number of men and horses that would be used, accepting the contractor's statement as absolutely true, if then he did not pay him the full amount these figures entitled him to, Mr. Brady put in his order, "it being less than pro rata."

Now, in this case fifteen orders are proved, apart from those where trips and expedition are mixed in one gross sum. Of these twelve are themselves stated to be pro rata. Mr. Brady, by his own declaration, declares that in twelve of those cases he has put the sum up to the extreme limit allowed by law, measuring that limit by the statement of the contractor. He took the contractor's ten-foot yard stick, and he measured that, and he gave him all the cloth that his ten-foot yard stick would cover, and if he did not give him all that cloth he said it was less than pro rata, less than the poor contractor was entitled to. The other three orders that were less than pro rata are undoubtedly less. But let us see, the aggregate less than pro rata on those three orders, all told, is \$7,453.02. The contractor in one case gets \$198 and in the other \$1,692, and then on the third, which is the Tongue River case, where that magnificent swearer, Mr. Miner, declared that to run the Bismarck and Tongue River route, which was two hundred and fifty miles long on the expedited service, required one hundred and fifty men and one hundred and fifty horses—based upon that oath there is a considerable saving upon pro rata. I shall have occasion to show you something which I think will open your eyes a little in connection with that.

I say again, gentlemen, can there be any pretense of justification in making all these orders up to the limit allowed by law? If it could be pretended that that was done in some ignorant way, nobody ever accused Mr. Brady of being ignorant. The late Horace Greeley once said of a gentleman, "Nobody ever accused so and so of being a fool, what-

ever they might say of him as a knave," and I think nobody ever accused Mr. Brady of being ignorant. Now, if it might be claimed, however, that these orders were ignorantly made, what do we find? We find that on the route 35149, from Kearney to Kent, the contractor received before expedition \$868, and he paid out \$700 to French. After the increase and expedition the contractor received \$4,302.65, and he paid out \$1,587.40; so that he got \$2,715.25 in excess. Vaile got that amount in excess of the sum which he paid for running that service.

On the route from Pueblo to Rosita, No. 38134, after increase and expedition, the contractor received \$8,148. A subcontract on file, I think, from the outset, showed that the service was done for \$3,100. There was an excess of \$5,048, which went into the contractor's pocket, and that appeared by the paper on file in Mr. Brady's office. It has appeared in this case on the evidence that that subcontractor, at \$3,100, had so good a thing of it that somebody was content to take it off his hands at \$2,600, and he put the five hundred dollars in his own pocket, and yet Brady authorized to be paid \$8,148 for service which cost \$2,600 to perform.

On route 41119, from Toquerville to Adairville, three trips were added and the contractor after that got \$20,894.22 and the subcontractor got \$8,444, being an excess to the contractor for doing nothing except preventing any friction in Washington, of \$12,450.

On route 38145, Ojo Caliente to Parrott City, the contractor got \$13,433.06, and the subcontractor got at one time \$6,200, at another time \$7,233.04, and when one of these unfortunate subcontractors wrote Mr. Stephen W. Dorsey that to do that service for which he, Dorsey, had got \$14,333, though the subcontractor did not know it—when he wrote him that to do that service would cost \$12,000 Mr. Stephen W. Dorsey replied by letter which is in the record here, substantially: "You are a fool; it would not cost any such sum; don't talk so."

On that same route, after the other subcontractors had gone out and after there had come in Mr. Sanderson, whom these gentlemen told us, and told us not correctly, performed the service without any fines, and, therefore, showed that the thing could be properly performed, took hold and his subcontract, which is on file, shows that he got only \$8,000 for performing the service, and that the contractor kept for himself \$5,433.04 for doing nothing. These papers, gentlemen, are on file. Many of them were on file before Brady when Brady was making these orders in which he was saying, "I, as Second Assistant Postmaster-General, placed here to guard the Treasury of the United States, with a limit placed over me that I shall not allow more than a certain amount of money," and with an implied limit, undoubtedly a legal limit, a limit binding upon him in law that he would not allow an unnecessary sum for increase and expedition, "I, Thomas J. Brady, with these facts before me, staring me in the eyes that it was not necessary to pay \$14,433 for service because somebody was doing it for \$8,000," proceeded to make these extreme orders of allowance, and then his counsel insult your intelligence, insult your integrity, insult your reputation in this community by asking you to find a verdict that those orders are proper, that those orders were not improper, were not corrupt.

On route 46247 I have already called your attention to the fact that the contractor got \$35,928, and he gave the subcontractor who performed the service only \$21,000. That is the Julian and Colton route, where Major & Culverhouse were the subcontractors at one time. When it got to be seven trips they got \$23,000, and for six trips \$21,000. This allowance of \$21,938 is upon six trips I think. In the order in that case which

Brady made for expedition he expressly provides over his own signature that he allows the contractor \$17,964, and of that only \$10,500 is to go to the subcontractor, to the man whom he knew and wrote down there was performing the service, and he gave to the man who was not doing the service, and whom he knew was not doing the service, \$7,264 for himself. And, gentlemen, bear this in mind, that all through all these cases of subcontract the subcontractor is the man who bears all the fines and deductions, and necessarily so, because inasmuch as the contractor makes his arrangement with the subcontractor, and has no control over the performance of the service, he must throw that burden upon the subcontractor to secure the performance of the service. That is all right. But you will bear in mind that the contractor sits in Washington and takes his share of money free and clear so long as the fines imposed upon the subcontractor do not exceed the amount which is allowed to the subcontractor, the full amount of his contract. And if you look at a letter of S. W. Dorsey, to which I shall have occasion to call your attention pretty soon, you will see that it caps the climax of Dorsey's indignation against the subcontractor, "you will be fined not only the amount of your pay, but you will be fined our pay, too."

Now, on the Rawlins and White River route, No. 38113, at the time of three trips, the contractor got \$13,706.25, and the subcontractor \$5,100. The contractor got an excess of \$8,606.25. At a later stage, the contractor got \$10,000 of that \$13,706.25. On the stand here, the subcontractor said that the \$10,000 was good pay. His only trouble was, that he did not get it direct from the Government, because under the arrangement on the route at that time, as I recollect, they had one of these little open-and-shut arrangements by which Mr. Rerdell, or Mr. S. W. Dorsey, or somebody else, had a subcontract on file, and therefore the subcontractor, who was actually performing the service, could not get his subcontract on file, and consequently could not secure the payment of his money; and this man said, if he had got his money directly from the Government, \$10,000 was first rate pay.

Mr. HENKLE. Who was that?

Mr. BLISS. That was Foote. At a later stage in that case, when seven trips came to be added the contractor got \$31,981.25, of which the subcontractor got \$23,333.33, leaving an excess of \$8,647.92 to the contractor, and Rerdell in communicating to the subcontractor the fact that he was to get \$23,333.33, instead of also adding that the company kept the little sum of \$8,647.92, wound up his letter by a congratulation and with the hope that he would make a good thing out of that \$23,000, and then he subsequently wrote him that he wished him to understand that he got that order for him; that he was on good terms with his attorney here, and his attorney might undertake to claim pay for getting that order that he, Rerdell, got for him and if there was anything to be had out of it "I, M. C. Rerdell, ought to have it." That is the substance of it.

On route 34140, The Dalles to Baker City, at the time of three trips the contractor got \$21,460.89, and the subcontractor got \$7,400, of which \$14,060.89 is an excess. I believe I am correct in all these figures. I have made considerable examination of them and have marked against them in each case the page of the record on which they appear.

Route 38135 is the route where there was an extension from Saint Charles to Pueblo, of twelve miles, about which I may have something to say to you. Now, there was a temporary contract on file in that case with a man named Ames, who subsequently put his permanent contract on file. That temporary contract showed, if I remember right, that on

the service, even under the temporary contract, with all the expenses incident thereto, Ames was getting for the twelve miles but a little over a hundred dollars, as I recollect, and yet with that contract on file showing that temporary service was made at that rate, Brady made an order for permanent service at \$328.80, and that was for that twelve miles which by expedition was subsequently carried up to some \$1,500 or \$1,800.

On route 44160 the subcontractor got \$10,000. The contractor got \$50,166.66, and there, gentlemen, is a little conundrum that I want to ask you. The subcontractor got \$10,000. It was divided between two of them at \$5,000 apiece. Vaile, the contractor, got \$50,166.66, and he says he made \$15,000 or \$20,000 out of it. Suppose he made twenty and the contractor got ten, where did the odd \$20,000 go to? Can you imagine any legitimate place to which that \$20,000 went?

I called your attention to one or two cases in which Brady in ordering showed that he knew that the subcontractor got these differences. I will mention one or two others.

On the Ojo Caliente route the order specifies that Dorsey got \$13,433.04 and ultimately got \$6,200. I have already said I think that it shows that Sanderson got \$8,000.

On the Silverton and Parrott City route the order specifies that the contractor got \$16,512.28 and the subcontractor only \$9,400.

On the Redding and Alturas route the contractor got \$17,964 and the subcontractor \$10,500. That order, I think, is an order made by French. In the same way, the order on the Rawlins and White River route contains the sliding scale to which I called your attention giving Perkins, the subcontractor, so much per trip. That appears in the order on the back of the jacket. The same is true of the allowance to Foote.

On the route from Eugene City to Mitchell the order shows that of the \$21,460.89 only \$7,400 went to the subcontractor. I am bound to say that I think that is an order of French's. That is my impression.

Now, assuming therefore, as I have in all the argument heretofore, that the increases of trips as made were proper, assuming that expedition as made was proper, that they ought to have the additional trips which Brady ordered, that time ought to be reduced as Brady ordered, assuming all that, upon this mass of evidence which I have brought to your attention from the evidence in this case, from the records of the department under Brady's control, and many of them bearing the marks that they were within Brady's knowledge, in view of all these I ask you again can you, can any man who means to be faithful to his oath, who does not mean to expose himself to a repetition of allegations which have been referred to by counsel here, say that these orders of Brady were made in good faith, were dictated by an honest and sole regard for the public good, or must he not say that they were dictated by improper considerations, by a desire to benefit parties at the expense of the public, and in view of the evidence to which I shall call your attention I shall ask you also to add to that, by a desire to benefit himself

Now, there is another class of orders, as to which I shall call your attention to only one. The law as to increase of service provides—

And no compensation shall be paid for additional service rendered before the issuing of such order.

Now, on page 839 of the record, on the route from Ojo Caliente to Animas City, we find that on the 26th of February, 1881, by the order in this case, which is 56 E—bear in mind the date, the 26th of February, 1881. At the bottom it is stated, "Order No. 1891, date February 26, 1881; postmaster and contractor notified February 26, 1881."

Mr. Brady says:

From January 15, 1881, increase service to seven trips per week, and allow contractor \$17,910.72 and subcontractor \$10,666.64—

One of the orders, you see, to which I just referred as showing over Brady's hand that the subcontractor got less than the contractor—

per annum additional pay, being pro rata.

That is the order made by Brady, gentlemen, upon a jacket inclosed, in which are petitions urging that from Pagosa Springs to Animas City, which was only a small portion of the route consequent upon the building of a railroad. [Taking up map and indicating.] The route, gentlemen, is this route going down here. Pagosa Springs is here. The railroad had been built across here, and therefore, the petitions properly prayed that there should be service. The service ran down to here—that, from there to there. Here was the railroad. That, there, should be about forty-six miles. I think it was daily service. The petition only asked that. Mr. Brady made his order for daily service over the whole length of the route in the first place, and then he proceeded to antedate it and to say that it should take effect from the 15th of January, 1881, though the statute says that—

No compensation shall be paid for additional service rendered before the issuing of the order.

But it will be said, gentlemen, that that is all covered by the fact that there was an earlier telegram. We have had that telegram trotted out in our faces before, and I took occasion to put it in and now let us see. The telegram is dated the 13th of January, 1881, and is addressed to J. L. Sanderson:

You are hereby authorized to begin daily service from Chama to the nearest point on the Ojo Caliente route, twenty-five miles, and increase service daily on Ojo Caliente route from junction made to Animas City.

They are authorized by that telegram to begin from Chama, which is here [indicating on map] off the route, and then from the place that they connect with over here from Pagosa Springs to Animas City which is over here, to make daily service. That telegram gave them a right to make daily service from there to there. If that order of the 26th of February relating back to the 15th of January had concerned only that distance from Chama to Animas City, it would have been borne out by the telegram. The telegram would be regarded as the order authorizing it, and the result would be that this formal order upon the jacket would not have been an illegal order. I admit that frankly. But that telegram covers eighty-nine miles of the route. This order on this jacket covers a route of one hundred and seventy-four miles. Now there is no escape from it. There is no telegram. There is nothing by which you can escape from the fact that Thomas J. Brady, on the 26th of February, 1881, made an illegal order, antedating it one month and eleven days, at the rate of \$17,910.

There are other orders in this case that we claim to be antedated, but there is none that is so bald and bare as that, and there is none that is, perhaps—I won't say not to be excused but perhaps not to be apologized for, and I do not desire to take up your time by going over them. But I say that as to this order on this Ojo Caliente route there is no escape from the fact that Thomas J. Brady, Second Assistant Postmaster-General, put there to enforce the laws, put there to obey the laws, baldly, badly, bravely, if you choose, made an order in

direct violation of the law. It is like a good many other things that we find in these papers. As the parties got along down, as Brady got warm in his seat, as his understanding with the parties had become so binding that neither could "give the other away," then they became careless and they went on regardless of appearances, regardless of law, with no idea that there would ever be any investigation or examination. They ran against an examination in Congress as to which I told you in my opening that I would lift up one corner of the curtain, and our friend McSweeney said, "Yes, bring on your Congressional wax-works," and when we got Walsh on the stand we lifted up that one corner. We showed Brady asking Walsh to pay \$8,000, part of what he said it had been necessary to spend upon Congress. Mr. Walsh did not like to pay it, and our friend did not like the Congressional wax-works for a cent.

The COURT. We will now adjourn.

Thereupon (at 3 o'clock and 5 minutes p. m.) the court adjourned until 10 o'clock to-morrow morning.

FRIDAY, AUGUST, 18, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. BLISS. Gentlemen, upon route 38145 on which I called your attention yesterday to the retroactive order made by Brady as applicable to that portion of the route which was not covered by the telegram, and as to which therefore the order was absolutely retroactive, the amount annually which he ordered paid by that order, which was clearly illegal, was, as I calculate it, \$2,019.68.

Before proceeding let me say that yesterday in referring to route 38140, from Trinidad to Madison, I made inadvertently, and in passing, without laying any particular stress upon it, an incorrect statement as to the petitions on that route having asked for expedition, that the mail might arrive by daylight. That application was not made upon that route, but was made, I think, upon the route from Pueblo to Greenhorn.

Now, with reference to these various orders to which I have called your attention, made by Brady, there are of course but two possible explanations. One is that they were made in bad faith by Brady, which is the claim that we make. It was perhaps open to him to have claimed that he was imposed upon in making those orders. I say it was open to him to some extent, had it not been for the evidence furnished by the subcontracts. It might have been open to him to say, for instance, that in ordering the amount paid that he did order, he exercised his best judgment, but was deceived. The moment the subcontracts appeared on file, that excuse was cut off from him. But even supposing he had the right to say that he was imposed upon; then the question would naturally come, who imposed upon him? Presumptively and without reference to the papers, if anybody imposed upon him the parties who did it were these defendants who were benefited by his acts. Acts of this sort, if there is imposition and if there is deceit, do not commit themselves. Orders for increase and orders for expedition which put large sums of money into the hands of favored contractors who render no service themselves, do not come like surprise parties. They are sought, they are worked for, or at least, they are suggested, provided the party who is to make the order stands in such relation that a mere

suggestion is sufficient. But as to these orders let us look a little at the question of how they were made as bearing upon their good faith and bearing upon their propriety. It is in evidence before you, that the provision in the regulations that an oath shall be required of a contractor, stating the number of men and horses, first appeared in the regulations of 1879, and did not appear in the preceding regulations which were made before Mr. Brady came into office. It does not appear precisely when that regulation was made, but it is a regulation and to some extent a very proper regulation, requiring that the contractor in case of expedition shall make an affidavit stating the number of men and animals. Perhaps I had better refer to the provision. I read from page 145 of the Postal Laws and Regulations:

When it becomes necessary to increase the speed on a route, the contractor will be required to state under oath the number of horses and men required to perform the service according to contract schedule, and the number required to perform it with the proposed increase of speed.

That is the regulation made at some time after the general regulations of 1873 were adopted and before those of 1879 were adopted, and apparently acted upon by Mr. Brady in every one of these orders for expedition. Now, this, as I have said, was a very proper regulation, but it was a regulation prescribing the statement of a party interested and a party to be benefited, and therefore very clearly not a paper to be implicitly relied upon and to be accepted as the conclusive basis of the action. It was not the course of any honest officer to take that affidavit in a given case and to accept it as conclusive, and then applying the rule of three laid down in the statute as to the amount to be allowed, to allow the amount that those figures worked out. No man in his own business would take such a course. If you have a party working for you you do not take his statement as to the amount of work he has done as conclusive, as to the amount of digging, or as to the amount of hauling, or as to the number of feet of building, or anything of that kind. You get his statement and then you judge as to whether it is correct, bearing in mind, particularly in a case of this sort, that you are dealing with the statement of the party who is directly interested, and bearing in mind how very human all contractors are. Now it is not in evidence in this case that Mr. Brady ever consulted anybody who was concerned on a route, who was actually carrying the route. I do not mean these gentlemen here in Washington, but the men who were on the route doing the business. It does not appear that he ever sought any information there as to the number of men or horses which were then actually being used. Of course the number being used is naturally and presumptively the best evidence of the number required. We asked man after man on the stand if he ever was questioned upon that subject, and they all said they were never inquired of in any manner. The nearest approach that you find to any one of these defendants ever seeking any information upon that subject, is when Rerdell, at that famous interview with Pennell in Bismarck, when he wanted that little elbow made out one hundred and twenty or one hundred and fifty miles off, and to have a supposititious post-office and a supposititious route created on the petition of Pennell's gang of workmen, did with Pennell at that time figure upon the number of men and horses that would be necessary on an expedited schedule, when there was no honest reason to suppose there was to be any expedition; and Mr. Rerdell arrived at a figure considerably larger than Mr. Pennell, and when he returned here Mr. Miner made the oath which was about double Mr. Rerdell's figures, as I recollect them.

The COURT. Double Rerdell's figures?

Mr. BLISS. Pretty near double, as I recollect. It was a mere conversation with Rerdell. It is right for me to say that I do not recall at this moment whether the figures are stated in the evidence. I knew beforehand what Mr. Rerdell said they were, and I think they were stated in the evidence.

Mr. HENKLE. He said that Rerdell made the figures larger than he did.

Mr. BLISS. Did he not name the difference?

Mr. HENKLE. I do not think so.

Mr. BLISS. I will not say that he did. They were certainly very much larger. And other than that there is not any evidence anywhere that Mr. Brady ever sought information from any person who was actually doing the service as to the number of men and animals that were actually being used at that time. There is not any evidence anywhere that Mr. Brady ever sought information from any contractor, from any person skilled in mail contracts, from any person engaged in transporting the mails, as to the number which would probably be needed upon the increased schedule. There is nothing of the kind. Moreover, gentlemen, there is most conclusive evidence that he could not have done anything of the kind, or if he did do anything of the kind it answered no purpose with him; for, as I called to your attention yesterday, in all but three of the cases of expedition he allowed the extreme amount allowed by the statute, declaring it to be pro rata, and taking as the basis the oaths which the contractors made and laid before him. He accepted those as absolutely conclusive, and yet I shall show you that those oaths were false in the statement of the number then actually required and false in the statement of the number to be required on the increase, that they were all altered, erased, and written into; that there were double oaths on the same route, and that he took one and discarded the other without any apparent regard for the interests of the Government; and in general, the evidence is conclusive that he accepted the *ex parte* statements of the contractors as conclusive as to the amount that they were to be paid. He did not, in the first place, gentlemen, adhere at all to his own regulation. The regulation said that the contractor must make the oath. On route 35015, from Vermillion to Sioux Falls, he took the oath of the subcontractor, although his attention was called to it by Mr. Brewer, the clerk. Mr. Brewer regarded the matter as so important that, for his own protection, he made a memorandum of the fact that he had called Mr. Brady's attention to it and put that memorandum with the papers relating to the case and reproduced it here with the other papers on this trial. On route 38140, from Trinidad to Madison, he took the oath of John W. Dorsey. On that route John R. Miner was the contractor. John W. Dorsey never was, so far as there is any evidence on the files of the department, and so far as there is any evidence on this trial, the subcontractor, and never had any relation to that route excepting the relation that arises from that of coconspirator in this case; and yet Mr. Brady took the oath of John W. Dorsey, swearing that he was subcontractor on that route, and accepted that oath as to the number of men and horses needed and to be needed.

On route 38134, from Pueblo to Rosita, there are two oaths, both made by John W. Dorsey, and both sworn to before the same man on the same day, the 21st day of April, 1879. In one of them he says that the number of men and animals necessary to carry the mail on route 38134, on the present schedule, seven times a week, is two men and six animals. On the other, he says, on the present schedule, three men and

twelve animals are required. I say there are two oaths made by the same man on the same day before the same officer, in which he states, first, that two men and six animals, making eight, are required, and next that three men and twelve animals, making fifteen, are required. Both of those oaths were on file in the department before Mr. Brady, and Mr. Brady accepted one or the other of the oaths as the conclusive oath upon which he ordered expedition and the payment therefor. These, gentlemen, are the oaths of the same man who swore he was a subcontractor when he was not. He makes two oaths of that sort upon the same day. That is the person who was pictured to you, I see by the record, for I had not the happiness to be present, by one of the counsel who preceded me, as the true Christian gentleman who sat here with his countenance beaming with forgiveness for everybody. We see, gentlemen, in the newspapers occasionally, by people who do not care apparently to speak well of religion, a little item headed: "Another good man gone wrong." I think this true Christian gentleman has gone a little wrong when he makes two affidavits on the same day as inconsistent as these. He also swore in one of them that the number necessary on a schedule of ten hours, seven times a week, that is the increased schedule, was six men and eighteen animals; and in the other affidavit, made on the same day, he swore that the number necessary on a schedule of ten hours, seven times a week, was seven men and thirty-eight animals, in one case the aggregate being twenty-four and in the other case the aggregate being forty-five. Now, that is the condition of the record. One of these oaths went on file on the 6th of May, 1879, and the other went on file on the 8th of May, 1879, both having been sworn to on the 21st of April, 1879. Mr. Dorsey having put the first oath on file on the 6th of May, on the same day wrote a letter, which is in evidence here, asking permission to withdraw the first affidavit to correct an error therein. Why, gentlemen, you notice there is not one single figure in the two affidavits that agree in any manner, and yet he called that a case of withdrawal to correct an error. But John W. Dorsey made another error. On the 11th of March he made an oath in Vermont before the same person before whom he swore to the other affidavits that the number of men and animals necessary to carry the mails on route 38145, from Ojo Caliente to Parrott City, three times a week, was three men and seven animals; and on the 26th of April, about six weeks afterwards, he made oath in Washington that the number necessary to carry it on the present schedule three trips a week, was five men and fifteen animals, the aggregate being in one case ten and in the other case twenty. In this case there was some excuse for the necessity of making a new oath, because in the mean time between the time, as I shall have occasion to show you, when he made the first oath which looked to the idea of a reduction to eighty hours, and therefore stated the number of men and horses required, and the time that he made the second oath, the conspirators had come to the conclusion that it would be possible to get a reduction not only to eighty hours but to fifty hours, and therefore Mr. Dorsey goes in and makes the second oath as to the number which would be necessary under the expedited time. For eighty hours he said it would take nine men and twenty-seven animals, and for fifty hours it would take twelve men and forty-two animals. There is, therefore, no inconsistency between those statements. But as to the statement of the number required to carry the service on the existing schedule there is a very grave inconsistency. To reduce the time, according to those oaths, from ninety hours to eighty hours, required the addition of six men and twenty animals. To reduce the time from ninety hours

to fifty hours required the addition of nine men and thirty-five animals, a much less liberal allowance for difference than they were in the habit of making. But there is another class of peculiarities as to these oaths and that is that the oaths were very clearly filled up without much regard to what the facts were, or without much regard apparently to whether the statements inserted had been really sworn to by the parties. On route 38113 John W. Dorsey, as contractor, in a letter written by Rerdell on paper of the Senate of the United States—where did Rerdell get possession of that paper?—sends to Perkins, who was the subcontractor, an oath with the numbers in blank, with direction to sign it just as it is, and acknowledge it before a notary public or county clerk. Perkins swears that he did so, and Smith, the notary before whom it was sworn to, swears that he did so. After having been sworn to, this blank came here, and as the evidence is was filled up by Rerdell. Any one of you, gentlemen, looking at that oath can see that it was so filled up, and that the numbers 1, 3, 6, 8, and 24 were inserted in the blank which there existed. It is as obvious as anything can be [Exhibiting affidavit to the jury.] That was an oath, which declared, as filled up, that one trip took three men and six animals on the existing schedule, and on a schedule of eighty hours it would take eight men and twenty-four animals. It was said when that evidence came in that this oath was not used. If it was not used, why was it filed by Rerdell in the department on the 16th day of April, 1879? If it was not used will these gentlemen explain to me why upon the jacket upon which the order for expedition was made it is recited that the subcontractor submits a sworn statement as to the number of men and animals? Perkins was the subcontractor. Dorsey was not the subcontractor, and the evidence therefore is conclusive that that was the oath used. I say that was the oath used, because on the 26th of April John W. Dorsey transmitted to the department a letter, in which, praising his own liberality in understating the number of men and animals which would be required on the increased schedule, he swore that the number of men and animals required on the present schedule and three trips a week, was four men and twelve animals. Perkins's statement is three men and six animals, but Perkins swore for a reduced schedule of eighty-four hours, and Dorsey, by the time they got there, had come to the conclusion that they could do better, and made an oath as to the number necessary on a schedule of forty-five hours three times a week, and said it was eleven men and thirty-two animals. The one is eighty-four hours and eight men and twenty-four animals, making thirty-two. The other was forty-five hours and eleven men and thirty-two animals, making forty-three. The difference between the two is not in proportion as you will see.

On route 35051, from Bismarck to Tongue River, we have evidence of a still more peculiar affair. John R. Miner, by his oath dated on the 4th of October, swore that to carry the mail three trips in eighty-four hours took twelve men and thirteen animals. Eighty-four hours was the original time.

Mr. HENKLE. It was extended.

Mr. BLISS. It never was extended. It was originally eighty-four hours, and John R. Miner swore that it would take twelve men and thirteen animals.

Mr. HENKLE. The time is not in the contract. I beg your pardon.

Mr. BLISS. And that to carry it on sixty-five hours would take one hundred and fifty men and one hundred and fifty animals. Did he not make that affidavit?

Mr. HENKLE. Yes, he made the affidavit, but it did not say on eighty-four hours.

Mr. BLISS. Precisely. If a man makes an affidavit under a regulation which requires him to state the number required on the then existing schedule, and makes a statement of that sort, it either is intended to deceive, or else it applies to the then existing schedule.

Mr. HENKLE. Excuse me. I did not wish to interrupt you, but you want to be right, I know.

Mr. BLISS. I have the affidavit here.

Mr. HENKLE. My understanding about it is, that after the distance circular came in the distance was extended seventy miles.

Mr. BLISS. Precisely. After the distance circular came in sixty miles was added. But no additional time was allowed for it. Your own witness on the stand, Mr. French, said they never did that. The statement of the distance did not make any change of the time, and you cannot find a distance circular or a schedule of time over eighty-four hours on that route.

Mr. HENKLE. Well, go on.

Mr. BLISS. They constantly failed to make eighty-four hours, and were constantly fined for not making it. You cannot find any schedule fixing over eighty-four hours on that route. Now, Mr. Miner, on the 30th day of September, 1878, which, by the way, is, if I remember right, four days before the distance was restated, the distance being restated on the 4th of October, swore that the number necessary to carry the mail on route 38051, from Bismarck to Tongue River, three times a week, is twelve men and thirteen animals, precisely what I said, and the number of men and animals necessary to carry the mail on a reduced schedule of sixty-five hours is one hundred and fifty men and one hundred and fifty animals. Upon that oath—and that is one of the cases where Mr. Miner developed this magnificent capacity as a swearer, a capacity which, I think, is unequalled in this case—he then made a liberal proposal to carry it for two additional trips in sixty-four hours for less than pro rata, that is to say, to carry it for \$32,650. That was Mr. Miner's proposition. By an order on a jacket of the same date at the top, reference is made to this and an order is made to allow \$4,700 for trips, being pro rata, and \$27,950 for expedition, being less than pro rata. The statement is that \$27,950 is less than pro rata. Well, gentlemen, that is true if you except Mr. Miner's statement that it needed one hundred and fifty men and one hundred and fifty animals. But now we come to a little transaction and let us see what it is. I produce from the files a jacket dated 1878, with no further date, headed Bismarck and Tongue River; length of route two hundred and fifty miles as advertised; number of trips per week one; contractor, J. R. Miner; pay, \$2,350. Those items show that that jacket therefore, dated 1878, was made up before there had been any order for increase upon that route. What do we find? The order which was made for an amount less than pro rata upon Miner's oath of one hundred and fifty men and one hundred and fifty animals reads in this way:

Date, October 4. State, Dakota.

No. of route, 35051. Termini of route, Bismarck and Tongue River.

Length of route, 250 miles. No. of trips per week, one.

Contractor, J. R. Miner. Pay, \$2,350.

Precisely like the other jacket to which I called your attention. Then it goes on:

Hon. J. P. Kidder, ex-Mayor Charles, of Sionx City, postmaster Bismarck, president N. P. R. R., clerk district court, attorneys, Hon. M. Maginnis, citizens of Bismarck and Miles City, Gen. N. A. Miles, ask for three times a week service and expedited schedule.

I shall show you presently that that is a lie.

Present schedule, three and a half days; proposed, 65 hours. Contractor furnished sworn statement that 12 men and 13 animals are required for tri-weekly on present schedule; that for a 65-hour schedule 150 men and 150 horses will be required. This will cost pro rata per annum, \$828,250.

There is a misprint here.

And contractor agrees to increase and expedite from October 7 for \$32,600 per annum additional. War Department letter also inclosed, stating that Gen. Sherman desires this service.

Across the jacket is written:

State distance as 303 miles, as appears by certificate of Gen. T. A. Rosser, engineer N. P. R. R. From January 1st, 1879, increase service to three trips per week, and allow contractor and subcontractor \$4,700 per annum, being pro rata. Reduce schedule time to 65 hours in each direction, and allow contractor \$27,950 per annum additional pay, being less than pro rata, as appears by his sworn statement of stock and carriers required.

BRADY.

That was based entirely upon Mr. Miner's sworn statement.

Now this other jacket to which I began to call your attention is on page 1207 of the record, if I remember right.

Bismarck and Tongue River.

Length of route, two hundred and fifty miles.

As advertised.

Number of trips per week, one.

Pay, \$2,350.

So far identical.

Hon. J. P. Kidder, ex-Mayor Charles, of Sionx City, P. M. Bismarck, president N. P. R. R., clerk district court, attorneys. Hon. M. Maginnis—

So far this is identical with the original jacket. Then comes—referring to personal interview of himself and General Miles last winter—

That is new—

citizens of Miles City, Gen. N. A. Miles, citizens of Bismarck—

That is identical with the other except it says: "Citizens of Bismarck and Miles City"—

ask for tri-weekly service and expedited schedule.

"Ask for three times a week and expedited schedule." Now comes on:

Contractor furnishes sworn statement that for service three times a week on present schedule eleven men and twelve animals are required—

The oath on the other one showed that twelve men and thirteen animals were required. That is not a very great difference—

but thirty-seven men and seventy-three animals will be required on a sixty-five hour schedule.

"Thirty-seven men and seventy-three animals will be required on a sixty-five-hour schedule," when the oath that is actually on file is one hundred and fifty men and one hundred and fifty animals.

Now that jacket goes on and it contains figures. There is on the back of it in detail the figures showing what the expedition would be upon the basis of this affidavit of Miner's which has disappeared—the lower statement—and it appears and it was proved by Mr. Sweeney, I think it was, or Mr. Brewer, on the stand, by a calculation that he there made that it was correct within \$10. It appears upon this affidavit of Mr. Miner's, which has disappeared, that the outside amount that could have

been allowed for expedition was \$26,884. That affidavit disappears and a new affidavit appears stating the aggregate number at three hundred instead of at one hundred and ten, and then there is allowed to Mr. Miner for expedition \$27,950, being about a thousand dollars more than he could have got at the outside by this affidavit which has disappeared. And then it is paraded upon the record that that was less than pro rata.

Now, I asked Mr. Brewer on the stand whether this indorsement was in his handwriting, and he said it was. I asked him whether that oath was there as stated on that jacket, and he said it was there, and he made it up from that jacket, and what has become of that oath nobody can tell. It was cast aside as a useless oath, apparently, and the other one taken up. There is a little peculiarity about this that is worth noticing. This jacket, which was made on the one hundred and fifty men and horses affidavit, after stating the people who petitioned, the present schedule, the oath, &c., puts at the end:

War Department letter also inclosed, stating that General Sherman desires this service.

Evidently put on this jacket as an afterthought.

I am wrong. What I hold here is a piece of the other jacket. That is a piece of the jacket used in that case. I thought that this belonged to this jacket. [Referring to another paper in his hand.] I see I am wrong.

Now, there is the condition of things, gentlemen. Here was an oath made by Miner saying that it would take one hundred and ten men and horses in the aggregate to perform the service on a sixty-five hours schedule, the jacket made up with all the details placed upon it. That jacket is cast aside, and that oath disappears, and another jacket is made up, with another oath calling for three hundred, instead of one hundred and ten, and upon that jacket an order is made to pay for expedition, and the sum being in excess of the outside limit that would have been paid under the original oath, and that is claimed to be less than pro rata. Gentlemen, have you any question of what influences prevailed in the office of the Second Assistant Postmaster-General at the time this and other orders were made? Taking these oaths, therefore, just as I have called your attention to them, and going no further; taking the case of John W. Dorsey, with his double oaths upon two different routes; taking the oath of Miner, with his double oath upon this route, could any one, as Second Assistant Postmaster-General, from that time on, honestly or decently pay any attention to affidavits made—I will not say by these contractors, but by any contractors, for it was notice to him that under that regulation there might be any amount of fraud perpetrated upon the Government if the oath was accepted as conclusive. He never ought to have required any such notice. It is obvious from the nature of the case. But if he did require any such notice there, it was brought home broadly and squarely to him.

But, gentlemen, there are in this indictment nineteen routes. There are eighteen affidavits made in them. There never was any expedition on this Los Pinos route, and therefore there was no affidavit. Of those eighteen affidavits, one is made by Vaile, and it bears no marks of alteration or change. It was made here at the national capital. One of those made by Miner is unaltered. But of the sixteen every one bears upon its face the evidence that it has been altered either by inserting figures in blanks, as was done in the case of the Rawlins and White River route, or altered by erasures, or altered in some similar manner. There is not one of them, I say without hesitation, that does not contain those things

inserted in blanks, and when inserted we cannot say; we have no knowledge; we have no means of getting any knowledge; it was not in our power to ascertain. The notary or the clerk before whom they were sworn to, naturally paid no attention to them. A man comes before him and says, "I want to swear to a document," and he swears him to it as it is. It is not the business of the clerk or the notary to question any blanks that may be in the paper, or to question the condition of the paper. And here they all are—every one of the sixteen—bearing evidence of alteration or insertion.

Now, with those oaths, and those oaths alone, before Mr. Brady, even if he had not had this evidence from the double oaths of John W. Dorsey, from the double oaths of John R. Miner, what right had he as a fair, intelligent, and honest officer, if those adjectives can have any application to him, to pay any attention to these affidavits, and upon those affidavits to make orders in every case save one, carrying the amount up to the limit? I say one case on the correct oath, on the Bismarck and Tongue River route, it would have been so. He claims that there were three less than pro rata; one of them one hundred and sixty-odd dollars less than pro rata, the other on the Bismarck and Tongue River route, and another one on a route which escapes me. But the Bismarck and Tongue River route, on a correct oath which had been before him, was in excess of pro rata. All the others, except that one of \$100 and one other, were up to the very limit of pro rata, as designated and as fixed by those oaths, and as fixed by nothing else in God's world.

Not only that, gentlemen, as to these oaths. We had the pleasure of hearing on the stand from only one person who made any one of these oaths and that was Mr. Vaile, who swore in the oath upon the Vermillion and Sioux Falls route, and he promptly admits that he made that oath without ever having been on the route; he could not tell us anything about the route—its condition or anything about it. But he made the oath stating how many were then required and how many would be required on an increased schedule, and he made a statement which I shall show you was incorrect as to the number that were then required, and as to the number that were afterwards required on the increased schedule—entirely incorrect—and on the stand he said, "Oh, I did not say that so many men were actually being used, but I said that so many would be required, ought to be used, and therefore my oath is a correct one."

Mr. WILSON. He said so many were necessary.

Mr. BLISS. So many were necessary or required; I do not know which. I do not care where the quibble was. The regulation called for a statement of the number. I do not care whether you say "Necessary, required," or "used." The best evidence of what is required and what is necessary is the number that the service was then being performed with, and that is the theory on which the Post Office Department has always proceeded. Whether, as he said he did, he stated it with no knowledge on the subject, or whether he stated it with knowledge, he stated it falsely.

Now, gentlemen, I told you that we had the pleasure of hearing from none of these affiants as to the affidavits. We have no knowledge from them as to whether they ever saw the routes or anything of the kind, and we were kindly favored by one of the counsel in the case with a little information on that subject to which it is just as well to call your attention. On page 532 of the record, when talking about the route from Pueblo to Greenhorn, we have this statement:

The COURT. Not as to the contract. The parties are bound by the distance laid down in the contract. But when an application is made for expedition, and an affidavit accompanies that application, and the question is whether the party who made that affidavit made it in good faith, then the actual distance becomes important.

Mr. INGERSOLL. I do not see that it does. As a matter of fact we have got the actual distance in the circulars. There is no dispute about that.

Mr. TOTTEN. It is proved by the postmasters, officials whose duty it is to find out. That is here as a matter of record, and now they bring the driver from that route to prove that the post-office officials in that country made a false report.

Mr. MERRICK. No, I do not.

The COURT. I do not know what the witness may testify to, but here is a man who seems to have been over the route. We will hear what he has to say.

Mr. HENKLE. Before your honor makes a ruling, let me offer this suggestion: This affidavit was made by Mr. Miner, who never saw the route, and who takes the estimate of the distance and the number of men and horses that are required from the post-office reports.

That extraordinary statement was made by Mr. Henkle soon after he came into the case. He would not have made it long after that because he would have known something of the facts. He would have known that the post-office report never, in any way, anywhere, and under any pretense, contained any information as to the number of men and horses required on a given route. He asserts that as being in the post-office report. There is not a particle of evidence of anything of that kind, and you all know it is not so. Mr. Miner says that he takes the estimate of the distance and number of men and horses. Now the estimate of the distance he may well take from the statement of the department in the advertisement. But when he comes to tell you that he takes the number of men and horses from the post-office reports, he states what is not true and what a little later he must have found out was not the truth. Why, gentlemen, if the number of men and horses were stated in the post-office reports, what business has Brady to go into the affidavits of interested parties to find it out? Was it not better for him to take it at first hand from the post-office reports than to let an interested party tell him that he had gathered from some post-office reports some information upon that subject? The thing is obviously untrue. The result, therefore, gentlemen, that we come to is, that these affidavits, so far as we know, other than the affidavit of Perkins, the subcontractor, were made by men who never saw the routes, who knew nothing of what they were swearing to, but knew only that it was necessary to have some kind of an affidavit to use as the key to open the door of the Treasury, and they placed that affidavit in the hands of Mr. Brady to enable him, acting upon that, to furnish the money.

Now, acting on papers such as these, gentlemen, what was the result? On the route from Canyon City to Fort McDermitt, route 41160, Peck swore, on the 18th of September, 1878, that the number necessary, mentioning no schedule, was five men and eight animals, and on a ninety-six-hour schedule would be twelve men and twenty-two animals. As to the number necessary when the oath was made no service had been performed since July 1, 1878, under that contract, by Peck or anybody acting under him. The evidence is conclusive and undisputed that on half that route service was commenced I think some time in September, and on the other half commenced on the 16th of January, 1879. He swore that the number then necessary was five men and eight animals. Up to June, 1878, on a schedule of one hundred and thirty hours—precisely the schedule then existing on that route—one trip had taken place, as the evidence on the stand here shows, with two men and ten horses. He swore that it would take five men and eight horses. The difference is not serious. But as to the

other branch of it, in which he swore to twelve men and twenty-two animals on a ninety-six hour schedule, what do we find? The difficulty in that oath of making any comparison arises from the difficulties as to the number of trips, as to how many trips he means the ninety-six hour schedule to apply to, as I recollect. He says, "With a schedule of ninety-six hours is twelve men and twenty-two animals." The implication I assume from that would be that he means on the one trip as it then existed, as he does not refer to any increase of trips. But I call your attention to that as a possible ambiguity there. One hundred and thirty hours one trip had taken one man and two horses. There is no direct evidence upon the subject of the one trip on ninety-six hours, as it never was run one trip on ninety six hours. But we find that while he swore it took twelve men and twenty-two animals, when it came to running seven trips, seven times one trip, the evidence is that it took twelve men—the same number of men that he named—and it took fifty-two animals. Where he says twenty-two for one trip, it took fifty-two for seven.

Mr. DICKSON. [The foreman.] Is that the oath of Peck?

Mr. BLISS. That is the oath of Peck. On three trips Brown, who run half the route, and McKibbin, who ran the other half, state that each of them took on their half three men and sixteen horses. In summer they had four carriers; in winter three carriers. In other words, they took twelve men and thirty-two horses to run two trips a week on a ninety-six hour schedule, and that included, as they state, the hauling of feed and everything, and the carrying of passengers also.

On route 44155 originally it was two trips and one hundred and eight hours. The offer to carry the mail and the order were for three trips and seventy-three hours. The oath made on the 18th of September, 1878, swears that there were necessary eight men and ten animals to carry it on the schedule then existing of two trips in one hundred and eight hours, making eighteen in the aggregate, and that to carry it in seventy-two hours three trips would take twenty-six men and sixty-six animals, making ninety-two in the aggregate.

Now, what do we find? Having stated that on two trips at one hundred and eight hours it would take eight men and ten animals, we find this condition of things. Pierce and Fisk, both of whom ran a portion of the route from South Forks to Baker, say that it took on the other portion two men and fourteen animals. Cowne and Schutz, who ran from Dalles to Canyon, say that it took four men and thirty animals on a two-trips schedule. Two and fourteen and four and thirty, which would make six and forty-four. When they came to three trips, where it was stated there would be required ninety-two men and animals, it appears that there were required between Dalles and Canyon three men and thirty-six animals, and that there were required on the other end a somewhat less number, which is not accurately stated. At any rate it does not in any sense come up to the claim in the affidavit.

On route 44140, Eugene City to Mitchell, the oath is that three trips on the present schedule required four men and nine animals, and on a fifty hours schedule it would require ten men and thirty animals. Powers swears that three trips on the existing schedule required four men and seven animals, being a difference of only two, but when it came to fifty hours instead of requiring an aggregate of forty, it required an aggregate of only twenty-six, and when asked whether that was enough, he says, "Of course it was; that only called for a horse to travel fourteen miles in a day."

On route 38135, Pueblo to Greenhorn, the oath is that the present

schedule, three trips a week, requires one man and one animal. That to do three trips on a seven hours schedule would require two men and four animals. The evidence of Sears, Farrish, and Higgason is that from the commencement of the service down to the present time, though the service has been expedited and increased, that there never has been any increase of horses or animals whatever; that from the outset, and before the beginning of the contract, it was run with one man and two animals, not with one man and one animal, as they said under the original schedule, and that after expedition it continued to be run with one man and two animals. There was no change in the number of men or the number of animals, and I think that is the route on which it appeared that the animals were transferred from one carrier to another, as one subcontractor to another, as each one succeeded the other in performing the service.

Now, that route, gentlemen, is important in this connection, because Mr. Brady had no right to make an order in which he gave one cent additional of money for expedition, unless it involved the use of additional men and carriers. The statute is express upon that subject:

No extra allowance shall be made for any increase of expedition in carrying the mail; unless, thereby, the employment of additional stock and carriers is made necessary.

And yet, upon that route, Mr. Brady paid \$2,630.40 for expedition in direct violation of the statute, because there was no increase of men and horses required. If there had been no such provision of law on that subject then Mr. Brady's allowance was excessive, because he based that allowance on six men and horses, when in point of fact, only three men and horses were used.

On route 35015, from Vermillion to Sioux Falls, Vaile swore that it required three men and twelve horses to make three trips a week on the then existing schedule, which was fifteen hours, if I remember right; to make it in ten hours would require five men and ten horses. Leach, the carrier, says that to carry it one trip a week on the existing schedule, required one man and four horses, where Vaile, never having been on the route, swore it required three men and twelve horses; the difference between five and fifteen. You will bear in mind, gentlemen, that in this case, it is always for the interest of the contractor to make the discrepancy as great as possible; to make the number used on the then existing schedule as small as possible; to make the number that will be used on the increased schedule as large as possible; because, in that way he applies his rule of three, with its geometrical progression, and he gets large additional allowance.

Now, Vaile swore that it required three men and twelve animals on that schedule, never having been on the route, and running the route they did at one man and four animals. On a three-trip schedule of ten hours Mr. Vaile swore it would take five men and ten animals, making fifteen. Mr. Leach apparently makes no statement as to a three-trip schedule, but he says, as to a two-trip schedule, it took only one man and four animals, just what it would take if it were a one-trip schedule. There was no increase after two trips, but he does say that to make six trips a week it required only two men and fifteen animals on the increased schedule, while Vaile declares, to make three trips a week would take five men and ten animals. Snyder, the carrier, who came on to the route after there had been taken off ten miles, and it had been made to terminate at Worthing, swears that he ran that distance in eight hours, and it took one man and three animals on three trips a week—three or six, I have forgotten the number of trips. On six trips

it took one man and eight animals on an eight-hour schedule, which was equivalent to a ten-hour schedule when the eight miles was taken off. On a twelve-hour schedule, six trips per week, it took precisely the same number. This is the uncontradicted evidence, and on your oaths you are bound to accept it.

On route 38140, from Trinidad to Madison, John W. Dorsey swore that three trips a week on the present schedule took one man and four animals, and three trips a week on a forty-two-hour schedule would take three men and eleven animals. Mr. Burgner, I think it was, swore that three trips a week on a twelve-hour schedule took one man and six horses. Dorsey said it would take three men and eleven horses. An aggregate of seven is what it did take. Dorsey said it would take fourteen. He said that on three trips a week on the original schedule the statement of the number in the oath of Dorsey was substantially correct. De Busk gives substantially the same figures.

On route 38134, from Pueblo to Rosita, Dorsey swore that on the present schedule it would take three men and twelve horses in the first oath that he presented. In the second oath he presented he swore it would take two men and six horses. Tuttle swore that including the mail and passengers it took for one trip four men and eight horses, and for the mail only it would have taken one man and three horses. Dorsey had it at the lowest two men and six horses. For seven trips on a ten hour schedule Dorsey said first it would take seven men and thirty-eight animals and then six men and eighteen animals. In point of fact, Tuttle said that it would take two men and fourteen horses for seven trips at ten hours, making sixteen, while Dorsey said in one forty-five and in the other twenty-four. Hull, who was the carrier, swore that two men and twelve horses were used, and Tuttle gave two men and fourteen horses.

On route 38156, from Silverton to Parrott City, John W. Dorsey swore that on the present schedule of seven trips it would take three men and ten horses, and that was proved by Cornell and Carson's evidence to be substantially correct; but he said to reduce it to a fifteen-hour schedule it would take six men and thirty horses, when, in point of fact, there were used only four men and twelve horses. That was the outside that was ever used, and at times only three men and nine horses were used. I am compelled to repeat these figures to you gentlemen, and yet I recognize the fact that they may not find any permanent lodgment in your minds. I trust they will, however, leave in your minds some conviction of the absurdity of these oaths.

On route 35051 Miner's oath was that it took for three trips twelve men and thirteen animals. Upon that there was a good deal of evidence as you will bear in mind. That was the route upon which Mr. Ketchum was on the stand. We were allowed to question him somewhat sharply. Mr. Ketchum said on his direct examination that on the 20th of September, this oath having been taken on the 18th of September, there were certainly eighteen animals employed. Miner said in the oath that only thirteen were necessary. Mr. Pennell swears that there were fourteen head that they bought in Saint Louis, and then that there were added a certain number, and that on the 1st of October, 1878, there were employed five men and twenty-five horses, if I have these figures right. Then McClellan swears that they started out with thirteen head and that Pennell bought five at one time, making eighteen, which was the number that was used when they were doing the service at the time or pretending to do the service at the time this oath was made. There is not any question, gentlemen, that the number then in use was five or six greater than Mr. Miner swore was then in use. Now, Mr. Miner said that one

hundred and fifty men and one hundred and fifty animals were necessary for the increase. Mr. Ketchum gave in detail the number of animals that were bought, and everything of that sort, and he did not come anywhere near to one hundred and fifty. He only approached in the aggregate of the horses one hundred and thirty-four, and of that number he stated that a very considerable number were to supply horses that died from the epizootic.

Mr. HENKLE. I do not want to interrupt you, but I think you misremember his testimony. I think he made the number in one way or another two hundred and one.

Mr. BLISS. I have been unable to find any such proof. You will have the pleasure of following me and you can then state it.

Mr. HENKLE. I only wanted to call it to your attention.

Mr. BLISS. But in reference to that there is no proof anywhere that there ever were one hundred and fifty men used. There was never any pretense of that. You will not say that yourself. Mr. Ketchum swore, and swore positively on re-examination, after these gentlemen had been chuckling over the way in which he swore—and bear in mind that Mr. Ketchum was the superintendent of Mr. Miner, and this route was the only one that the parties in this indictment ran themselves, and that they did not sublet to somebody else—Mr. Ketchum swore absolutely, on page 1289, when Mr. Miner's oath was made, and when he swore there were only thirteen animals necessary, that they had fifty head.

Mr. HENKLE. They ran the Dalles and Baker City route also.

Mr. BLISS. Mr. Powers was the subcontractor on that route.

Now, gentlemen, based upon these oaths I have amused myself by going into some calculations to see to what results they would lead, and I think you will find at least some of them interesting. On the original schedule the speed was three and sixty one-hundredths miles an hour. On the expedited schedule it was four and sixty one-hundredths miles an hour. On the original schedule, taking it in each case by the oaths, it required one horse to travel twenty-three miles in each day. On the expedited schedule one horse would have to travel only two miles a day. If they had driven double teams, then the horses would have had to travel, on the original schedule, forty-six miles a day, and on the other four miles a day. The increase of speed from three and sixty one-hundredths to four and sixty-six one-hundredths per hour diminished the capacity of a horse by 450 per cent. On that route the trip cost \$14,100, and the expedition cost \$55,900.

The COURT. I do not understand that. You say it diminished the capacity of the horses?

Mr. BLISS. Yes, sir; in their statement in the oath they say it will take so many horses to make the proposed schedule. If you take that number of horses it makes each horse travel in double harness only three and forty-six one-hundredths miles a day. If they drove double teams that was all any horse on that route had to travel. According to the same oath, before expedition, driving double teams, the horses would have to travel thirty-nine and ninety-four one-hundredths miles a day.

The COURT. I cannot understand what you say about diminishing it 400 per cent. I can understand how any figure may be increased 400 per cent., but I cannot understand how it can be diminished more than 100.

Mr. BLISS. Perhaps that was not a correct statement.

The COURT. When a figure is decreased a hundred per cent. it is extinguished.

Mr. BLISS. On the oath at the then existing speed it required every

double team of horses on that route to travel thirty-nine and thirty-four one-hundredths miles a day, accepting their statement as true.

The COURT. That was too small a number.

Mr. BLISS. Then the number that would be required was stated too large. On that number a double team of horses would be required to travel three and forty-six one-hundredths miles a day. I mention these figures as showing in the nature of the case that the statements in the oaths were false, and that they were before Mr. Brady, and that if he had applied a little arithmetic to them he would have seen, from the nature of the case, that they were and must be false.

The COURT. I have not heard you explain, and I do not know whether it is necessary to explain to the jury why it is that the parties applying for increase of expedition were interested in representing that the present service required a smaller number than the actual number, and that the proposed service would require a larger number than the actual number.

Mr. MERRICK. Your honor will see in a moment if you will just look at it.

The COURT. I understand it, but I do not know whether it has been explained to the jury or not.

Mr. BLISS. If there is any question on that subject, the jury will perceive very clearly that if they say it takes ten men and horses to perform the existing schedule, and if they get \$1,000 pay, and it will require thirty men and horses to perform a schedule in half the time, that then the basis of the rule of three is this: As ten, the number of men and horses on the present schedule is to the amount of present pay, so will the additional number of horses upon the reduced schedule be to the pay that should be allowed.

Mr. MERRICK. Give them the sum in figures.

The COURT. I suppose it is this way: If the present service requires ten, and the increase and expedition requires twenty——

Mr. BLISS. [Interposing.] I am not very good at arithmetic, but I will put it roughly in this way: Suppose it takes ten men and horses for the present schedule, for which they pay \$1,000, and it would take thirty men and horses on the proposed schedule. The result is that as ten is to a thousand so is thirty to three thousand, and it would be \$3,000 on an increased schedule, where it would be \$1,000 on the original schedule.

Mr. MERRICK. Now take five.

Mr. BLISS. Now take five on the present schedule, and the result will be on the increased schedule you would get \$6,000 as the answer; just double the amount. In the same way, if you made the number to be required as large as possible, and the number now used as small as possible, you increase the amount that must be paid on the increased schedule.

The COURT. In other words, the simple rule is this: That it is to the interest of the party making the affidavit to represent that the present service requires the smallest number of men and horses, and that the proposed service requires the largest number of men and horses. The greater the difference between the two the greater the result.

Mr. MERRICK. Certainly.

Mr. BLISS. I ought perhaps to have stated that. As I remember my opening address to the jury I did not restate it. Doubtless it is putting too great a strain upon the jury to expect them to remember it.

The COURT. The jurymen may remember it, but I had forgotten it.

The FOREMAN. [Mr. Dickson.] While you are on the subject of arith-

metic let me ask you how many hours you allow in your calculation there.

Mr. BLISS. It is not a question of hours. The hours do not come in at all. It is merely, under the law, a question of how many men and horses are necessary on the existing schedule, and how many men and horses will be required on the proposed schedule. The three elements are the men and horses on the existing schedule, the men and horses on the proposed schedule, and the existing pay. Taking those three elements you get from them by the rule of three what the pay is to be on the proposed schedule.

Now, on the route from Pueblo to Rosita the original schedule required the horses to travel three and twenty-six one-hundredths miles an hour.

The COURT. Before you leave that point just let me say this: If the present service, for example, required three men and three horses, and the proposed service required six men and six horses, the six men and six horses would be double the number required previously. Then, if the order for expedition was allowed, the previous compensation would be simply double. But if the oath represented that the present service required one man and one horse, that would be two, and the proposed service required, as I said, six men and six horses, then instead of doubling the compensation you would multiply it by six. So that a false oath representing the present service as performed by one man and one horse when actually three men and three horses were required would increase the compensation to be allowed instead of double, six times.

Mr. BLISS. Yes, sir.

The COURT. So that the man who makes the oath is interested in diminishing to the lowest point possible the present requirement, and increasing to the largest point possible the proposed requirement so as to make the difference as wide as possible.

Mr. BLISS. And to show you that they were influenced by their interests, and that they furnished Mr. Brady the means of seeing they were influenced by their interest upon the very face of their oaths, I am directing your attention to these calculations. On the route from Pueblo to Rosita, by the original schedule the speed was three and twenty-six one-hundredths miles an hour. On the expedited schedule it was four and nine one-hundredths miles an hour; on the original schedule, every horse, according to the affidavit, would have to travel sixteen and one-third miles a day. On the expedited schedule, according to the affidavit, every horse would have to travel five and four-ninths miles a day. On the route from Silverton to Parrott City, on the original schedule every horse would have to travel thirteen miles a day. On the expedited schedule the horse would only travel four and one-third miles a day. On the route from Mineral Park to Pioche, on the original schedule every horse would have to travel six and sixty-four one-hundredths miles a day; on the expedited schedule six and twenty one-hundredths miles a day. On the Toquerville and Adairville route every horse would have to travel, if the oath was true, forty miles a day on the original schedule. On the expedited schedule the horse must travel thirteen and a third miles a day only. On the original schedule the rate was two miles an hour, and every horse must travel every hour of the twenty-four hours on the original schedule to get the mail over the route; and if as the affidavit in that route looked for seven trips a week, and they had been put on, each man would have had to travel eighty miles a day and each man would have had to travel forty hours in every twenty-four

hours. From Eugene City to Bridge Creek on the original schedule, according to the affidavit, each horse had to travel nineteen and seven one-hundredths miles a day, and according to the expedited time he would have to travel only five and nine one-hundredths miles a day. On The Dalles and Baker City route, allowing for the fact that they laid over four nights, as appeared beyond dispute, and therefore traveled sixty hours, the schedule was changed from sixty hours of intermittent travel. That is to say, sixty hours of day travel to seventy-two hours of continuous travel. By that change the capacity of a horse to travel was reduced from thirty-one and forty-three one-hundredths miles a day to four and seventy-six one-hundredths miles a day. In the Canyon City and Camp McDermitt route, on the affidavit for the original schedule, each horse would have to travel eight and sixty-eight one hundredths miles a day. You will remember that I said in going over it that on that route the statement which was made in the oath as to the number on the original schedule was substantially correct. The original schedule required each horse to go eight and sixty-eight one hundredths miles a day. The expedited schedule required him to go only three and fifteen one-hundredths miles a day. On that route to expedite the schedule from one and eighty-seven one-hundredths miles an hour, a little less than two miles an hour, to two and a half miles an hour, there was paid \$29,950.66. For the difference between a little less than two miles an hour and two and a half miles an hour there was paid \$29,950.66. On the Julian and Colton route, taking the oath as correct on the original schedule, each horse had to travel twenty and six one-hundredths miles a day. On the expedited schedule he would have to travel only five and seventy-two one-hundredths miles a day. On the Redding and Alturas route, the expedition cost \$5,347. The amount paid for expedition upon that route would have given on the original schedule four additional trips, and would have left a balance saved to the Government of \$594. That is true of several routes. On the Redding and Alturas route, taking the oath as correct on the original schedule, a horse had to travel twelve and eight one-hundredths miles a day. On the expedited schedule he had to travel five and seven one-hundredths miles a day. On the Saint Charles and Greenhorn route, on the original schedule, a horse had to travel twenty-seven and forty-three one-hundredths miles a day. You will remember, in the examination of witnesses, the other side threw considerable ridicule on the idea that a horse could travel thirty miles a day; now, on the original schedule, according to their oath, a horse had to travel twenty-seven and forty-three one-hundredths miles a day. On the expedited schedule he would have to travel six and eighty-five one-hundredths miles a day.

On that route the amount paid for expedition would have paid for four additional trips and left \$876 in the Treasury.

On the Trinidad and Madison route a horse, on the original schedule, judging by the schedule, would have traveled fourteen and fifty-two one-hundredths of miles a day, and on the expedition schedule five and three-tenths miles a day. The sum paid for expedition on that route would have added four trips and left \$715.05 in the Treasury.

On the Ojo Caliente route, on the original schedule, a horse, would have traveled nine and ninety-sixth one-hundredths miles, and on the expedited schedule he would have traveled only three and fifty-three one hundredths miles a day. Mr. S. W. Dorsey, on that route, tells us, in a letter to Joseph, that on all routes of that kind they ought to make five miles an hour, and that on many of the routes they are making seven miles an hour. If that is true, then on the expedited schedule every

horse was to be used only three-fifths of an hour in the course of the twenty-four.

On the Rawlins to White River route, on the original schedule, a horse would have to travel, according to the oath, twelve and eighty-six one-hundredths miles a day, and on the expedited schedule four and eighty-two one-hundredths miles a day.

Now, gentlemen, I have not gone over the other routes to make the figures, but I have gone over sufficient of them to show to you that it is perfectly clear that the oaths were not and could not be correct. It did not need us to put these witnesses on the stand to testify how many horses were actually used on the original schedule, nor how many horses were used on the increased schedule. You would get at it with considerable accuracy by just applying a little test of arithmetic to it in the way that is done. At any rate, whether you would get at it accurately, anybody would get at it sufficiently to see that the oaths were false. Then in addition to that there is the fact that the oaths were all altered, that they were double and inconsistent oaths, that all these things existed, and that all of these things were staring Mr. Brady directly in the face. He could not look at one of these oaths without seeing that they were altered; he could not himself make or have had made a calculation as to testing these oaths without seeing that they were false and intended to be false, yet Mr. Brady acted upon the statements of these oaths, accepted them as the conclusive basis, so far as the evidence goes, without any inquiry from anybody else, and upon those made the orders which took, I do not remember how much of the four hundred and odd thousand dollars a year going out for expedition, but certainly more than half of that which is covered by his increased orders.

Now, what pretense was there for doing all this thing? Why, they tell you that it was called for by petitions and letters, and that therefore Mr. Brady, having before him petitions and letters, was perfectly justified in making these orders, and even if the result had been great extravagance, great expenditure of money without an adequate return, still the proceeding is all right; that Mr. Brady is not subject to any censure, and that these contractors who were concerned in getting these orders are not subject to any criticism.

Now, with reference to this business of petitions, I submit to you that the proper rule is this. We all know how easily petitions are signed and how easily petitions are got up. Everybody understands that, as a matter of course. It is, I do not pretend to deny, justifiable for a contractor desiring to have an increase of service, or desiring to have expedition, to get petitions, to get them signed, and send them to the department. But I submit that it is not admissible for a contractor doing that to accompany it with any form of deceit, or anything attempting to show that what is asked is the voluntary and unsought request of the people—seeking to conceal the fact, I ought to say, that what pretends to be the voluntary and unsought request of the people of the locality is, in point of fact, the purchased, sought for, and manufactured opinion obtained by the contractor. In other words, it is not permissible for a contractor to seek to get petitions and letters; to direct that petitions be drawn, and that no two be the same in handwriting; that petitions be no two expressed in the same language, and to direct that they shall reach the department in a different way, so that they shall not appear in any sense as his work. I submit that when a contractor goes to that extent he goes beyond the line which is fairly admissible, and subjects himself to criticism.

Now, take for instance, this condition of things. Mr. Wilcox, it ap-

pears, was employed by Dorsey to get up certain petitions and certain letters on the route from Eugene City to Bridge Creek, and these were written and sent to Mr. Stephen W. Dorsey, and Mr. Stephen W. Dorsey, in the most innocent manner, writes:

Hon. THOS. J. BRADY,
Second Asst. P. M. General:

SIR: I have the honor to transmit herewith letters addressed to me in relation to an increase of mail service on the route from Eugene City to Bridge Creek, Oregon, which please place on file in your department, and to request your early consideration of the same.

Very respectfully,

S. W. DORSEY.

There are series of that sort of letters. Moreover, without dwelling upon that, I submit that petitions are to be regarded by the Second Assistant Postmaster-General as expressing the wishes of the people who would like, undoubtedly, the most of them, an hourly mail.

The statement of the wishes of the people in the locality are entitled to the respectful consideration of the Second Assistant Postmaster-General, in connection with the needs of the whole country, but are not to be accepted as necessarily conclusive.

Now, as to this question of getting up these petitions, the evidence is full of the fact that these contractors got them up, and that they accompanied them more or less with deceit as to the way in which they were got up.

Again, gentlemen, as to route 35051. That is the route from Bis, marck to Tongue River, on which Mr. Rerdell, one of these defendants-proposed to Mr. Pennell, and it is undenied, that when with his construction party he got one hundred and fifty miles out he should get up a petition signed by his party pretending that forty or fifty miles north of the route there was a settlement that needed mail service, and that they should have that petition forwarded to get that mail service over that supposititious forty or fifty miles, and that they were to have one of Mr. Pennell's construction party appointed postmaster at the supposititious place. That was Mr. Rerdell's request to Pennell. It was not done, but it shows what these parties were concerned in doing, and what they were ready to do, and we do not know how much of it may have been done upon some of these routes, because really it has been impossible to go over all these questions.

We find on route 38134, Pueblo to Rosita, that Miner writes Tuttle about getting up petitions, and cautions him to have the petitions for expedition separate from those for increase.

On the route from Trinidad to Madison Miner transmits the petitions.

On the route from Rawlins to White River Rerdell writes to get up petitions, to have them here before the 1st of March, a new administration coming in on the 4th of March, and saying that, "If I can get the petitions I can now get seven trips a week." Petitions were got up, they did get here; there was an order for seven trips a week promptly made. The petitions did not get here before the new President came in. They did get here before Brady went out. On the same route prior to the time for trips and expedition Rerdell went out there and wrote the petitions.

On route 41119, from Toquerville to Adairville, Peck writes Johnson—I say Peck because it is signed Peck—to get up strong petitions for a reduction to forty-eight hours and for an increase of service, and says, "Don't use the same language in your different petitions;" and J. W. Dorsey writes that he has forwarded the petitions from some

place west, where he was, to the contractors here, but he does not believe they will present them until Johnson makes a desired modification in his contract.

On route 38114 Mr. S. W. Dorsey writes apparently in considerable alarm:

DEAR SIR: The department talks some about discontinuing the mail route from Pagosa Springs to Parrott City, and I write this to ask you to send *every protest within your power* by petition and letter against any such proposition. Do this forthwith.

Also go to Santa Fé *immediately*—

The word *immediately* is italicized—

and get letters, not petitions, to the Postmaster-General, urging that this route from Ojo Caliente to Parrott City be *made a daily line with a fast schedule*. Obtain these letters from all the bankers, all the merchants, the governor, secretary of state, surveyor general, U. S. attorney, judges of the court, and especially of the military officers. In addition to the letters, get the same persons to sign petitions. Send me at least 6 or 8 petitions. I have written to General Atkinson, Col. Barnes, Mr. Ritch, and Mr. Wallingford, who you will find in Gen. Atkinson's office. I have also written to General Hatch and Captain Rucker. Get up a petition in Taos, San Juan, Plaza Alcalde, etc. Please go to Santa Fé *immediately* on the receipt of this, as I wish to have the increase made before I leave Washington. Write to your Delegate also. Send all papers to me direct that are not sent to the Postmaster-General. I leave for Washington to-day. I have taken this route myself on account of Peck's illness.

How comes in this matter of division, then?

I beg to apologize for the writing of the letter.

The letter is apparently in a dictated hand, but signed by Dorsey. This part is in his own handwriting.

I beg to apologize for the writing of letter. I had a great deal to do to-day, and got this short hand to help, but he makes a sorry mess of it

Do not have any two petitions written by the same person.

You will notice there, gentlemen, that he says:

I have written to General Atkinson, Col. Barnes, Mr. Ritch, and Mr. Wallingford, who you will find in General Atkinson's office. Have also written to General Hatch and Captain Rucker.

These parties promptly responded. You will find on page 823 a letter from Atkinson, on page 817 one from Ritch, on 817 one from Hatch, and on 813 one from Barnes. And let me say here, by the way, that Mr. Barnes, who was the United States district attorney for the district of New Mexico, was the all-embracing and all-pervading friend of S. W. Dorsey. You will find him recommending the increase from Tres Alamos to Clifton. You will find him recommending the increase upon some half dozen other routes, so far as I can bear in mind, upon no one of which was his residence within a hundred miles, save the Ojo Caliente route, and as to none of them is there any possibility that I can perceive of benefit to be gained to the locality in which he was save on that particular route.

On The Dalles to Baker City route, Schutz wrote the petitions, at Williamson's request; that Williamson, who sat here in court all the time, putting up questions to be asked to our witnesses as to whether they did not do so and so and did not do so and so, and insinuating all of that, and then disappearing from the court just at the time when it was possible for him to go upon the stand and contradict them if there had been anything to it.

On route 44160, from Canyon City to Fort McDermott, Brown got up the petitions, got his brother at work to get them up, got them up under the instruction of these contractors, wrote them that he had done his best, that there were not very many people down on his end of the route,

and he hoped they would not find any fault with him because they had not got more names. He did not understand that on that route they did not need him to get any names. He did not understand that it was possible to go to work and pick up three or four loose pages bearing the alleged names of people living out in Utah, and that they could paste those on to a petition, and that they could send them here, and that they could take that identical petition so pasted on with the Utah names, and that they could carry that to two United States Senators who would certify that they had made a careful investigation, and they recommend that that increase be granted. That indorsement is upon that petition. If Brown had known the contractor's patent Washington way of dealing with these things, he would have got along much easier and with much less trouble than he did.

Now, about these petitions again. Great reliance is placed upon the Congressmen and Senators. The court said once in the course of the trial that when a Congressman left the Capitol he was just like any other citizen. He was not employed to get expedition or increase; he was not elected by the people for any such purpose, though they largely, I apprehend, did it with the idea that it might help them to be re-elected; but that they were just like any other people, entitled to the consideration to which a man presumptively truthful would be entitled, who is presumptively acquainted with the facts in the case, but entitled to no other consideration.

And now what do we find? We had in the opening statement an immense number of Members and Senators who were to be brought on the witness stand here. Well, what do we find? We had Page and Berry, of California; we had Maxey, of Texas; we had Valentine, of Nebraska; and we had Maginnis, of Montana, and I think those are all we had, and what was the result of it all? We had Mitchell; do not forget Mitchell. He had been a Senator and became an ex, and had already entered upon that canvass for re-election which is still going on.

Mr. HENKLE. And Secretary Teller also.

Mr. BLISS. And we had Mr. Teller. He has ceased to be a Senator; I was going to say we had him.

Now, what was the result of it all? Mr. Mitchell said distinctly that he had a general knowledge of one of those routes, but he never had been there; he did not know what mail went over it; he did not know what post-offices there were on it; he did not know what the additional cost would be of what he requested, and he did not care what the additional cost would be; he was doing what he believed his constituents would desire, and he therefore recommended that these things should be done. He had no knowledge of the offices; he did not know that the through mail on the Baker City route never went over it, but went around by Pendleton. He did not know any of those methods which were absolutely essential to forming a proper judgment as to the propriety of an increase. Mr. Valentine, with a magnificent disregard of law, said on the stand he did not care anything about the revenues or productiveness of the office; that it hadn't anything to do with it, though the statute says it has. He did not remember advising any increase of speed on the Kearney and Kent route, and he did not know anything about the forgery of the thirteen hours to which I called your attention. Mr. Teller said that he never thought of the cost, did not care anything about the cost; and Mr. Teller lugged in the Indians. It was very important to have the Indians in, and when I asked him about the routes which he had himself recommended increase upon, there was not but one of them that he was

able to suggest that an Indian had been within sight of since the service commenced, and there was not but one of them on the line of which or near which there had been any increase that there had been any Indian trouble. The nearest was, I think, Silverton and Parrott City. Mr. Maxey was altogether too general in his knowledge to be allowed to give any testimony, and the court ruled him out. Mr. Page said that he did not know anything about the route that he went on, except that Mr. Berry asked him to go, and he went; that he never had any information about it, except what Mr. Berry then told him; that he did not know anything about the time; that he did not know that the thing was being done at the same speed which they sought for, and that this was simply a device to get money out of the Treasury and without any return for it; he did not know about the cost; he did not know anything about it, except what Mr. Berry told him, and Berry when he got on the stand did not know anything about it, except that these people up there wanted it.

Now that is the whole catalogue of Congressmen so far as they have appeared on the stand in this case, and I submit to you that it shows better than anything else the absurdity of the theory that the Postmaster-General has a right to rely upon and to repose with implicit confidence upon the statements of Congressmen and Senators, and has a right to surrender to them the discretion and the judgment which the law has imposed upon him. He cannot protect himself because people petition. We all know that everybody petitions; he cannot protect himself because a Congressman or Senator comes to him and, without questioning them at all for their knowledge of the elements which enter into the decision of the question, accept their statement, and upon that make orders. These are the only men who have been on the stand here, gentlemen, at their request.

We put Senator Saunders on the stand. I do not know that there is any impropriety in my referring to the fact that there were other people in court called by them who did not go upon the stand.

Now, as to these petitions. Assuming that these petitions are the basis upon which Brady relied, bear in mind, gentlemen, that Walsh told you that Brady told him that the petitions were simply the cover, were simply the cushions that he wanted to fall back upon if he was attacked, that the petitions did not amount to anything, and that he, Walsh, knew there were petitions upon some routes and Brady had not paid any attention to them because the little 20 per cent. had not been arranged for. Brady told Walsh that the petitions were simply a cover. Now, let us see how poor a cover they were to any man who ever expected there would be an examination or an investigation.

On that Kearney and Kent route, No. 34135, there is not a petition or a paper which suggests expedition to thirteen hours except one petition, in which there is an interlineation. There is one petition in which there is baldly added at the end of the paragraph the words "thirteen hours" in a different handwriting; and that, gentlemen, you will bear in mind. Remember how the little accident happened by which it had to be in a different handwriting. Awkwardly out there in the West they upset an inkstand on the original petition which came there in Miner's handwriting, and therefore Mr. Hale or Mr. Nightengale rewrote the petition, and just as the original. You see it was nicely arranged, and there is evidence in other petitions of the same thing. They managed to end a paragraph in the middle of a line and to leave it where something could be added, and I do not think I am uncharitable in saying that if that original petition going West in Miner's hand-

writing had come back here with these petitions, we never should have been able to detect the fact that the words "schedule thirteen hours" had been added, because they would have been added in the same handwriting as the original schedule. But there it is. [Holding up a paper.] A plain, barefaced addition, "thirteen hours," in an entirely different handwriting. while there are letters and petitions here urging an increase of trips on this route, which is what this petition asked for when it was signed, there is not a letter, there is not a petition, there is nothing there asking a decrease of speed, asking for expedition, except that one that is altered.

The COURT. Decrease of time, you men.

Mr. BLISS. Decrease of time. There is not one, except that one altered petition, and you do not find anywhere, gentlemen, the words "thirteen hours," except in that altered petition, until you come down to John M. Peck's affidavit, which is made on the 1st day of February, 1879, in which he uses the words "thirteen hours." Now, how came he, on the 1st of February, 1879, to have it in his mind that it was desirable to have a thirteen-hour schedule? There was no petition, no paper, nothing of any kind whatever on file, except this petition sent from Kearney to Miner by Mr. Hale or Mr. Nightingale, I have forgotten which. Senator Saunders thought that he probably got it direct from Kearney, but when his attention was called to the fact that though his indorsement is dated on the 6th of February, the petition never got to the department until the 30th of April, he said he did not believe he would have kept the petition any such length of time. Hale or Nightingale, I do not remember which, swore that he mailed it to Miner on the 6th of February, five days after Peck had sworn to the oath of thirteen hours. Mr. Saunders makes his indorsement upon that; he says that he did not notice the words "thirteen hours" there, and he thinks it is so plain that if they had been there he should have noticed, and yet it may have been there without his noticing it. But, gentlemen, the great fact is this, that when that petition was signed, when that petition was forwarded, it did not have the words "thirteen hours" in it. That is the uncontradicted oath of Mr. Nightingale on the stand, who wrote the petition, and he says he sent it to Peck by mail. He says the words "thirteen hours" were not in it. French says the same thing. They all agree that it was not in it. Now, who put those words "thirteen hours" there? It went nominally to Peck. There is no evidence that Peck ever was in Washington, any more than there is any evidence, I may say in passing, that Peck is dead. It has been assumed, in the eloquent language of counsel on the other side, that Peck is dead. There is not a particle of evidence of that in the case.

Mr. HENKLE. Brother Ker assumed that he was in heaven.

Mr. BLISS. Brother Ker assumed that he was in heaven. Probably in view of the tight place in which these defendants are he would get as far away from them as possible.

This petition, without the words "thirteen hours" in it, went nominally to Peck, the letter which transmitted it as Peck's being written by Miner—the letter which sent it West. It came back to Peck here, and did not have the words "thirteen hours" in it. It went to Saunders, and on the 6th of February he indorsed it. He cannot say whether it had the words "thirteen hours" in it then or not, but he thinks he would have noticed it if it had. He does not believe that he sent it direct to the department, for he would not have kept it from the 6th of February until the 30th of April, or whatever the day was. He undoubtedly indorsed it, either brought to him by somebody or sent to

him, and he returned it to these parties, and it went to the Post-Office Department, and upon that petition Brady acted with no earthly thing suggesting thirteen hours, except Peck's oath and that forged petition, and directed \$2,200 a year to be taken out of the Treasury for it.

They were not seeking expedition. They were seeking an increase of trips, and the people up there had no desire for expedition, and did not know anything about it. The amount paid for expedition on that route would have given them two additional trips, which would have carried them to five trips a week on that route.

Now we come to Mineral Park and Pioche route. On this route we find this condition of things. There is a petition which you have seen, and it is so remarkable that you undoubtedly remember it :

We, the undersigned, citizens furnished mail by the U. S. mail, on route No. 40104, from Pioche, Nevada, to Mineral Park, in Arizona Territory, wish to have more frequent mails, and would respectfully request that the service on this route be increased to three trips on a schedule of sixty hours instead of eighty-four hours.

Now that petition was made, and there were no alterations or anything of that sort. It is stated that they are citizens furnished mail by the United States mail on that route. Every petitioner who can be identified on that route lives down at Signal, one hundred miles south of the southerly termination of this route. The postmaster says that he never saw a letter for Signal going over that route, and these mail bills for thirty-nine days, which I presented to you, do not contain an indication of a letter going to Signal. Therefore on the face of it the petition is a petition nicely got up, not perhaps to state a lie, but wisely calculated to deceive:

Citizens furnished mail by the United States mail.

In point of fact they were not furnished mail by the United States mail. Look at that row of signatures. [Exhibiting paper to jury.] Have you any doubt that that row of signatures, some ten or twelve were all written by one man? Not one of those is identified as a man living at Signal, and it is true that the names here are written clearly by the same man, and not only that, but on the same day on which this petition is filed in the Post-Office Department there appears another petition filed on the route nominally from Ehrenberg to Mineral Park, which was the route going south from Mineral Park to Pioche, while Mineral Park to Pioche went north, and that is:

We, the undersigned, citizens furnished mail by the U. S. mail on route 40105, from Ehrenberg to Mineral Park, in Arizona Territory, would recommend and request that said service be expedited so as to have the running time from Ehrenberg to Mineral Park only forty-eight hours in lieu of sixty hours, the present running time.

That is a petition for expedition. The other is a petition for increase and expedition on the Mineral Park route. Although filed on the 28th of December, 1878, both are signed by the same identical names, written in the same identical handwriting, and most of them in the same identical order. That same little collection of names there and there. [Indicating on papers.] I will hand them to you directly, gentlemen, but I have something further to which to call your attention about it.

There are these two petitions so filed in the Department. But, taking this Mineral Park and Pioche route 40104, what do we find? We find in the first place that the undersigned citizens furnished mail by the United States mail on route 4010—and then when there comes the word “four,” which designates the route, the “four” is written over a transparent erasure, and then when you come to the word Pioche, which designates one of the termini of the route, that is also written over an erasure. So that

that petition as originally got up applied to some route, 4010—and something, the commencement of which was not at Pioche. And on this line [indicating] there appears N-e-v., Nevada. That is written over an erasure. Whatever there was there apparently the word spread over it, because there was a word with a long leg projecting down below the line there, which you can see on the erasure. Therefore that petition was got up originally for some other route than this Pioche route. And then having got it for some other purpose than that, you find that when you come down to the words “to be increased to three trips on a schedule of sixty hours instead of eighty-four hours,” they are all of them written over erasures. The operative parts of the petition are all written over erasures; the thing which they ask shall be done is all over an erasure.

Mr. HENKLE. What are those petitions numbered?

Mr. BLISS. Eleven and 12 P. Now, that is the petition on route 40104.

Now, the other petition signed by the identical petitioners is here, and you find that that represents that “the undersigned citizens furnished by the United States mail on route No. 4010—” just the same as before, and when it gets to the last figure which would have designated the route, the figure five is written over an erasure, just as four is written over an erasure. Then you go along to the designation of the beginning of the route which represents from Ehrenberg to Mineral Park, and you will find that the word Ehrenberg designating the beginning of the route is written over an erasure. You then go along down to the word which, comes in so as to have the running time from Ehrenberg to Mineral Park, and the word Ehrenberg, there is again written over an erasure. And then “to have the running time only forty-eight hours in lieu of sixty hours, the present time,” the word forty and the word eight are written over erasures. The word sixty has this peculiarity. There was very obviously written in there eighty. They then undertook to alter the eighty to sixty, by writing an “S,” and so on. They could not make that work, and therefore the word sixty was boldly written above that running time.

Now there are the two petitions, and upon these petitions, both filed in the department upon the same day, Mr. Brady made orders for just what those petitions asked on each of the two routes, which were altered and forged so as to represent on the Mineral Park and Pioche route, which took from the Treasury \$19,318 a year upon that forged petition, and upon one or two other papers to which I shall call your attention further on. The amount which was ordered paid upon the Ehrenberg and Mineral Park route is, I think, by accident not in evidence in this case and therefore, under the ruling of the court that we could not go into other routes, I have no right to refer to it. The evidence in one is that the words written over the erasure are in Miner's handwriting and in the other in Rerdell's handwriting. [Submitting petitions to the jury.] That is all I have to say upon that route.

Mr. WILSON. I suggest that as Mr. Bliss is going to take up another route that we take a recess.

Mr. BLISS. I shall take but very few moments on the other route.

The COURT. Proceed.

Mr. BLISS. Route 44160, from Canyon City to Camp McDermitt. That is the route on which the petition appeared with the Utah names in it. Here is a petition in a handwriting which I think is identified, and if not identified I think you will readily recognize it. [Exhibiting paper 19 Q.] This is identified as in Mr. Miner's handwriting. There [indicating], gentlemen, is a sheet of the petition, you will notice, that is pasted on. It is

not a continuous sheet. We exhibited that to the parties from along the route. They said that they knew some of the names here [indicating], but they did not know any of the names on these other sheets. Glancing my eye over the sheet I happened to see some names which I recognized as identical with names which had appeared upon the Utah petition, and upon calling the attention of the two Messrs. Johnson, from Utah, to it, they proceeded to examine it, and they stated that all the names on the latter portion of this petition were the names of persons living in Utah, one of them being Mr. Nephi Johnson's own son or nephew, all of them living away down there, some not less than a thousand miles further west and not less than a thousand miles north of the route, and I think all of these are deeply interested in the expedition of the service between Canyon City and Camp McDermitt up there, and certify that a reduction of time is very essential, as also is daily service, and that petition, gentlemen, bears this indorsement, written in the Post-Office Department, I think by Turner.

Petition for increase and so forth. See indorsement of Hon. J. H. Slater, L. F. Grover, and J. W. Whiteaker inside.

And here are Whiteaker and Grover and Slater inside. They did not get very far inside, and you will see from this the value of indorsements of Congressmen and Senators:

Having examined the foregoing petition and list of names I find it correct in the statements, except that it affects the middle and southeastern section of the State; the north and northeastern section being supplied from Kelton by way of Boise City to The Dalles. The section, however, supplied by route 44160 is not less important to the section through which it passes than the Kelton route was to the section through which it passes only a few years since. Therefore, I recommend the granting of the prayer of this petition.

J. H. SLATER.

It was not a very strong indorsement. It was making a little draft upon Slater to get him to indorse it any way; but he made a mild indorsement, and then Grover and Whiteaker concur, and they certify that they have examined this list of names, and it is a list of Utah names, and that shows the value of petitions.

There are, gentlemen, upon that route some other petitions. There is there a petition, as you will remember, containing a name forged. [Exhibiting a paper.] There it is; also in Miner's handwriting, gentlemen; a petition upon that route. And mind you, I say Miner's handwriting. Brown shows that the petitions got up in this case came from Miner and went back to Miner. Here is that petition in that route. It bears the pretended name E. Hall, postmaster, James Robinson, James F. Clearer, Max. Metscham, and W. C. Alred. Those are all the names on the original sheet, this sheet [indicating] being pasted on. Of those names, the first one, that of Hall, the postmaster, who was here on the stand, as he told you, he did not sign, and the evidence is that all six of those names that are on that paper—certainly three of them, and I think six—were written by John R. Miner, and it stands uncontradicted that they were written by John R. Miner.

Mr. HENKLE. What is the number of this exhibit?

Mr. BLISS. This exhibit is 20 Q. These are petitions, gentlemen, presented to Brady and upon which Brady acted. Another one of the papers has ninety-six hours in the schedule. I will not stop to expose it to you, but one of these papers has ninety-six hours for the schedule time boldly inserted right in the midst of the petition and in an entirely different hand. Now these are the petitions. I am not going to conceal from you, gentlemen, that there were other petitions upon

this route. As I told you, Brown did his work. Brown got all the people he could down at his end of the route, and he employed his brother, and so forth, and they went to work and got the petitions, and therefore there were petitions there asking just what was granted. But all these things were before Mr. Brady when he made his order upon that route, and I say to you that it seemed to me, and I think it will seem to you, that these threw a lurid light upon the absurdity of these petitions. They show that Brady at least overstated the case to Walsh when he said they were intended as a cover, because they show that they do not even constitute a cover which would prevent anybody seeking to protect himself under them from an indictment for indecent exposure. I have done with that route.

The COURT. We will take a recess.

At this point (12 o'clock and 35 minutes) the court took its usual recess.

AFTER RECESS.

Mr. BLISS. Recurring again to the petitions, gentlemen of the jury, I will briefly refer to those upon some of the other routes, without stopping to submit them to your examination. On route 44155, from The Dalles to Baker City, I said the words "seventy-two hours" were boldly interlined in a petition. That will be found on page 677. On route 38135, from Pueblo to Greenhorn, in one petition the words "on a faster schedule" are inserted, in another "in quicker time," and in another "and faster time," and the evidence is as to some of those insertions that they are in Rerdell's handwriting. On the Toquerville and Adairville route, Johnson, who wrote the petitions, swore that the word seven was inserted in the place of "six", as he wrote it. On the Saint Charles and Greenhorn route, Sears swore that the words "quicker time" were not in when he wrote the petition. That, gentlemen, is what the petitions amount to, and what the petitions on their face showed Mr. Brady when he sought to use them as a cushion to fall back upon or a covering to protect him. These petitions and these Congressmen are the bulwarks of his defense, apparently very light bulwarks, as it seems to me. When he did not desire to pay any attention to a Congressman or a Senator he swept him aside as if he was a mere common piece of clay. Now they recognized Senator Hill, of Colorado, when there was a petition to increase and expedite the Silverton and Parrott City route. He was then an important factor in the case. But by and by it turned out that the expedition that was ordered on that route was impossible to be made, and Senator Hill, of Colorado, transmitted a petition which he stated was signed by all of the leading men and all of the business men of Silverton, asking that the time be lengthened in winter, and he recommended it very strongly. No attention whatever was paid to his recommendation, for the simple and obvious reason, that the Government was paying on that route \$14,870, and the work was being done by a contractor for about \$9,000, and if the expedition had been taken off the trouble would have been that the parties in Washington who were doing nothing would have lost the small difference between the two sums that the Government was paying. No attention was paid to Senator Hill's request. There was some desire to account for it, because they say that Senator Hill said in his letter that he would be glad if it could be done; that the contractor had struggled along so to make this impossible time; that

he would be glad if the extension of time could be made without deducting anything from his pay. But the petition of the merchants and business men of Silverton contained nothing of that kind. It asked that the time be extended during the winter months, and Senator Hill backed it up as strongly as a Senator could, and no earthly attention was paid to it. Now, do you believe, gentlemen, that if Senator Hill had been urging in the way he did, backed by the people of Silverton, a diminution of time, which diminution was to put into the pocket of these defendants a large sum of money, that that order would have been promptly made? It was the same way with regard to Raton. The postmaster at Raton asked that it be connected with the railroad at Pulaski, and that request was backed by Senator Teller. They did not do that. They put Raton on an entirely different route and added twenty-three miles. Not only, gentlemen, were these petitions that I have stated thus altered, thus suspicious on their face, thus forged, not only were the members of Congress thus unworthy of being relied upon, inasmuch as they obviously had no accurate idea of the things they were recommending, but even in connection with this same thing we come to these jackets. They were constantly so made up as to misstate or to give a wrong impression. Thus on route 44160, from Canyon City to Fort McDermitt, the officers at Camp Harney in July, 1878, when the service on that route had not been commenced—although the contractors ought to have commenced it—wrote a letter in which they said:

SIR: We respectfully request your polite attention to the following fact, viz: This post-office and this military post and the surrounding country has received no mail, excepting two or three letters and a newspaper or two from the East, the South, or the West, for thirty-six days, and the mail *due* here weekly is a *very large* one. Mail matter on military or governmental, as well as private business, from New York, Washington, and San Francisco, from Army headquarters and military division headquarters, fails entirely to reach us. It is left some place on the route, believed to be left either at Kelton or Winnemucca or McDermitt, as well as we can ascertain. The routes and roads are open; passengers and mail are, as we are informed and believe, carried to the East, South, and West, and passengers *from* those points to here, *but not the mail*. For more than five weeks this state of things has continued. It is true that this post-office is on a route for which no contract at present exists.

They assumed that there was no contract because the contractor was not doing his duty.

So we are told, but reliable men are ready to contract to carry over the route heretofore used from Winnemucca and McDermitt through here to Canyon. What is immediately available for the present purpose is the military express that we have between here and Canyon City, Grant County, Oregon. Between Canyon and Boise, and thence to Kelton and to Winnemucca on the railroad, there are established routes, but our mail does not reach even Canyon City by the Boise or any other route.

We respectfully and earnestly request that you will please present these facts to the proper authorities, and ascertain if our large and important mails cannot be made to reach us, or at least reach Canyon City, Oregon, whence we can get them.

Now, that was a petition or request of these officers in July, 1878. Away down in December they chose to make an order for expedition, and they made up a jacket. I think it was made up by Turner. It recites:

Petitions numerously signed by citizens living on and receiving their mail from this route are presented and recommended by Hon. John H. Mitchell, U. S. S., asking for six additional weekly trips, and expedition of schedule from 130 hours to 96 hours.

Military officers stationed at Camp Harney petition for improved mail facilities.

Now, gentlemen, was that an honest, fair, and decent indorsement to take this petition of the military officers in July, 1878, remonstrating that they did not get their mail on the then existing schedule of time and trips, and on a jacket directly under the indorsement as to the

recommendation of citizens, say the military officers stationed at Camp Harney petition for improved mail facilities? There was not any misstatement in that, probably, and yet I submit to you, gentlemen of the jury, whether the inference would not be, from looking at it, that those officers asked for this increase of trips and increase of expedition and that that was what was sought under it. Brady knew that no service was being performed until November 3 on part of the route, and until January 16 on the rest, because he had had correspondence frequently back and forth about the payments for temporary service, and everything of that sort; and yet this petition, written at a time when no service was being performed, is made to do duty upon this route as recommending increase and expedition. It is upon this route also that we had the forgery of Hall's name to a petition and the Utah petition.

Mr. HENKLE. Allow me to call your attention to another petition in this case.

Mr. BLISS. I am aware of the fact that there is another petition, dated in September, on this subject, undoubtedly. I was going to speak of that. But so far as we can find, that petition was not in that jacket. It may have been. I do not understand it to have been. I will not say it was not, but as I understand it, it was not in that jacket. There were two orders upon that route, and the papers were somewhat mixed up, and the question of what jacket the papers belonged in cannot be absolutely settled.

Now, on route 35051, from Bismarck to Tongue River, the jacket says that General Miles asks for expedition, and we had General Miles trotted out and thrown up in our faces at various times in the progress of the case. Without stopping to detain you, I will say that all letters of General Miles (I think in connection with that route there are two or three) ask simply for trips. On page 1211 is General Miles's letter asking for increase of the mail from three to six times a week, and there is a prior letter somewhere which contains a somewhat similar request, and does not contain any request for expedition, or it comes in afterward. The request of General Miles and the military authorities is, that the mail "be increased to a tri-weekly or a daily mail," and yet this jacket has a statement that General Miles asked for expedition. One of those letters that I referred to was not in the jacket at the time the order was made, and therefore the other one is the only one that could have been referred to, and that is the one asking for a daily mail. It also quotes General Sherman as desiring this service, when General Sherman asks a tri-weekly or a daily mail. Nothing is said about expedition. General Sherman told you on the stand that what the military authorities desired was numerous trips; that the question of speed was not important.

On route 46132, from Julian to Colton, the petition says thirty-six hours, and the jacket reads thirty six hours in its original indorsement, yet when they came to the order under it that is for twenty-six hours. It was not anywhere in the papers suggested that it be twenty-six hours, except that which appears on the oath, asking twenty-six hours, and that "twenty-six" is inserted after there had been originally written thirty-six. It was a case where the people along the route asked for expedition to thirty-six hours. There is not a suggestion of twenty-six hours. Thirty-six hours appears on the jacket with an attempt to alter it to twenty-six hours, as I interpret it; and thirty-six hours appears originally in the oath and the proposal, and those are altered to twenty-six hours, and upon that there is an order made for twenty-six hours which was not asked for by the people, and which the

witness on the stand told you broke up all connections, and gave nothing whatever. They were so confident that it could not be an order for twenty-six hours that they went on for two or three weeks after the order came, and made the expedition in thirty-six hours. They did not believe the Department had gone to work and given them ten hours better time than they had asked for, especially as the reduction benefited nobody but the contractor.

On route 38135, from Pueblo to Greenhorn, the indorsement says, "Senators Teller and Hill recommend increase and expedition." You will find, I think, they did not recommend expedition at all; they recommended simple increase.

Hon H. M. Teller and Hon. M. P. Hill join in recommending the increase and expedition.

The recommendation is really for increase of service.

I respectfully recommend the increase of service herein asked for.

They did not recommend increase and expedition. They emphasize it by expressly using the words "increase of service." That recommendation is signed by Senators Teller and Hill, and will be found on page 519.

On route 40103, from Mineral Park to Pioche, General Frémont, as governor of Arizona, writes a letter asking for two trips and a sixty hour schedule. It is jacketed as a request for three trips, and the order is made for three trips. Mr. Stevens, a Delegate, respectfully recommends the granting of the petition. It is jacketed as earnestly recommending it. On route 38113, from Rawlins to White River, the jacket states that military officers stationed at Meeker and General Sherman recommend the increase, and that it is maintained for military purposes, and yet, gentlemen, that service maintained for military purposes is increased up to seven trips upon petitions not resting upon the military authority at all, but upon a petition upon which there are only two signers, Captain Munson and a lieutenant, the commander of the post, and others having refused to sign it as the witness says. That is the increase that Kerdell wrote he could get if he got the petition here before the new administration came in. The request is from citizens and residents of Rawlins and other points on the mail route, and citizens and residents at and near Bagg's Crossing and Dixon post-office asking for increase to accommodate thereby the important business interests of the towns and country to, from, and through which said route passes, thus allowing answers to important mail matter to be sent by return trip from time to time on said route. That is a request based not upon any military necessity, or anything of that kind, but based upon the business interests, but it is jacketed as maintained chiefly for the military. So a mail service maintained chiefly for the military is increased four trips on account of the business interests of the community. On the same route, at an earlier stage, Mr. Chaffee and Mr. Corlett indorsed a petition for three trips and eighty-four hours, and they are quoted on the jacket as recommending forty-five hours, and forty-five hours is the time named in the order. On the Eugene City and Bridge Creek route the jacket says that all mail matter from Western California, Puget Sound, and Western Oregon would go over it. The evidence is perfectly clear that nothing of that kind did happen, and I should say clearly that nothing of the kind could happen. There is only one other indorsement that I want to call your attention to at the present time, although there are others. Here is a case where the postmistress at The Dalles wrote—

SIR: J. M. Peck, contractor on route 44154, has failed to appear, either in person or otherwise, or called for said mail. I have been unable to make a temporary contract for the service on said route at the old rate of compensation, the present route and schedule calling for service which no one can give at present rates. The mails for that section lie now in this office. I have reported this condition to the postal agent. The Indian war renders service on this line a matter of the utmost importance.

And Mr. Turner indorsed it:

July 15, 1878. 44154. Postmaster reports that contractor has failed to commence the service, and that it is impossible to carry the mail on account of Indian depredations in the country through which the route passes.

Mr. HENKLE. That is not in the indictment.

Mr. BLISS. I am aware it is not in the indictment. Mr. Wilson called Mrs. Wilson back to the stand and he insisted upon going into the business upon that route in connection with Mrs. Wilson's letters about expedition. [To Mr. Wilson.] You need not shake your head. There it is, and there are your own questions recalling her to the stand the next day after she had left it, and opening the whole question of the Lake View route.

Now, gentlemen, I have stated these things which have occurred, these orders, and all that sort of thing. I have stated the petitions and the papers and the oaths, and the matter upon which they are alleged to have been made. How did it happen that Mr. Brady made all these orders upon those papers? Is there any evidence of an understanding and a prearrangement? I say that there is abundant evidence. On route 35051, from Bismarck to Tongue River, Pennell had a conversation with John W. Dorsey early in July, 1878, and Dorsey said there would be an increase of not less than \$25,000; he had a brother in Washington who would help it through; that there would surely be two increases inside of a year, and the second would be to six or seven trips a week, and that the time would be reduced to sixty-five hours. That conversation occurred early in July, 1878. They undertook to make out that it occurred at a later date, after he had seen General Miles at Miles City, and he said distinctly that it did not, and they asked again about Williamson, and everything else, and implied that they were going to contradict him; but they did not dare to undertake to do it. What do we find the fact to be? On the 4th of October, 1878, there was an increase of two trips and an expedition to precisely the time that John W. Dorsey named, sixty-five hours, and there was an increase of \$32,650. He said there would be an increase of at least \$25,000. He wanted Pennell to go into partnership with him, furnish the money, and run that route, and he mentions to him as the reason why he should do it that there would be this increase. Pennell did not know then what he has known since. Pennell did not know what the people of this country did not know then, and have learned since.

Mr. HENKLE. Is that the reason Pennell gave?

Mr. BLISS. He said he did not think there was money enough in it to run that route for \$2,350, relying upon this assurance of this eminent Christian gentlemen, John W. Dorsey, who makes two oaths on the same day entirely inconsistent, and that he had a brother in Washington who would help him do it. Mr. Pennell did not believe that there could be such things done in Washington as it seems were done in Washington. He was told there would be two orders in a year and at least \$25,000 increase. One of them was made on the 24th of October, 1878, within three months afterwards, making an increase of two trips and reducing it to the precise time that Dorsey said it would be brought to and granting the amount, but Mr. Dorsey made a mistake when he said two orders within a year. He did not get the second order until the

2d of August, 1879, this conversation having taken place in July, 1878, but when he got that order it was more than he supposed. That was the route that it was represented that there was no occasion for; that there was no travel over it; that the mail matter could go by any other route, and it was said that they could not perform the service at any such rate; that the Indians would stop them, and all sorts of other difficulties were in the way of it. That was the condition of things down to the end of June, when they found that with the persistence of Mr. Maginnis and these other people in insisting upon the establishment of the route and the necessity of the mail, that Mr. Brady did not dare to say no against the views of his favorite Congressmen. They then changed their base; they then went to work and made their arrangements for increase and expedition, and I submit to you, gentlemen, that in view of the facts to which I called your attention, whether you are not bound to infer that when they found they could not get the route discontinued they then did the next thing, they went into "caboot" with Brady, and they had a clear agreement with him. They were certain of getting increases, and the Christian gentleman let that information drop out in Bismarck. Moreover, you will bear in mind, gentlemen of the jury, that upon this route they were so sure of expedition, they knew so evidently that it would be done, having a route, on which the pay for the entire four years gave them only \$9,400, they went to work and spent \$6,000 in payment of ranches and other expenses in placing the stock and carriers upon the route. They spent two-thirds of the entire amount of the pay for their whole four year's service at the very outset in 1878 in placing ranches, &c., upon the route, independent of the horses that Mr. Miner swore would be required to run the route. They not only did this, but they were so sure of an increase that they built twice as many ranches as they needed on slow time and the single trip, and they stated that they were going to do it so as to have the ranches ready for the decreased time and the increased trips, and they commenced their service by occupying only every other ranch, and when they commenced the increased service and the trips the other branches were occupied.

Again, there are various cases where the first indication of the time to which the schedule was to be reduced is found in the contractor's oath. The petitions do not show the time; they do not ask for a definite time; no other paper on file shows it until the contractor's oath appears in which he names the time, and very frequently that oath precedes in the date of its being taken all the petitions coming into the department. Thus on 34149, from Kearney to Kent, Peck's oath is made February 1, 1879, and specifies thirteen hours. Of the papers on file in that case the earliest reached the department on the 30th of April, 1879. The earliest paper that reached the department was that paper that contained the words thirteen hours inserted in it. Senator Saunders indorsed that petition on the 16th of February, but it did not reach the department until the 30th of April. All the other papers in the case are dated in April and May. But as early as the 1st day of February, Mr. Peck had found out, some how or other, way out in New Mexico, that thirteen hours was to be the schedule time, and he made his oath of the number of men and animals that would be required on thirteen hours.

On route 44140, Eugene City to Bridge Creek, Peck's oath is made the 22d of January, 1879, and refers to a schedule of fifty hours, three times a week. His proposal transmitting the papers refers to a schedule of sixty hours. Now, of the papers on file on the 20th of April, Mr. Mitchell

wrote asking a hundred hours. The petitions dated in April and May speak only of increase of service and of fast time, though some of them say daily. No one of them refers to any question of fifty or sixty hours. Mr. Mitchell's letter, which was the earliest paper, I think, on file, refers to one hundred hours, and yet those being on file in April, Mr. Peck's oath on the 22d of January, 1879, speaks of fifty hours, and fifty hours is the time which, on the 22d of June, 1879, was ordered, and to carry the thing out they put on to the jacket, where Mitchell had himself recommended one hundred hours, that Mitchell personally recommended fifty hours; and it appeared on the stand that Mitchell's letter was written three days before he left Washington to go to Oregon; and they tried in vain to make Mr. Mitchell say that after that time he had had any communication with any one connected with the department. The nearest they came to it, they asked him if he did not remember seeing Turner the day before he went away. However, there was no evidence of it. He said he might have done so; he did not remember anything about it. They have not proved anything of the kind. Mitchell is on record as recommending a hundred hours. There is no evidence that he ever recommended fifty, though the jacket says he personally did it. But whether he did or not, it must have been done after the 23d of June, 1879, when Mitchell's letter recommending the one hundred hours was filed; and yet Peck, on the 22d of January, 1879, found out that fifty hours was to be the time. You will bear in mind that this was not a hazard sort of thing. There was a schedule of one hundred and thirty hours. The reduction to fifty hours was a very large thing, and yet, somehow or other, by some telephone or something else, by some instrument—I presume it was not a telephone, or at any rate Mr. Peck, or whoever made that oath, if it was Peck, will not communicate hereafter by telephone, because we all understand there is no telephone to his dungeon cell—Mr. Peck on the 22d of January, 1879, anticipated there would be fifty hours, and he made an oath of it.

On route 40119, Toquerville to Adairville, Peck made an oath the 22d of January, 1879, in which he asks for seven trips and thirty-three hours. The petitions dated in May were received on the 25th of June. The order is made on the 8th of July. The petitions ask for forty-eight hours. There is not a paper in the lot that asks for anything smaller than forty-eight hours, and yet Mr. Peck's oath and the order concur in asking for thirty-three hours, and Peck's oath is made on the 22d of January. The order is made on the 8th of July, and the petitions come in in May and June.

On route 38156, from Silverton to Parrott City, John W. Dorsey's oath is made the 21st of April, 1879. It was transmitted May 5, 1879. It specifies a schedule of seventy-five hours and seven trips. Of the papers on file, a letter dated April 24, three days after the date of Dorsey's oath, says: "A daily service and fast time." One, on the 5th of May, says: "Daily service and faster time." One, on the 25th of April, says: "Three trips and faster time." "One, on the 26th of April, says: "Daily and faster time," there being no reference on the papers on that route to any particular time. On the 12th of June, 1879, the schedule is ordered as petitioned for, and the time is reduced at the extraordinary rate of from thirty-seven to fifteen hours, being the time which was arranged for in John W. Dorsey's oath, made on the 21st of April, 1879, preceding.

On route 44155, from The Dalles to Baker City, Peck's oath, made on the 15th of December, 1878, specified seventy-two hours. The schedule was one hundred and twenty hours. The order made on the 29th of

October agreed with the oath, and was for seventy-two hours. The petitions naming that time are dated on the 25th of September, seven days after the date of Peck's oath in New Mexico. They did not reach the department until the 20th and 23d day of October, and yet those petitions specify the precise seventy-two hours that Peck had the foreknowledge to name in his oath out there on the 18th of September, six weeks previously.

On route 38113, Rawlins to White River, Rerdell writes on February 8, 1881: "I can get the increase to six or seven trips if you will send me petitions so as to have them here before the 4th of March," and on March 5 the petitions get here, and on March 8 an order is made for an increase to seven trips. Rerdell says distinctly: "I can get it if you will send me the petitions." The petitions came here, were not filed until March 5, and three days later Brady had hastened through that order which he did not revoke when Postmaster-General James ordered it revoked, increasing that service to daily. On that same route Rerdell, in January 1879, had a conversation with Perkins, in which Perkins wanted four days' time. Rerdell wanted that he should do it in eighty-four hours. The time then was one hundred and eight hours. He told Perkins he was going to have three trips. There was only one then, and on the 12th of May following the trips were ordered and the schedule time was fixed as Rerdell said he wanted it.

On the Ojo Caliente route, on the 30th of April, 1879, immediately after an order had been made for three trips, which S. W. Dorsey was notifying Mr. Joseph had been made, he adds in his letter that he thinks that it will be made daily in July, and if I am not mistaken he did not get it daily as early as July, but he got it daily in the following February. As incidental in connection with this, Miner. Peck & Co. wrote to Tuttle on August 19, obviously replying to the same letter that he had written to them, and which is in evidence:

we make no boast of being solid with any one, but we can get what is reasonable.

John W. Dorsey told Johnson, out in Utah, that they had influence in Washington.

On route 38140, Trinidad to Madison, there are certain petitions. They have been supposed to be used for expedition, but on examination we find this condition of things: The order for expedition is made on the 9th of May, and is based solely on the letter of Congressman Belford and a letter of Chaffee, written from New York. The letter is dated April 21, and asks three trips and one day's time. Belford asks one day's time. That reminds me, gentlemen, that my correction on the Trinidad and Madison was incorrect. I was right yesterday. They did seek one day. Chaffee asks three trips and one day. Belford asks one day. These two letters were filed on the 21st and 29th of April, respectively, but the petitions were not filed, as the indorsement shows, until the 10th of May, and the order was made on the day preceding and notified to the contractors on the day preceding. Those petitions do not name the time. They name only faster time and three times a week, with increase of service, but there again comes in the foreknowledge which was necessary, or possessed, in making the oath, and the oath was fitted to the order, which was made for twelve hours, there being no time named except that.

Now, there is another class of orders made by Brady, one of which is shown on route 44160, Canyon City to Camp McDermitt. Service was not begun there until the 16th of January, 1879. On the 23d of December, 1878, an order for increase of two trips and expedition from one hundred and thirty to ninety-six hours was made, at a cost of \$18,612.

The affidavit in that case is made by Peck, on the 18th of September. Service was not commenced until the 16th of January; but on the 23d of December, Brady made an order for expedition. When French was on the stand he swore broadly and promptly, in the direct examination, that that order for expedition, made before service was commenced, was in accordance with the custom of the office, and yet when he came to be cross-examined he finally wound up by saying that he took that all back; that he did not know of a case of expedition ordered before service had been commenced, and that there was not any custom of the office to that effect.

In all these Oregon routes, gentlemen, and in some others, these contractors were allowed to go for a considerable time without commencing the service. In that way the temporary service was put on, and they were eventually made to pay for it, and therefore it was all right; but you will see, gentlemen, what the condition of things was. They did not mean to commence the service on the Canyon City and Fort McDermitt route. They did not mean to commence the service on those routes on those original bids. They must have the increase of trips; they must have expedition, because if they ran it under their bids they would run it at a loss, and of course expedition and trips came in and saved them.

Now, there is talk about Indian troubles, and all that sort of thing, but the evidence is conclusive on this Canyon City and Camp McDermitt route that as early as the 15th of September all trouble from the Indians had ceased, and Mr. Brady knew it, for the postmaster at Camp McDermitt had telegraphed him that there was no trouble from Indians.

Now there is another class of questions, and that is in connection with remission. With reference to this matter of fines and remissions, the evidence is incomplete upon the record, arising from the fact that we originally, as we put in the schedules in every case of tables, &c., put in the fines and remissions. The court allowed us afterwards on one or two routes to put in the papers in connection with fines and remissions, and then finally ruled them out, saying that they seemed to him too remote. The result is that the evidence in connection with the fines and remissions is not as complete as it might otherwise be, but unless I have made an error in the table I roughly prepared late last night, or rather early this morning, there were imposed on all of these routes fines to the amount of \$172,958.86. Of those fines \$46,093.06 were imposed after Brady went out of office. There were remitted \$24,611.88, of which remissions \$1,416.20 were made after Brady went out of office. So that there were imposed under Brady \$126,865.80 of fines, and there were remitted \$23,195.68, leaving unremitted \$103,670.22. Now of these fines and penalties there was imposed upon the Tongue River route \$46,000, of which \$17,000 was after Brady went out of office. Thirteen thousand dollars was remitted by Brady, leaving remaining as imposed under Brady on that route, about \$16,000 of fines.

On the Ojo Caliente route there were imposed \$14,000 of fines under Brady, of which only \$1,600 were remitted. No [correcting himself] there were imposed under Brady \$12,800, of which only \$1,600 were remitted.

On the Saguache route there appears as fines and deductions \$21,728, of which \$16,000 was that clerical error made in the calculation of the expedition, by which they calculated four or five thousand dollars more than proper under the law, and which was corrected after Mr. Brady went out of office.

I am mentioning only the routes on which the fines amounted to much. On the Mineral Park route there were \$34,000 of fines and no remission. On route 44140, Eugene City to Bridge Creek, there were \$17,700 of fines and \$5,600 of remissions under Brady.

Now, you will see, gentlemen, that the bulk of these fines and penalties were upon the Tongue River route, upon the Ojo Caliente route, upon the Saguache route, upon the Mineral Park route, and upon the Eugene City route. Only upon the Bismarck and Tongue River route did the result of those fines fall upon any of the defendants in these cases. They were to be borne by the subcontractor, except in the Mineral Park and Pioche route, where there were successions of subcontracts; and those attempts to carry the mail, all of them failures, and all of them failures, as it seems to me, because the contractors insisted upon keeping a large portion of the money themselves, and not giving the subcontractor, who was doing the service, enough money to perform it—only upon that route was there any imposition of fines which exceeded the amount due to the subcontractor, and therefore only upon that and upon the Tongue River route, as I recollect, unless they ran The Dalles route, in which there was about two thousand dollars coming out of the contractors—only upon the Tongue River route and upon the Mineral Park route, because the fines exceeded the amount that went to the subcontractor, was there, as I recollect, anything that came out of these defendants. At any rate I recall none.

But on the Ojo Caliente to Parrott City route having been expedited on the 29th of April, 1879, from ninety to fifty hours, at an expense of \$8,457 in the first quarter of 1880, \$2,192.93 were deducted for failure either to make the trips or to arrive on time. On the 19th day of August, 1880, \$1,655.98 of that amount was remitted because going on schedule time was impossible. Mr. French stood there on the stand and in his loose swearing, when I had the papers in my hands here questioning him about it, declared that if trips were not made, if time was not made, no matter for what cause, under all the circumstances, by the custom of the department, they deducted the proportionate amount for the trips made on the time they were behindhand, and they only failed; when they showed reasonable cause they did not impose a penalty in the sense of the fine other than the deduction upon it. He swore that that was the custom of the department. He swore to what I do not believe was true. If it was true, then when Brady remitted \$1,655.98 of the \$2,192 on this route he remitted in favor of these contractors fines and penalties against the custom of the department. You will bear in mind, gentlemen, that that is the route on which they did not return to Joseph, the contractor, the money that they received by remissions though he was fairly entitled to it, and it was the route on which they did not return to Jaramillo the money that he was entitled to for remission, but they actually took from the poor fellow \$500 to let him off from his losing contract, when they had in their hands money that they had received for remissions for failure on his part to perform the service, and they did not let him know anything about it, and they put in their release a provision releasing the United States from any claim that he might have on them. And, gentlemen, that remission on the Ojo Caliente route of this \$1,655.98 was on the letter of John W. Dorsey, stating that the expedited time could not be performed; that it was impossible to be performed.

That is the substance of it; and yet John W. Dorsey and Company having got this expedited to an impossible time, Brady having made the order to an impossible time, first imposes a fine for their not making

that impossible time, and then remits that deduction and leaves the United States to pay the contractor the full sum for not making the time which he had ordered him to make, but which he could not make. The money was to come out of the United States under any circumstances. The service was not performed.

Route 38156, from Silverton to Parrott City, was expedited on the 12th of June, 1879, from thirty-six to fifteen hours, at a cost of \$10,549.51. On the 15th of November, 1880, John W. Dorsey writes that the time is impossible, and he wants it extended in winter. The postmasters and Hill do the same thing. It was not extended, but there was deducted some \$3,200 on that route which came out of the poor subcontractor, and not a dollar of it, so far as I can see, came out of the contractors. I merely refer to Dorsey's letter as showing the statement that these contractors knew that they were asking and getting paid for an impossible time.

On route 44140, Eugene City to Bridge Creek, on June 26, 1879, the time was reduced from one hundred and thirty hours to fifty hours—I called your attention just now to the way in which it was done—at a cost of \$14,806.10. On the 15th of November, 1880, Mr. Peck says that that time is impossible in winter, and transmits the papers asking that it be changed, and Brady changed it to a sliding scale, which he describes by his favorite phrase *pro rata*. He says he will reduce the time—the time having been reduced from one hundred and thirty to fifty hours—and they say it is impossible in winter. He then changes it so that it is made forty in the summer months and sixty hours in the winter months, and he says that that is without change of pay, the decrease and increase of running time being *pro rata*. He might just as well have said that it was the same to the people of that locality in the long run that they should have a mail which arrived in ten hours in summer but they should take ninety hours in winter, and that would be *pro rata*. He says that that is a proper mode of administering the department, and that it is right to pay for the average time on which the mails are delivered. The subcontractor on that route swears that it was impossible to make the time, just as Peck certified it was, and then on examining them, not remembering that their own people had certified that the time could not be made, they undertook to make the contractor say that the reason he did not make the time was because he had not horses enough. He said he had abundance of horses; that horses stood in his stable; he could not use them; they could not get there on account of the snow; that there was no use talking about that, and he did not count horses.

There are a large number of cases, gentlemen, in which the expedited time was not made. On the Bismarck and Fort Keogh route, the postmaster at Bismarck who wrote for the expedited time, and who is relied upon upon the jacket, subsequently wrote that the time could not be made in winter. Now, on that route time was reduced from eighty-four to sixty-five hours from January 1, 1879, at a cost of \$27,950. Lambert and Barnes and Cole and Ketcham all swear that that expedited time which was to commence on the 30th of January, 1879, never was commenced until way down in April. Lambert specified his trips, and said he took eight days in going over the route at one time and eleven or twelve days to return. He always laid over five nights. Lying over five nights and traveling three hundred and two miles it is pretty difficult to say they did it in sixty-five hours. Mr. Barnes swears that he took eight days. Mr. Cole says it was the last of April before they increased their speed, and that they never drove nights until the 16th of August, 1880. Now, do you believe it was possible to go three hundred

and two miles in sixty-five hours and lie over night? Ketcham swears that they began running nights in April, 1879, and he was superintendent four months after they were ordered to, and that up to that time the period was six days. It is one of the incidental advantages of having these gentlemen on the stand that this money for this expedition which was not made has been stopped since this trial commenced.

On route 44155, from The Dalles to Baker City, one trip was added November 15, 1878, making three in all, and \$4,144 were added after that. On the same day the time was reduced from one hundred and twenty hours—I am not able to make it out on this memorandum—it was reduced considerably at an expense of \$18,648, and on May 1, 1880, four trips were added at an expense of \$41,440. Cowne swears that he drove going from The Dalles to Canyon, which was about half the distance; that he took three days all the time. That makes seventy-two hours that he took on that distance. He laid over night. The expedition was very clearly not performed there.

Now, those were the orders which Brady made of impossible expedition—orders made for expedition not performed. There is another class of things that throws a light upon Brady's course. Let us look at it briefly. I refer to cases where orders were made that the papers in the department show should not have been made.

On route 38134, from Pueblo to Rosita, a Mr. McGrew wrote, August 30, 1878, that a petition was circulated for three trips; that the mail did not go over that Rosita route; that it went by railroad; and on March 17, 1879, the postmaster at Greenwood advises the discontinuance of all weekly service upon that route. On July 8, 1879, however, in the face of those statements brought to Mr. Brady's notice the service is increased to six trips, and the time reduced from fifteen to ten hours, and the pay of \$388 is increased to \$8,148, while the service was being rendered by a carrier on the route for \$2,600, if I remember right. No [correcting himself], I am wrong, it was Pueblo and Greenwood route.

In May 8th, 1880, the postmaster at Greenwood began—and a different postmaster—to advise the discontinuance of the service, and he states in doing it that he has the concurrence of the postmaster at Rosita and the postmaster at Pueblo, being all the postmasters on the line, who consider it a useless and expensive route to the Government, and that his office is the principal one on the route supplied by it, and it is now supplied in a different way. And yet Mr. Brady not only paid no attention to the notice that the increase ought not to be made, that the route should be discontinued, but he added six trips, and then, after a further remonstrance, he went out of office, leaving his order still in force. On route 38135, Saint Charles to Greenhorn, the postmaster at Pueblo writes, calling attention to the fact, and he writes as early as the 15th of December, 1877, that the route is terminated at Saint Charles by advertisement, and that there is no means for mail to go to Saint Charles; that the head of the route ought to be at Pueblo. No attention was paid to that, notwithstanding the provision of law which authorizes in every case where there is a mistake in an advertisement of that sort the route not to be let and to be readvertised, but instead of making that correction they went on and extended it twelve miles, the final result of which was a cost to the Government of about \$1,600 a year.

On route 44104, from Mineral Park to Pioche, the postmaster at Mineral Park wrote on the 15th of July, 1878, before the service had been begun, that the time had been shortened in the new advertisement, to

eighty-four hours from one hundred and thirty-two hours, which it was previously, and he said there was no earthly use in shortening the time if it cost the Government anything. That was written before service began, but after the contract was entered into, on the 15th of July, 1878. But on the 16th of January, 1879, Brady added two trips and reduced this time of eighty-four hours, which the postmaster had told him was forty-eight hours faster than was needed, to sixty hours, and paid \$19,318 for that reduction, of which \$16,773.75 was apparently for expedition; and this, gentlemen, you will bear in mind was upon these forged petitions on that route which I showed to you, and upon the letter of Frémont, jacketed as recommending three trips, when he recommended only two. On that same route, on the 25th of August, 1879, Mr. Beene a lawyer at Ward, Nevada, had written, saying there was no earthly use of the route, calling his attention to it in very vigorous terms, and that was the route on which these mail bills for thirty-nine days showed that there was practically no mail.

On route 38145, Ojo Caliente to Parrott City, on April 2, 1879, the contractor wrote that six days was the best possible time. On April 14 John W. Dorsey, in transmitting his application, said that the route was very difficult. On the 29th, distance circulars were sent out, calling for fifty hours. The postmasters wrote back saying that the fifty hours was impossible, and sent a schedule of five or six days. That is on page 813, and I will not stop to look at it. Brady then sent back another distance circular. The postmasters then returned that, adhering to the same thing. Then there went out a distance circular by some queer arrangement, or mistake, calling for one hundred hours. That was returned, and they pestered these unfortunate postmasters along that line with these distance circulars, seeking to make them give a schedule which should be fifty hours, they all replying that they could not make a schedule of fifty hours. One of the postmasters on the stand here told you that it finally got to be such a nuisance that he threw the distance circulars in the waste-basket and did not pay any attention to them when requested to respond to them. Brady was determined to force down upon the people there the fifty hours' schedule, and finally, by misreading and misinterpreting a distance circular which was returned, they got some kind of a schedule, though all the time the parties were representing that it was impossible to make it, and the result shows that it was impossible to make it. They could not make it. It was on that route that there came these large reductions. It was on that route that Brady made these large remissions, on the ground that they had been fined for not performing an impossible schedule which these postmasters and everybody swears they had represented to him could not be made. They told him it could not be made. He stuck to the schedule, insisted upon cramming it down their throats. When it was not made he fined them, and then he turned around and took the fines off and those fines were all kept, not for the benefit of the subcontractor who suffered all the loss, but they were kept for the benefit of the contractors here in Washington, for the benefit of the man who told Walsh that he took 50 per cent. of all remissions.

Mr. MERRICK. I will just interrupt my friend for one moment in connection with that route, to correct an error in the record which is quite material. On page 812, it is stated that the jacket is dated April 12. It should be stated that the jacket is dated April 29, the day upon which the order was passed and oath filed in the Post-Office Department. There was a letter of Anthony Joseph, of April 2, which was filed April 14, representing the impossibility of making the time.

The COURT. You have the original order in your hand.

Mr. MERRICK. Yes, sir; I have. Your honor said in the progress of the trial that Anthony Joseph's letter had not reached the department until after the order was made. This correction shows that Anthony Joseph's letter forewarning Brady of the difficulties and impossibilities in his way reached the department before he made the order.

Mr. BLISS. The correction has heretofore been made, and is in the record. I had a memorandum here to call attention to that before I left the route.

Mr. MERRICK. I did not know that you observed it.

Mr. BLISS. So much for that. Now, take the route 38152, from Ouray to Los Pinos. You remember that route originally ran from Lake City across the mountains to Ouray, and was carried around three sides of a square. To the order making that change we make no criticism.

[Mr. Bliss here illustrated to the jury by a map of the territory in question the location of the route referred to and the adjoining routes.]

Taking this route and carrying it over here [indicating], the result was that there were three different routes passing over the same portion of one line. Those were in the proper time in a measure discontinued. One route was made to terminate at Barnum, so that there was no payment over the route from Barnum to Lake City, except that they got the month's extra pay for taking off the service, which they claim they were entitled to under the law. One of these routes was a daily route, and this route that crossed the mountains here [indicating] was a weekly route, and when they changed it so as to come around this way [indicating], it of course overlapped the existing daily route, and the mail was carried by the same conveyances and the same people right along. Now, the postmasters out there were a good deal puzzled by that sort of thing, and the postmaster at Los Pinos, Dr. McDonald, who was on the stand here, was called to an account by the department because he did not send in his register and report of the arrivals and departures on that route 38152. He wrote to the department on the 18th of March, giving them a long account of the whole thing; giving them a statement of the facts; showing the correspondence with Barlow & Sanderson, the subcontractors on both of the routes, and saying substantially to the department: "You are paying twice for the same service upon that route one day in the week. What am I to do? Am I to go on and certify to this thing, and continue to do it?" He sent them the whole record of the matter, and the papers were filed in the department, and they reached the department as early as the spring of 1879, and the department went on, paid no attention to the remonstrance of the officers until the end of 1880. In the fall of 1880 the thing got too barefaced to continue any longer. It was a petty steal, to be sure, but they could not continue it any longer and then the thing was cut off.

Now, all these orders were made after notice to Brady, which should have shown him that they were improper orders, notice direct from his own officials; they were orders persisted in after notice from his officials that they ought not to be persisted in. There is a similar order on route 38113, from Rawlins to White River. The postmaster at White River wrote a letter on the 22d of January, 1879, saying that the time of five days ought to be made six days in winter and five days in summer; and yet on the 1st of May, 1879, Mr. Brady reduced the time to forty-five hours, in the face of that recommendation of his own postmaster of the Meeker office, the office for which the whole mail service on that route was stated by Mr. Brady to be maintained. The

postmasters said all they needed, in accordance with General Sherman's idea, was trips and not time, and recommended five days in summer and six days in winter; but Brady, within three months afterward, ordered a reduction to forty-five hours and paid \$8,606.25 of public money for so doing.

On route 35015, from Vermillion to Sioux Falls the advertisement erroneously stated the distance to be fifty miles, when it was really about seventy-five. The schedule was fourteen hours. On July 10, 1879, it was reduced to ten hours and \$3,680.10 allowed. That was ten hours' time for seventy miles, with ten post-offices on the route, each post-office the contractor being entitled to be detained at by the postmaster seven minutes; in other words, they were to make the seventy-five miles in nine hours. On the 15th of December, 1879, every postmaster on the route advised that the time be extended to sixteen hours. This paper was transmitted through Judge Bennett, the Delegate, who had advised the expedition. Brady indorsed in his own handwriting on the paper "Write Judge B. it cannot be done." A letter was written to Judge Bennett, which was forwarded by Judge Bennett to Shaw, the postmaster at Vermillion, which letter was lost in the flood there last spring, but which Mr. Shaw on the stand testified to you, stated that the information was that this extension of time, asked by every postmaster on the route, could not be done because it would be unjust to the bidders. The bidders were Dorsey & Co. The probability is, gentlemen, that Brady had got his 20 per cent. It would be unjust from his point of view to cut off their expedition after taking the 20 per cent.

On route 41119, from Toquerville to Adairville, the original schedule of sixty hours was, by order of July 8, 1879, reduced to thirty-three hours and \$12,718.22 was allowed, though the petitions all asked for forty-eight hours only. There was not a syllable in any petition asking for thirty-three hours, only the oath of the contractor. The postmaster at Pahreah, on the 21st of December, 1879, advised the return to sixty hours, and on March 13, 1880, all the postmasters advised a return to sixty hours, and yet no attention whatever was paid to that advice. The schedule was persisted in, and Brady went out of office leaving it in force.

Now, I have spoken in this way about these orders as showing the bearing and relations of Brady to this business. Let me for a moment, gentlemen, call your attention to the relations of some of these other defendants in connection with the bidding. We say that they went into this business of bidding relying upon getting increases and expedition, as shown by the facts which I have called your attention to in the conversation of Dorsey, and everything of that kind. That they bid very low is admitted by Vaile. Vaile says, taking the aggregate of their contracts, they bid so low that they were losing ones, and yet he, benevolent man that he was, another Christian gentleman I presume, worthy to be yoked with John W. Dorsey, took those contracts and carried them. They did not bid low ignorantly. They had the advice of Albert E. Boone. Dorsey sought him out as a thoroughly competent man to supervise the business and arrange it. They knew what they were doing when they made the bids. They bid on a preconceived arrangement. We say a preconceived arrangement because they knew that they could get expedition, which they did get, and they could convert their losing contracts into gaining ones. Now, we showed you, gentlemen, the schedule time that they did bid on not only on these routes, but on others. What do we find? Bear in mind, gentlemen, that of

course there can be no increase of trips unless the original service is small. There is no room for increase of trips otherwise. You will bear in mind also, what is obvious from all these papers, that where there is but a single trip a week or a small number of trips the time is a slow time. That is necessarily so. Now, take the accepted bids that these parties put in. They had ninety-one accepted bids on routes which were advertised as only once a week, twenty-two at twice a week, eleven at three times a week, and two at six times a week. There was abundant room for increase of trips and expedition. In their bidding they bid for two hundred and eighty-one routes on which service was once a week, one hundred and fifty-nine routes on which service was twice a week, and one hundred and twenty-one routes on which service was three times a week, twenty-two on which it was six times a week, and by some mistake or other one on which it was seven times a week. Fortunately for them they did not get that route. I read from the table which we put in ourselves. There is a somewhat similar table put in by the other side which gives a portion of the same information, but not with the same detail. Now, they did another thing. After they had gone into the business of bidding they went to work and got up a subcontract, and that subcontract for the first time, so far as Boone knew, with all his large experience with the department and postal business, contained a provision looking to how much should be paid for expedition. These people going into this business bid on infrequent routes and slow time, and went to work and got up subcontracts, and put into those subcontracts a provision that in case there should be expedition ordered by the Government then the subcontractor should get only a certain percentage, which was left in blank to be filled up. That clause appeared in those subcontracts of these defendants for the first time, so far as the evidence shows, upon any subcontract made in connection with the postal service of the country. It was put there for a purpose. It was put there for a cause. It was put there at the suggestion of somebody else than Boone. He cannot remember whether it was put there at the suggestion of Miner or S. W. Dorsey or J. W. Dorsey. It was put there at the suggestion of some one of them, and it attracted his attention as an original device in connection with the postal service, which he, well informed and experienced as he was, never dreamed of before.

Now, gentlemen, on a number of these routes they paid their subcontractors at the outset more than they got, being money squarely out of pocket; but they made haste to get square. On route 38113, from Rawlins to White River, they got at the outset \$1,700, and they paid Perkins \$2,500. They were at that time out \$800 a year from the 27th of January, 1879, when Perkins's subcontract went into effect. But on the 12th of May, 1879, they had got it up to three trips, for which they were getting \$5,100, and they had a provision in Perkins's contract, made prior to January, 1879, by which if it went up to three trips he was to do the work for \$4,000. The result was that having commenced on the 27th of January, 1879, by paying \$800 more than they got, on the 12th of May, 1879, they succeeded in evening it up by getting \$5,100, or \$1,100 more than they paid. On the 12th of May, 1879, they had it reduced to forty-five hours, and then the amount became \$13,706.

On route 38156, from Silverton to Parrott City, they got \$1,488 from the Government, and paid \$2,280. But on the 1st of July, 1879, one year after the service commenced, they got five trips added, with expedition, which increased the amount to \$16,296.63, and after an interlude they made a contract with Steineger to perform the service for \$9,400,

so that they got away with \$6,800 of profits, where they had started in with \$800 of loss a year previous.

Now these defendants were guilty of all sorts of variegated crookedness in connection with the postal business. Saying nothing of the cheating of the subcontractors, as the Government has nothing to do with that, and you have nothing to do with that, except that when they starved the subcontractors and did not give the subcontractors money enough to perform the service, keeping for themselves a liberal pay, it inflicted an injury upon the Government, because they rendered it impossible to have a regular and prompt mail service. They inflicted an injury upon the people and upon the Government. That is all we have to do or you have to do in connection with the question whether they cheated the subcontractors. But let us look at one little transaction. On route 44160, Canyon City to Fort McDermitt, we find on page 1382 of the evidence an interesting transaction. On the 15th of April, 1881, John R. Miner wrote this letter:

[The Northern Overland Mail Company, H. M. Vaile, president; L. P. Williamson, superintendent, Independence, Mo.; John R. Miner, secretary, Washington, D. C.]

WASHINGTON, D. C., *April 15th, 1881.*

JOHN CARREY, Esq.,
Fort McDermitt, Nevada:

DEAR SIR: One S. H. Abbott, who was postmaster at Alvord, I find by accident, is writing to the department that you do not pay your bills, and that there is no need of anything more than a weekly mail.

Mind you, this was on the Canyon City and Fort McDermitt route. Recollect they ran that route up to six trips a week and were getting \$50,166 for it, while on the original pay and one trip a week they got \$2,888. Mr. Abbott was writing what the evidence before you shows was true, that there was no necessity of making but one trip a week. Miner found it out by accident. By what accident? Abbott, by his own statement, had written a letter to the department. Miner knew of it. That letter could not be found on the files of the department. It has not been there since this investigation commenced. Can there be any doubt from what you have heard before that that letter was promptly handed by Brady to Miner, and that he was told he must shut that fellow up, and that he went to work to shut him up?

I wish you would see this man at once and satisfy him; pay him whatever is reasonable and report to R. C. Williamson, at The Dalles. I suppose that is what he is after. He knows nothing of the through mail—

Neither did Miner know, because the evidence shows there was not a bit of through mail and only ten or twelve pounds over the route. There was no through mail—

and probably a weekly is all he needs; but more likely he wants some money. He complained once before to the department that he had to make a special trip to Camp McDermitt to make his returns, and I sent him \$30 and it was all right. Now, I suppose, he wants a little more money.

On that route, when I saw that letter, I felt perhaps it might be said by them: "That man was a striker; he is after money and we evidence the former payment." But these gentlemen again oblige us. They have obliged us a great many times. They put Buell on the stand, and they put Vaile upon the stand and then they stopped. They oblige us greatly. They obliged us by putting in a paper on page 2245. Vaile says:

I received a bill from the department occurring in this way: The postmaster at Alvord, by reason of there being no mail from Alvord to Camp McDermitt, had been put to the trouble and expense of a certain sum of money, as he claimed, to take his report to Camp McDermitt to send it on to Washington. The department called my

attention to the fact, and I said, * * * "It is but right that we should refund him that money that he pretends he had expended to take his report to Camp McDermitt as we could have put on that service earlier if we had had sufficient number of men."

There is Vaile's own admission that they did not put the service on that route as they ought to have done. Then they put in the receipt of that man as receiving from Vaile, Miner & Co. \$30 for traveling seventy-five miles to deposit in the mail a report which the Post-Office Department required him to deposit, and which Mr. Vaile said it was their fault that he had not an opportunity to deposit in his own office. They made him travel seventy-five miles to fulfill his duty to the department. He wrote to the department, being an ex-postmaster, having gone out of office, and having no interest in the matter, that a once-a-week service was all that was needed, and Mr. Miner hastened to direct that there should be paid him enough to stop him from further complaints, because if those complaints were investigated then the \$50,000 which they were getting on that route would necessarily be reduced to \$2,800. On route 41119, from Toquerville to Adairville, they wrote Mr. Johnson that they had concluded to increase his pay by, I think, nearly \$2,000; that they did it as a voluntary thing, but wanted him to stop writing to the department; that he had been writing to the department complaining about the time, &c., and they wanted him to stop, and they wanted him also to write to his Delegate, Mr. Cannon, and beg him to withdraw certain papers he had placed there. They took so much interest in it that they wrote Mr. Johnson two letters on the subject, which are in the record, asking him to withdraw these papers which placed upon the record in an inconvenient way for Brady the fact that that route had been run up in an unjustifiable manner. They paid Mr. Johnson so much money and wrote him that they had increased his pay so much, I believe about \$1,800. Somehow or other the papers that Mr. Cannon was said to have placed upon the files of the department are no longer there.

On route 40104 I called your attention to the way in which Brady had jerked the thing up and jerked the thing down within four days from \$49,000 to \$2,000, and up again to \$22,000; and there had not been and there cannot be any pretense of any excuse accounting for it.

There is one other little transaction that I will call your attention to on the route from Pueblo to Greenhorn. Mr. Ames was the subcontractor. There appears on the files of the department a letter from Ames requesting the withdrawal of his subcontract. That letter is dated on the 19th of November, 1878, at Pueblo, way out in Southern Colorado, and yet by the same submarine arrangement by which Peck, in New Mexico, knew months before what schedule time would be required, that letter was filed on the same day. That letter is in the familiar handwriting of John R. Miner. There has not been any power of attorney produced that I know of for him to sign Mr. Ames's name.

Now, gentlemen, I have gone over this case hurriedly. I must close. I have confined myself only to the evidence from the record and statements of the witnesses on the stand, giving their knowledge and their experience. To recapitulate what I have shown you, let me say this: I claim to have shown you that large sums of money were paid under the pretense of expedition when none was obtained, because they were already doing the service in shorter time than the expedited time. I have shown you that large sums were paid for expedition and increase on some local routes where there was almost no mail and where the evidence showed Brady there was no mail. I have shown you how in all the little matters everything was taken against the government, how allowances were made for supposed increases, for supposititious

additions of distance. I have shown you how routes were wrested to put on Raton and the other places and paid for in violation of law; how Agate was paid for one month for a service not performed and ordered to be performed, and one month for service not performed that was ordered not be performed; how Fitzalon was put on and paid for, though it was directly on the route; how Animas City was put on and paid for, though it was directly on the route, and the distance circulars and the communications of the postmaster showed the department that fact long before the order was made putting them on. (That last order was a French order.) I have shown you how ten miles was taken off for Pahreah and how they arranged that the allowance of the month's extra pay should be made after August 1st, though the post-office had been discontinued on the 14th of June preceding. because the amount of a month's extra pay would run up to thousands, instead of being simply a few hundred. I have shown you how Brady paid in every case for increase of trips up to the limit, though he knew, and the contractor knew, that it was not proper, and though he had before him the evidence that it was not proper; evidence upon the subcontracts; evidence which he boldly and brazenly in some cases recognized in his own orders. I have shown you how he made at least one squarely illegal order, the order in connection with the expedition on the Ojo Caliente route. I have shown you how the oaths were taken by him as the sole reliance, and I have shown you how they were changed and manipulated. I have shown you how Vaile, the only affiant who appeared upon the stand, admitted that he never had been on the route and knew nothing about it. I have shown you how Miner, on another route, by the statement of his own counsel, made an affidavit, never having been on the route, and claiming that he got his information as to the men and horses from the Post-Office report, where he could not get it. I have shown you how, in fact, the oaths were lies, how the number of men and carriers required on the then existing schedule was almost uniformly understated. I have shown you how the men and horses required on the proposed increase of schedule was almost uniformly grossly overstated. I have shown you how in some cases there were illegal orders made, because unless the men and horses were increased they had no right to allow an additional dollar, and yet upon one route the evidence is absolutely conclusive by four or five witnesses that there was no increase of a man or a horse for the expedited time. I have shown you petitions in which alterations were made in the figures, and which were the alleged bases for all these orders. I have called your attention to Brady's statement to Walsh, that those petitions were only an alleged basis. I have shown you the jackets with their endorsements; misleading, if not false. I have shown you the evidences of prearrangement and understanding in conversations with these defendants, and from the favoritism shown them in allowing service not to be commenced, and in expediting service before it was commenced. I have shown you the remissions made because they did not perform an impossible time, remissions which, according to Mr. French, were in violation of the custom of the department, though that impossible time had been called to Mr. Brady's attention because he insisted upon maintaining it. I have shown you expedition paid for, and time not made. I have shown you orders made after notice that they were improper; notice from his own officials, which he was bound to regard; notice giving the reasons why they were improper, which the evidence upon this stand has shown was true, and correct, and existing. I have shown you orders previously made, persisted in by Brady, after

he had abundant notice that they were orders doing an injury to the public. I have shown you the arrangements made for bidding by which they were to bid on infrequent routes and short schedules. I have shown you the device of inserting the clause as to expedition in the subcontracts. I have shown you the payment by these parties of more money to others than they got, and the expedition they manifested in getting more money than they paid. I have shown you the cheating of their subcontractors, and their seeking to buy up everybody who complained against them. I have shown you Brady putting down and up a single route, within four days, from \$49,000 to \$2,200, and then putting it back to \$22,000, upon a pretense which the papers to which he referred showed was a lie. I have shown you all these things, gentlemen, and having done that, were there no other evidence in this case, I should appeal to you confidently with the evidence that I have, I should appeal to any jury drawn from the body of the citizens, whether drawn in my own forum where I am accustomed to practice, or drawn in this forum to which I am a stranger, with entire confidence that none of you would dare to disregard this evidence, disregard your oaths, and find anything but a verdict that Brady and these other defendants were in a corrupt conspiracy to defraud the Government.

But, gentlemen, the evidence does not stop there. I have gone over substantially the ground that has been allotted to me. It has been allotted to me to deal with the facts in this case, and not to deal with the law and the immediate application of the law to these defendants. Therefore all that mass of detail and interesting evidence which there is in the case which will show the way in which these defendants are mingled together, and are combined together, aiding each other all the time in spite of alleged divisions, in spite of alleged conferences and separations, and all that class of evidence. They are so mingled with the questions of law as to conspiracy, that I pass them by, leaving it to my abler associates who are to deal with the more important questions of the law as bearing upon this case. I, however, simply desire to call your attention to one or two facts. If there is any vestige of doubt in your mind I ask you to remember the evidence of that gentleman who, from friendship, undertook to benefit a comparative stranger, Miner, by interviewing a comparative stranger, Brady. I ask you to remember the statement of Brady to Walsh. I ask you to bear in mind that Walsh stands uncontradicted. They have not contradicted him in anything. I might fairly leave that without a suggestion. I simply say that they have not contradicted Walsh in any manner. Nobody has dared to contradict the statement that that interview took place on the 28th of December, 1880. They put on the stand a boy not shown to be the boy whom Walsh referred to. He said he was not there, and quite likely he was not. But Walsh testified that that indorsement on that letter that he said brought him there on the 28th of December, 1880, was in Brady's handwriting. Nobody denied that. It stands admitted and uncontradicted that that interview did take place on the 28th of December. When they came here undertaking to prove that it could not have taken place on that day because Brady did not act as Second Assistant Postmaster-General on that day, and they swore he did not, and they swore that there never was a case in which two parties acted as Second Assistant Postmaster-General on the same day, lo, and behold, we bring in a letter book showing on that very day Brady had signed one of the letters as Second Assistant Postmaster-General. When the same witness swore that he was not here, and that he was acting as Second Assistant

Postmaster-General, we brought in another letter-book, showing that there was French signing one letter and Brady signing two letters, and French coming in again, so that there was an interchange of signatures. What more natural than if Mr. Brady had that interview with Walsh on that day at twelve o'clock that Mr. Brady was not in a condition of mind after that interview to have acted as Second Assistant Postmaster-General, performing all the duties of that day. He probably found time enough to go back to his office to sign the closing letter of the mail on that day. So much for Walsh. There are other matters in connection with him which I pass over entirely, simply saying that he stands uncontradicted, and, on your oaths, you are bound to believe him.

I desire simply to call your attention to Buell, and I will say as to him that if there is anything left of him in your mind or in fact I prefer to turn him over to the gentleman whose cross-examination, as it seemed to me, so thoroughly disposed of him.

Bear in mind, gentlemen, as to another party to this conspiracy, Rerdell, that it stands uncontradicted that Rerdell sought out Powell Clayton and told him he wanted to tell the whole story; that something was going to happen, and he was going to be one of the rats to leave the sinking ship, and be the first one out. He went to James and MacVeagh and told them his story, of which I do not propose to speak further. I leave that to my associate. I simply call your attention to the fact that it stands uncontradicted that he has confessed himself at least in the penitentiary. Bear in mind, also, that Brady's statement to Walsh and Rerdell's statement to Clayton, James, and MacVeigh fits right in with all this other testimony which we have brought here. There is nothing inconsistent, nothing contradictory.

I claim that with the evidence this record bears there can be no doubt in the minds of one honest juror, and I am not going to think I have been addressing any but honest jurors. If there was before any doubt then the evidence of Walsh, the evidence of James, the evidence of MacVeigh, and the evidence of Clayton must remove that doubt.

I leave the case with you, gentlemen, as men who have taken an oath, as men who desire to stand well before the community, as men who desire to stand well before your Maker, to find a verdict that the Government has made out its case, and that the defendants have been guilty of a gross and outrageous conspiracy to defraud the Government of the United States.

At this point (3 o'clock and 15 minutes p. m.) the court adjourned until Monday morning, August 21, 1882, at 10 o'clock.

MONDAY, AUGUST 21, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. WILLIAMS. If your honor please, and gentlemen of the jury, I had not intended to say one word to this jury in regard to this case, but, although on account of illness I have been prevented from attending this trial for an entire month and for the same cause did not propose now to address you, yet I feel that I would be derelict in my duty as counsel if I failed to enter my public protest against the adoption of the pernicious principles and unjust practices which appear to have controlled this prosecution from its inception to the present hour. Neither can I, in justice to myself and with regard to the liberty of citizens, remain silent

when this jury is asked to adopt such principles and draw such conclusions that would, in my opinion, unjustly endanger the liberty of every contractor under the Government of the United States. I deem it my duty to speak.

The principles of law applicable to this case have been overlooked, and instead of an examination to see whether or not the crime charged in this indictment has been committed, the prosecution have introduced here as testimony a cloud of calumny without weight, form, or substance, a shapeless mass like the mists of the summer's morning, and to be as easily dispersed, I trust, by the sunlight of truth and reason.

Let me consider for one moment what has been presented here in the evidence which has been brought before you. Let me enumerate if I can recollect them some of the salient points which have been introduced in this testimony. They have proven here almost everything connected in any manner with the star-route contracts of the United States. They have shown by some of their testimony that bids were made, and that upon some of these bids there were contracts awarded. They have shown to you that on others of these bids there were not contracts awarded. They have shown that the contracts calling for service on the mail routes of the United States were executed mostly by subcontractors; and they have given in testimony here that there were quarrels between the contractors and the subcontractors. They have given in evidence that as between the contractors and subcontractors there was a continual source of conflicting interests. They have given in evidence here that some of these subcontractors made money and that others did not. They have given testimony here to show that some of the contractors made money upon these routes, and upon some of the routes when they were first let the contractors lost money, and that afterwards they made money owing to expedition and increase of service. They have shown to you that there were increases and expeditions made; that petitions were gotten up by the people; that petitions were in some measure at least sent out to the people by some of these defendants to be signed; they have shown to you that the names upon these petitions were genuine, and that the names upon these petitions were in some instances, quite a number, in the same handwriting. They have shown to you that expeditions were granted and trips increased, and that expeditions were taken off and trips were taken off. They have shown to you that some of the subcontractors who performed the service were paid in full, and that others still hold they have a claim against the contractors. They have shown to you that some of the contractors for the time failed to perform the service, and were not paid, and that some of the subcontractors at times threw up the service and came in conflict with the contractors and with the department, and were not paid. They have shown that subcontractors were fined, and that subsequently, upon cause shown, some of the fines were remitted. They have shown that some of these routes during the time of service were extended, and that some of them were curtailed, but in all this cloud of testimony, in the whole shapeless mass, for shapeless it is, they have not shown to you one scintilla of testimony tending to establish the crime charged in this indictment, either direct or indirect. There has been given in evidence here something touching every matter connected with these contracts, but there has not been given in evidence here one word of testimony tending to establish the charge made against these defendants, and which you are bound to try.

Let us look back for a moment and see what this star-route service is. It is the service performed in the interest of the Government by means

of contract with its citizens, which calls upon the contractor to see that the mail is carried in the various sections of the far off western country. Each contract is separate and single. Each contract stands alone by itself upon its own foundation. No one contract has any relation whatever to any other. Each route is also a separate and distinct entity. Each route has a geographical location. Each route has a name or number, whichever you may choose to call it. They are separate and distinct existences. They are arranged and controlled by separate and distinct contracts. The letters pertaining to one in no way affect or interest the other, but they stand separate and alone, and unless they are brought together by some means or by some link, by some chain that encircles and surrounds them, they must be viewed as contracts separate and distinct, and in no way connected with each other. The Government seek to establish this fact: That by means of some indistinct and shadowy agreement which they say was entered into some time, and somewhere, and by some one, nineteen contracts were linked in some way together, and that the Government of the United States was the sufferer by means of that linking together, and they denominate it a conspiracy.

Now, I say to you, gentlemen of the jury, as a matter of law, and as a matter of fact, before a conspiracy can be established it must be made clear to your mind how a conspiracy came about, when it was entered into, who were its members, and where it came into existence. It will not do to take these matters here as a question simply of suspicion. It is not in any manner, or in any sense, a matter of suspicion. It is a matter of proof; a matter that must be proven to you under the principles of law, beyond a reasonable doubt. And, unless you violate the sacred obligation into which you entered, when with uplifted hand you entered this jury box and swore to give these defendants a fair trial, you must regard this law and see whether this proof reaches the point that I have mentioned; see whether there is in all these matters of testimony any conspiracy proved beyond a reasonable doubt; for the defendants are entitled to the benefit of all doubts in matters of this kind.

Now, gentlemen, not only must it appear as a matter of law that a conspiracy is established, but we must go one step further, and it must appear as a matter of law, and matter of fact, that the conspiracy established by the evidence is the conspiracy set forth in this indictment, and none other. When a man is being tried for murder, and is tried for the murder of AB, he cannot be convicted for the murder of CD. When a man is indicted for larceny, and is charged with taking goods that are specifically described, and the proof shows that other goods than those mentioned in the indictment have been taken, the jury must acquit. So it is in a matter of conspiracy. You are bound not only to find that a conspiracy was entered into here beyond the reasonable doubts thrown around the defendants by the law, but you are further bound to find that it is the identical conspiracy that is charged in this indictment.

Now, this indictment charges the conspiracy in regard to nineteen separate and distinct routes of the postal service of the United States, and in regard to those particular nineteen separate and distinct routes you are bound to find, if find you can at all, from this testimony, that the conspiracy was entered into. The combination is the tree. The act of defrauding in conspiracy as is charged in this indictment is the fruit of that tree. You must find that the fraud charged in this indictment was committed, and was committed in pursuance of this conspiracy charged in the indictment. The two must be brought home. They must be linked together indissolubly and unavoidably by this testimony before there can be a verdict of guilty.

Now, gentlemen, I say to you, when was this conspiracy entered into? Do you know? You have heard the testimony that the Government had to offer. A date is set down in this indictment when this conspiracy was entered into. Is there a man upon this jury who can say on a specific date, make it what you will, that there was a conspiracy entered into at that time or that it existed at that time? Take any date you will; is there any man here who can say that this conspiracy was entered into and fully agreed upon when the bids were put in? Can they say that if not entered into before the bids were put in, it was entered into after the bids were put in and before the contracts were awarded. If not, can they say it was entered into after the contracts were awarded and before the expeditions were granted? If not, then can they say that this conspiracy was formed after the expeditions were granted and before the finding of this indictment? From the whole mass of testimony, taken as it is, in no portion of it can you find one single scintilla of evidence that will enlighten you upon the point as to when the conspiracy was entered into. Nowhere does it appear.

Now, gentlemen, where were these defendants when the conspiracy was entered into? Did they conspire here? Did they meet here? or if they did not meet here, did they, by means of communications through the post or by friends or otherwise, come to an understanding or agreement while here? Or did they come to some understanding or agreement in some far off western city or town as to what they should do in regard to these nineteen contracts? Can any one decide that question from this testimony?

What were the terms of this conspiracy?—a most important matter. If gentlemen are entering into a conspiracy to defraud the Government of the United States, it is but reasonable to suppose that each member of that conspiracy will have it distinctly and emphatically understood just what proportion of the expense he has to bear, and what proportion of the profits are to result to him. Is there anything in this testimony which proves to your mind that this conspiracy, having been entered into, if it was, the terms were understood between these two parties? Is there a scintilla of evidence anywhere in this case that will satisfy your mind upon any one of these points? But, gentlemen, it will not do for you to be satisfied on one point simply. You have got to know when the crime was committed, where the crime was committed, how it came to be committed, what were the facts and principles that governed it, and you have got to know—for this is what you are sworn to find out, as well as other matters that I have mentioned—who were the members of that conspiracy. All of these things should appear to you by the testimony in this case, just as plain, just as clear, just as distinct as would be the fact if some one had been killed on a charge of murder, or that goods had been stolen on a charge of larceny.

Now, gentlemen, there are some things charged in this indictment that are of a specific and definite nature. In an indictment you must charge in some way something beyond the mere fact that a crime has been committed. You must set forth somehow that the crime was executed by the parties who are defendants. You must, in other words, show the means by which a criminal result was attained, and in this indictment they have undertaken to set out the means by which the criminal results charged therein were attained. First they tell you that there were petitions; second, that there were affidavits; third, that there were orders; fourth, and the last means, that there were untrue jackets. Now let us look, with the view of inquiring whether a conspiracy has been established or not, to see whether there is even any proof of a

conspiracy. Let us look at the testimony briefly, for I can speak only briefly to you, not having been able to use my eyes and read this testimony myself. Let us consider briefly whether the testimony in this case establishes, or tends to establish, the charge set forth in this indictment. I simply want to call your attention to some of the words contained in the indictment. The indictment charges that these defendants—

unlawfully did fraudulently and maliciously combine; confederate, conspire, and argue together between and amongst themselves, by means of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell, then and there fraudulently to write, sign, and cause and procure to be written and signed, a large number of fraudulent letters and communications, and false and fraudulent petitions and applications to the Postmaster-General, for additional service and increase of expedition on and upon each of the hereinbefore mentioned, numbered, and described post-routes.

Then the petitions were false. That is the first statement, that is the first charge contained in this indictment as the means by which this agreement is said to have been executed. Now, gentlemen, you have seen the petitions which have been brought here. You have examined them; they have been read to you. Tell me if there appears from the evidence in this case a single route that, so far as the petitions are concerned, is not fully sustained, and that does not convince your mind that they are the genuine expression of the wants of the people. I know it has been said here that there have been some alterations in these petitions. What are the alterations? In what particular have these petitions been altered, if altered at all? Why, you will find here that a great parade has been made of a petition in which were the words "quicker time." "Quicker time," they say, was written in afterwards—written by the same hand, but written afterwards. How do they know that it was written afterwards? Have they produced a witness who tells you it was written afterwards? Not one. I say to you, gentlemen of the jury, that the fact that "quicker time" is there and the further fact that it appears in some instances in writing a shade darker is no evidence whatever to satisfy your mind or the mind of any single person, who is honest and candid, that those words "quicker time" were introduced after the petition was signed. I know not who has had charge of these petitions since they have been in the files of the department, and I do not mean here to pass any insinuation in what I am about to say upon any single individual at all; but I do say this: If you moisten a piece of blotting-paper and put it upon a piece of writing, written weeks, months, years ago, that that place where the moistened blotting-paper, or any moist substance, is placed will leave the handwriting darker than it was before. Now, I do not say to you, gentlemen of the jury, that anybody has done that. I do not say to you that that is the solution of this question. I think, probably, that it was simply an accident. I think, probably, that it was owing to the condition of the pen and the thick condition of the ink at the time it was written. Yet, it is as easy a thing to do as it is possible for you to imagine, to make these petitions appear to have been changed or altered. "*Quicker time.*" "*Faster time.*" The two words only, nowhere appearing to be foreign to the text of the petitions, but in exact accord with what the petitions in other portions of them state are the wants of the people. And yet, to sustain this charge against these defendants, the prosecution have adopted this week subterfuge and argued gravely to you that Miner or Rerdell or somebody else unknown, *probably* made these alterations. Ah, to what straits, to what

extremities must a prosecution be put that will descend to such arguments as these.

Again, they produce another petition, in which they say that the words "schedule 13 hours" were introduced, and it turns out that among the other petitions on the same route, the very expedition that is mentioned in the petition, the very "schedule thirteen hours," is in fact asked for, is in fact demanded by the other petitioners and citizens who have asked the expedition upon that route. I say to you, gentlemen, take each route and view the petitions of the whole and upon the testimony borne by those petitions alone you will find ample ground for the orders that were made expediting the service and increasing the trips. We are not here to split hairs, we are not here to be technical; but the great question is, did those petitions represent the voice of the people. They have come here to you from the grassy slopes of New Mexico, they have come from the fertile fields of Nebraska, they have come from the woody fastnesses of Montana, from the vales of California, from the rushing waters of Oregon, and they spoke with no uncertain voice when they said to General Brady, "We want expedition, we want increase of service."

In addition to these petitions, gentlemen, upon this witness stand, at the instance of the defendants, have come Senators and members of Congress, gladly, quickly, earnestly, and they tell you that these petitions did represent the voice of the people of the great West, who demanded more mail facilities and quicker time. They at least father these petitions; they at least stand before this jury and the country as between these petitions and the charge contained in this indictment, and they denounce that charge as false and uncalled for. Talk to me about a little alteration. Talk about two words interlined. It is preposterous and unreasonable. There was no cause for such acts. Men do not alter petitions or change papers that are to be filed in the departments without cause. It was easy to obtain petitions. Why? Because the people wanted the mails. It was easy to obtain a statement from the people of what they wanted, because the demand existed there, and it is because of that fact that these petitions are here, and it is because of that fact that the orders expediting these routes were made.

Now, gentlemen, it appears that the next matter that is embraced in this indictment is affidavits. The means, first, were petitions. The second means are false affidavits, so charged. Now what is the office, what is the purpose of an affidavit upon these routes when an expedition is granted? It is to settle definitely between the department and the Government the amount of pay. There has got to be a definite settlement and understanding somewhere. Whenever there is a route increased or expedited it is necessary that there should be an affidavit made, and that affidavit must state, in case of expedition, at least the number of men and horses, or animals, whichever word may be desired as most correctly expressing the meaning. They must state the number of men and animals that are required by the service at the time the expedition is granted, and the number that will be required after the expedition goes into effect. Now, gentlemen, it is perfectly plain to me and must be to every one that in both of these matters the affidavits are mere estimates and nothing else. The first statement contained in the affidavit as to what is the number of men and horses used as well as the last statement of the number of men and horses to be used are simply nothing else but estimates. A contractor who tells you the number of men and horses now in use by actually going and counting the number of men and horses in service

upon the routes at this time may be in danger of defrauding himself. Why? Because the number of men and horses used in some seasons, and the number of men and horses used in other seasons changes and varies. It requires more men and it requires more horses in the winter season, when the mountains are covered with snow, than it requires in the dry summer sunshine when the traveling is good. Now, an expedition that takes place in the summer, and the exact number of men and horses actually used in the balmy summer days, when you can go over the route easily, is made the basis of the expedition, and the number estimated to be required is given and the pay made up from that. The contractor will find that as between the two there will be a great difference. The true theory, if I understand it correctly, is that the estimates are made at first covering the men and horses that will be used, say, upon a contract period of a year. Take the average number for a year, for the whole service as near as you can get it, for service in winter and for service in summer, make an average between the two, and then tell in that affidavit what amount of men and horses were needed to run the route upon the then schedule and trips.

Again, when the question of expedition is to be considered, when the time is to be reduced, then your oath must be nothing but an estimate from the very nature of the matter. From the very nature of the service it sometimes appears, as it has in this testimony, to be connected with the service of carrying passengers and express matter. From the very nature of the service, the statements made by these oaths must appear to be nothing but estimates. They are nothing but estimates. They are estimates that are agreed upon, and stated as an honest and fair conclusion, and nothing else; an estimate that the contractor thinks to be right and just; an estimate that the Government officer must accept as right and just for the interests of the Government.

Now, why must they accept it? For this reason, because, gentlemen of the jury, there is a clause in all these contracts, which seems to have been almost entirely overlooked, that gives these contractors the power to throw down the service; and if General Brady, sitting in his office here in Washington, should say to Mr. Dorsey or Mr. Miner or Mr. Vaile, "Your oath appears to state the number of horses too low in one instance, and too high in the other, and it makes your pay proportionately too large" Mr. Dorsey or Mr. Miner or Mr. Vaile could reply, "General Brady, I throw down the contract unless you accept it upon those terms." The Second Assistant Postmaster-General is bound to come to terms with the contractors, or he is bound to run the risk of the service being abandoned by the contractors. It is a matter of a bargain whenever there is expedition and whenever there is an increase. It becomes a matter of a bargain between the contractors and the Second Assistant Postmaster-General. The oaths are estimates, and I say to you that I do not care whether they appear to have been altered or erased in some particular or not. In the general testimony, as has been given, they appear to have been made honestly and fairly by honest and fair men. There are eighteen affidavits, and on sixteen in some parts there are some erasures. Of course there would be erasures. Why? Because it was a subject of consideration with the department and it was a subject of consideration with the contractors. The contractors who made those oaths were not the persons who were there and counted the number of horses and number of the men. They had to depend upon the information of others that came to them from the far West. Of course, there would be alterations and erasures. I deny to you, however, that there is any testimony that can establish in the

mind of any reasonable man the fact that a single oath or a single proportionate increase was beyond reason or beyond what was just, considering the wants of the service. The testimony here fails utterly to establish any such state of affairs.

Again, there have been orders by Brady, and the prosecution say that they were illegal. The same prosecution argue bravely to you because upon the face of the orders themselves they appear to be proper, and there appears the proportionate increase and the proportionate pay, that therefore the order was a fraud, and that General Brady knew it was a fraud. Gentlemen, the first instinct of any man, I care not whether he be an officer of the Government or the humblest and lowest person existing in your community, the first instinct of human nature when about to perpetrate a fraud is concealment. In this case, so far from that fact being sufficient to warrant the conclusion that there was a fraud known to Brady, it appears as the absolute, overwhelming proof that Brady regarded it as correct and just, and that he was willing to stand by it and to put it upon the records of the department. And he did it, not sneakingly, not concealing the matter, but in a manly, open, straightforward way, just as an honest officer should do an official act when representing the Government of the United States. And that is not all. Not only upon these jackets, as they have been brought here, but upon the journal of the Post-Office Department, the journal that was daily read by the Postmaster-General and daily signed by him appear also the expeditions that were granted, the terms of the expeditions, the amount of pay that was given to the contractor, and the amount of pay given to the subcontractor. The Postmaster-General is not to be considered here as a person without knowledge and without sense. He is, as you know, a person of honesty, a person of sound discretion, a person of careful judgment, a person thoroughly informed as to the interests of the postal service. That Postmaster-General in despite of the feeble attempt that has been made in this testimony to belittle him, and to prove that he did not read these matters carefully, it appears from the whole mass of this testimony, knew that these orders were made, and not only knew it, but I say I believe that he approved every one. Every order passed before him. If they were not approved by him why did he not stop them? He is a man of sense. He is a man of integrity. He is a man of discretion. He is a man of excellent judgment. He knew the wants of the people. If he had not intended that these orders should be made, if Brady was going beyond his power, if Brady was in league with the contractors, if Brady was carrying on a fraud, Postmaster-General Key must have been aware of the fact, and Postmaster-General Key as an honest man would have stopped it. Postmaster-General Key as an honest man knew that the increases were honestly made, that the expeditions were called for, and he permitted them to go on; nay, he fathered them. That is the condition of affairs in regard to these so-called illegal orders.

Again, it is said that General Brady was in league with these contractors in the matter of remissions of fines. The plan was, as near as I can understand it, that inasmuch as most of the subcontractors were responsible for the performance of the service, justly and properly made so by the terms of their contract, and also made responsible to the department for fines if they failed to perform the service, that Brady fined and deducted from their pay a large amount of money. Understand, now, gentlemen, they assume that Brady was in a conspiracy and had ordered these increases and expeditions. Now they say that another part of the same conspiracy was to fine the subcontractors

and to prevent them practically from carrying out the service. Is not that rather short-sighted policy? If they were in league together, if the Second Assistant Postmaster-General did make these increases through a conspiracy, why should he attempt to break up the service by fines upon the subcontractor and thus call attention to it? Better let the subcontractors go along. Better allow the fines to be remitted, or never to be imposed. Better seek to make excuses and let the matters go quietly along, so that there should be no investigation into them. I say to you that General Brady, in every instance where it was proper for him to do, in every instance where the law called upon him to do so, imposed fines and made deductions regardless of whom he hit or whom he hurt. The testimony is overwhelmingly in his favor that no such arrangement or agreement was ever known to him. And gentlemen, what do they advance as proof that there was such an arrangement? They say to you gravely here that there were upon these nineteen contracts during the time of the service of General Brady one hundred and twenty-five or thirty thousand dollars, in round numbers, assessed against these subcontractors for fines and deductions, on account of failures to perform the service. Then, as the proof that Brady was in league with these contractors, they tell you that twenty five or thirty thousand dollars, I forget the exact amount, was remitted. A hundred and twenty-five or thirty thousand dollars in fines imposed, and twenty-five or thirty thousand dollars remitted on cause shown; and yet they say that because that is shown General Brady was in a conspiracy in regard to the remission of these fines, and got 50 per cent. Why, if there was 50 per cent. to be given to Brady you would expect to find, and any reasonable man would expect to find Brady remitting everywhere he could. You would expect to find instead of only twenty-five or thirty thousand dollars remitted, that out of \$125,000 imposed, there would be at least \$100,000 remitted. If a man was getting 50 per cent. of the amount remitted, and he had it in his power to remit, why would he fail to remit at least a hundred thousand dollars of the whole sum I named? The testimony shows to you that in many instances the contractors and the subcontractors, through their agents, and through their attorneys, and by various means, by affidavits, by effort, and by every influence that they could bring to bear, endeavored again, and again, and again, to get Brady to remit fines and to remit deductions, and Brady refused to do it. Mr. Vaile said "When I appealed to him and told him that I found it impossible to prevent some failures, and when I told him it was on account of the weather, on account of hostile Indians, and on account of a thousand and one circumstances that are the practical difficulties in these routes—when I told him this and made affidavit to it, and when I proved it, Brady sat there, and all the answer I could get from him, notwithstanding this appeal, was a grunt; nothing else." Brady grunted. Vaile says he was treated so badly, his efforts were received with such contempt, in other words, that he never afterwards approached General Brady upon the subject. And yet they say to you that with Vaile General Brady had the corrupt agreement that he was to get one-half of the remission. If he had he would have grunted yes, instead of grunted no. These facts speak for themselves, and no sophistical argument made any by person can blind them to the common sense of the whole world.

Again they say to you as another portion of the means of this conspiracy that Turner, whose name is almost forgotten in this case, made the false entry on jackets. The gentleman who last addressed you as an instance of the false entry, and as a matter showing the corruption

of Turner, and bringing him in with these other conspirators, and as a matter upon which you should find your verdict against him said that "respectfully represented" was written "earnestly recommended;" the words "respectfully ask for an increase" in a letter or in a petition were made "earnestly ask for an increase" on the jacket. Well, is it not possible for a person to be earnest and to be respectful? Did not the petition or the letter, whatever it may have been—I have not read it; you have heard it read—earnestly ask for it? If it asked at all, it asked earnestly. It was not the only petition; it was not the only letter; it was not the only communication as to that route. And I say to you, although I have not read it, that I have no doubt that that petition or letter, whatever it may have been, was properly and justly indorsed when Mr. Turner indorsed it. Sitting there, however, in the department if he made a mistake in the use of a word, if it could not fairly have been "earnestly," but ought properly in this matter to have been "respectfully," is Mr. Turner to be convicted and sentenced to imprisonment for such a clerical error as that? Does it not appear to you, gentlemen of the jury, that this is simply another of those strained efforts, another of those weak suspicions that have been floating around this court-room since the 1st day of June? Nothing else; nothing else.

Again, passing from these orders of Brady and the untrue jackets of Turner and the petitions and the affidavits, they come here and tell you that these contractors must have been in league with Brady, because they seemed to know expedition was going to be granted. That is the next strong argument. That is the next forcible statement. They must have been in a conspiracy, or otherwise they never would have known that expedition was likely to be granted. Gentlemen of the jury, had they not ears? Had they not what this prosecution, I must say, seems to lack, common sense? Do not these contractors know when they enter into a contract that they must inform themselves in regard to the condition and circumstances touching the performance of that contract? Do they not know they must become informed in regard to the wants of the people on the mail route that they have taken and which they have undertaken to supply? Have they not the right to examine into the wants of the people on each of these routes to see whether it is proper that there should be increase or not? Have they not ears to hear? Then, why should they not hear, and hear very well? They could hear it from the communications with the subcontractors. They could hear it from people in the far West. They could hear it from members of Congress and the Senators who reside in these States and Territories where the expeditions were about to be ordered. They could hear it as well-informed men through the press. They could hear it, and it was proper that they should hear it, from the department, and every time they heard it it was their duty, if they regarded the interest of the people, it was their duty if they regarded their own interest, to see that the applications were duly and properly made to the department, to consult with the department, to ask what expedition was probable, to inquire and to inform themselves whether expedition ought to be made to thirty-six hours or to forty-eight hours. It was their duty to look at the various connections between the terminal points of a route. It was their duty to inform themselves generally and fully upon all these points, and then they were in a condition to say, "I believe that the department will expedite this schedule to thirty-six hours instead of forty-eight hours," as some other people seemed to think would be done. Then there were questions between parties, it may be upon these routes where some people would think forty-eight hours enough and others would think thirty-

three hours would be better. They were in a position to judge. They were in a position to represent to the department the wants of the people. They were in a position to see and know that the probabilities were that the expedition would be made to thirty-three hours and not to forty-four hours. It is but the exercise of common sense, it is but the exercise of common judgment. It is not the fruit of a conspiracy, and it does not in any way tend to show a conspiracy or a corrupt understanding at all. As an instance of this argument, they say that at one time, I think on the Bismarck and Tongue River route, more ranches were built than probably were needed as the route was then run. Why, gentlemen of the jury, the Bismarck and Tongue River route was a route between two terminal points going through a wilderness, and it was destined to become a mail route that supplied points up in Oregon from points here in the East. It prevented them from being obliged to send the mails around here some six or eight hundred miles out of their way. Now, does it require any judgment; does it require any corrupt conspiracy to know that when you establish that route there the mail would begin to go there because it would go quicker; to know that it would become a through mail; to know that the wants of the people would in a short time call for an expedition there, ay, to know that the wants of the Army, for that portion of the country was filled with hostile Indians, would demand an increase and expedition of trips? And, as men far sighted, men of judgment, bound as they were to execute this contract faithfully, was it not their duty to put in more ranches than were absolutely necessary upon the schedule of time then existing? Oh, such weak argument, it seems to me, ought not to be considered for one moment by brains and intelligence.

Again, it is complained that the service where the increases were made was arranged by General Brady, at pro rata, and that Brady must have known that a pro rata increase gave the contractor a little more money than the service actually cost him. Now, suppose that you had entered into a contract to perform a service for \$3,000, and it actually cost you to perform that service \$5,000, and the Government of the United States said to you "We propose to put on instead of one trip three trips more." You are losing then, \$2,000 upon that contract. Three trips more put on would rob you of \$6,000 more upon that basis, unless it was made pro rata. Unless it was made pro rata you could not carry out the contract. You would become bankrupt; therefore, the contractor, who had the power to give up the contract, insisted, as he had a right to insist, that the pay should be pro rata. The pay ought to be granted to them openly and publicly, and the pay ought to be granted to them generously, for they were taking great risks. They were performing a service that involved danger, that involved risk to capital, risk to health, and risk to life. And yet as one of the reasons that Brady knew of this conspiracy he is blamed because he gave them in twelve instances pro rata, and in the others he higgled over it, and bargained with them, and reduced them to less than pro rata. Here was a man in the conspiracy. Here was a man getting a percentage of increases and expeditions from the contractors; and yet, on some of these routes, you find that same man higgling with the contractors and beating them down, and actually making them take the contract for expedition and increases for less than pro rata, when pro rata was the legal pay.

Now, gentlemen, I have spent more time than I intended upon this question of contracts. I wish to say one single word more in regard to them. I say to you, and I believe I am correct, that of the number of

contracts that were awarded to Miner, John W. Dorsey, Boone, and Peck, on their bidding—some hundred and thirty-four—I believe it is shown by the testimony here that there are some thirty-two of these contracts in the name of John W. Dorsey or S. W. Dorsey and that as to Vaile and Miner there are some sixty. So that as to the parties who are defendants in this case there are at least, if I recollect correctly, ninety-odd contracts with the Government. They had at least ninety-odd contracts with the Government. Now, out of those ninety-odd contracts with the Government there are how many embraced in this prosecution? Nineteen. Why? I cannot tell you, gentlemen. I would not be permitted to argue from this evidence to tell you why. But if those other seventy-odd contracts were in evidence here I believe it would appear that the Government selected out of these contracts such as they thought would answer their purpose and charged the conspiracy as to them. I believe I have a right from the evidence in this case to say that it looks as if the Government selected out these nineteen because they thought in regard to them they could prove more irregularities, they could prove something that would bear the semblance and appearance of irregularity. Although there were ninety-odd contracts, and possibly more with these defendants, although the Government knew that there was that large number, yet they picked out these nineteen only.

Now, I say to you, gentlemen of the jury, that you may take ninety-odd contracts with ninety-odd contractors with the Government of the United States—I don't care whether they be mail routes, or whether they be contracts for building post-offices or any other buildings under the Government, or for any public improvement—and out of that number you can pick out nineteen with as many or more irregularities than are presented in the contracts which have been picked out and paraded before you here charged in this conspiracy. I can say that to do this, if there was a conspiracy at all, each conspiracy attached to each single contract, to each single route, with its definite name and number, had its definite agreement, and I say to pick out from these ninety-odd contracts nineteen contracts is an unfair and pernicious practice on the part of a public prosecutor, I do not care who that prosecutor may be.

Now, gentlemen, there are but two other points to which I desire to call your attention. I wish to say a few words in regard to the so-called confession made by Rerdell, and I also wish to say a few words in regard to Mr. Walsh; but first in regard to Mr. Rerdell. The Attorney-General has testified to you the statements that have been made by Rerdell in detail. Senator Clayton testified in regard to it, Postmaster-General James testified in regard to it. It seems that Clayton was the person who was first spoken to, James the second, and Wayne MacVeagh, the Attorney-General, the third.

Now the question that I desire to present to you in regard to Mr. Rerdell, and the one that I take it is to be considered fairly by you, is simply this: Was Rerdell telling the truth. That is all. Mr. Rerdell was not sworn. Mr. Rerdell's statement was not taken down in writing, which is a circumstance quite singular to me, but true nevertheless. His confession was made, if it is a confession, and I desire to call particular attention to this at this time because it will be mentioned hereafter. It was made about the 1st of June, 1881—about a year ago. Is it true? That is the main question for consideration. Was he there telling the truth? Well, it seems to me, gentlemen of the jury, that if you look at the testimony of the person to whom he first spoke in regard to this, that you will see that Mr. Rerdell had a motive. Mr. Clayton, in

his testimony, says that Rerdell had a father-in-law. The father-in-law wanted a position. Rerdell had an interest in some claim known as the Jennings claim. Rerdell wanted that claim paid. So that at least from this testimony Mr. Rerdell, when he went to the Postmaster-General and to the Attorney-General, was a man talking with an ax to grind. He was a man who had an interest. He was not making a fair and candid statement, perhaps, for I have no right to go any further than that. This ax to grind, this desire for the position, this desire for the payment of that claim, may have influenced his mind. It is significant, at least, and when taken in connection with the fact that the Attorney-General says that shortly afterwards he heard that he retracted it, it becomes doubly significant.

However, when Rerdell made this statement, did he say anything about the nineteen contracts contained in this indictment? Was there one word mentioned by him, either to Clayton or to the Postmaster-General or to the Attorney-General, in regard to the nineteen contracts embraced in this indictment? Not one. He never spoke of these contracts. His statements were general ones, and if he spoke of a conspiracy at all, if he in any way outlined a conspiracy at all, he dated it back to the time before the bids were put in, in 1878. This indictment charges a conspiracy on the 23d day of May, 1879, more than a year afterwards. Now I say to you, gentlemen, the testimony in this case shows that there was no agreement, no conspiracy entered into in 1878. Why? Mr. Vaile has told you upon the stand that when he came here the men who had applied for these contracts, Mr. John W. Dorsey, Mr. Miner, and Mr. Peck, were at sea in regard to the matter. Vaile tells you that. They did not know how to go to work to put service on these routes. They appealed, or some of them at least, appealed to Vaile and Vaile entered into their contracts and offered them his good services and assisted them to put on the service upon these routes that they had been so fortunate or unfortunate, which ever it may have been, as to secure by means of their bids. There is nothing then in existence as to any expeditions. There was no thought of expedition. Vaile was taken in because he had some knowledge of the business and because he had money. John W. Dorsey was borrowing money from Stephen W. Dorsey, then a Senator of the United States. Peck was raising all the money he could, Miner was doing the same, and they were endeavoring to the best of their ability to perform the contracts that they had entered into or to make arrangements for their performance. Now then, I say to you by the testimony of Mr. Vaile, by the records which have been introduced here by the Government that Mr. Vaile, from the time these contracts were entered into down to the time that there was a division of them in April, 1879, drew all the money. By the statements of Mr. Vaile who drew the money, as well as by the records which show that he drew it, it is proven beyond question that there was no conspiracy entered into and no thought of one. Vaile up-roots the idea of a conspiracy. Vaile is corroborated by the documentary evidence which has been introduced here by the Government, and he is also corroborated by the statements made by Mr. Keyser, who tells you that S. W. Dorsey was an indorser upon the paper of this company and that Vaile paid the money that S. W. Dorsey had become responsible for by means of his indorsements. That was the condition of affairs: So that Mr. Rerdell if he outlined any conspiracy at all in 1878, is contradicted by Mr. Vaile, and by the record testimony contained in this case. We were not permitted by the iron rules of law, gentlemen, I am sorry to say, to contradict other statements made by Rerdell in regard

to McGrew, in regard to Tyner, in regard to Mr. French, and in regard to Mr. Lilley. Mr. McGrew was placed upon the stand, but his honor, enforcing the rules of law, would not permit the question to be asked. You will recollect that it was a part of the statement of Mr. Rerdell that money had been paid to these men. We put Mr. McGrew upon the stand, but on the court ruling that it was collateral we were obliged to forego asking this question.

THE COURT. Mr. Williams, you are mistaken about that. There was no testimony that Rerdell said that money had been paid to McGrew.

MR. WILLIAMS. I so understood the testimony.

THE COURT. You are mistaken. If such testimony as that had been given by Mr. MacVeagh or Mr. James or Mr. Clayton the court would have allowed it to be contradicted. The court excluded the evidence, because there was nothing to impeach the integrity of Mr. McGrew.

MR. WILLIAMS. I was in court at the time that Mr. McGrew was upon the stand, and my recollection was that a part of Mr. Rerdell's statement, as made to the Attorney-General or to the Postmaster-General, was that Mr. McGrew in some way profited by means of this alleged conspiracy.

THE COURT. You are entirely mistaken. He said that they were assisted by the officers of the Sixth Auditor's office; or, in other words, the Office of the Auditor for the Post-Office Department.

MR. WILLIAMS. Perhaps the court is right. I am not going to say——

THE COURT. [Interposing.] There was not a single word of evidence of the character that you speak of in regard to McGrew, or that any of the officers there had received money.

MR. WILLIAMS. Passing that matter, then, as it is, we were not permitted by the rules of law to prove that these parties were assisted by anybody in the Sixth Auditor's office, whether Mr. McGrew or anybody else.

THE COURT. You did not offer to prove that.

MR. WILLIAMS. Therefore, gentlemen of the jury, I cannot consider that as a contradiction, and do not argue it so. I do not argue it as a contradiction, but I say to you, in the testimony as I understand it, and I am only speaking, as you all know, from recollection, there are abundant facts to show that Mr. Rerdell's statement was not a true statement. One part of the statement of Mr. Rerdell I recollect was this: That he assisted in the subletting of these contracts. He told the Attorney-General, I recollect the testimony well, that he took the subletting in his own name for convenience in the handling of the money, and yet the records that have been introduced here show conclusively that in two instances only did Mr. Rerdell have a subletting, and that then he only handled the drafts, and not the money. I know I am not mistaken about that. So there is another contradiction in this statement of Mr. Rerdell to the Attorney-General.

Now, gentlemen, if Mr. Rerdell told the truth, it is for you to ascertain it when compared with the other testimony in the cause. You are not bound, as was expressed here by the gentleman who preceded me in behalf of the prosecution in the argument of this case, to accept the statement of Mr. Rerdell as true. You are bound to consider it as true in the light of all the testimony in this case. Mr. Bliss, in his argument, stated that Mr. Rerdell had confessed himself into the penitentiary, and you were bound to believe it. A confession is to be taken as any other piece of evidence; it is to be weighed, it is to be considered, and the rules of law say that sometimes it is the weakest of all testimony. You are to weigh this alleged confession, to consider whether it is true

or not, and if, on the whole testimony, you do not believe that Rerdell at that time, with the ax to grind and the interest that he had, under the influences so far as you can see them that controlled him was telling the truth, you are bound to reject it. That is your sworn bounden duty as jurymen.

Now, in regard to Mr. Walsh. Mr. Walsh comes here, upon this stand, and tells this jury something that, even if true, does not affect these defendants or tend to prove the charge in this indictment. it applies only to one defendant here, and if the confession be true it shows that that one defendant attempted, and did by means of a loan and the subsequent taking of his notes extort money from Mr. Walsh. But it does not show, it does not tend to show in any particular, that Mr. Brady was in a conspiracy as regards these nineteen contracts with these other six defendants. The other defendants in this case were not alluded to. The nineteen contracts were not spoken of. No person was alluded to; no contract whatever was spoken of save the one that Mr. Walsh had been himself interested in, and he explicitly and emphatically told you in regard to that that there was no understanding, that there was no combination, that there never had been any agreement between himself and General Brady. So that I say to you so far from the testimony of Mr. Walsh being considered here in the light of proving the charges contained in this indictment, they tend rather to disprove them. They have no weight as enforcing the charge of conspiracy against General Brady, or against any other man.

But, gentlemen, I do not consider that that is the true view to be taken of Mr. Walsh. In my opinion, and I speak only for myself, and judging from this testimony Mr. Walsh is a corrupt schemer, a perjurer, and an attempted blackmailer; and I believe in that view and in that light we are to look at his testimony and consider it. Why, gentlemen, when he came here way back at the time or just before the time that he commenced his first suit against General Brady, he too came for a purpose. He, like Mr. Rerdell, came with an ax to grind. He had an object here. The Postmaster-General's office and the Attorney-General's office were greedy for news that would injure Dorsey and Brady. I say that they were greedy, because actions speak louder than words. I say that any man is greedy for news in regard to statements that will injure another when he will take to his own house, and to his own office, a man who comes under the guise of a traitor to his employer, and offers to give testimony against that employer while still employed, and so greedy was the Attorney-General that he failed to have that statement taken down in writing. And to show you that he was greedy—and I have a right to this argument—he failed further in making any effort to ascertain whether Mr. Rerdell told the truth or not. He says so in his own testimony. He was asked the question, "Did you endeavor to ascertain whether Mr. Rerdell told the truth or not?" And he answered by saying, "I have no recollection that I made any such effort whatever." He never put the statement in writing. He failed to inquire whether Rerdell was telling a falsehood or telling the truth and that was the attitude of the Postmaster-General, and that was the attitude of the Attorney-General, and that attitude existed on or about the 1st of June, 1881, according to the testimony of the Attorney-General himself.

Now, then, Mr. Walsh came over here, and on the 1st day of June, 1881, twenty-one days after Mr. Rerdell had made the statement to the Postmaster-General and the Attorney-General, and Mr. Walsh commenced a suit against General Brady, stating under oath in the files of this

court that General Brady owed him \$28,058. Why did he do it? Was **it** an honest suit? The circumstances will show that it was a dishonest **suit**. He had an ax to grind. There were fines and forfeitures upon **the** route that he was contractor on. Those fines and forfeitures and **deductions** still stood against him. Mr. Walsh was anxious to have **them** remitted. Why? Because they would place in his pocket the **sum** of twenty-four thousand and some hundred dollars, I believe is the **amount**. He wanted to get that. He is a corrupt schemer. He **commenced** his proceedings by bringing a suit against General Brady, and **swore** in his affidavit that General Brady owed him \$28,000, and in the **affidavit** and in the papers in that suit he nowhere mentions, I believe, **that** there were any notes passed between him and General Brady. Now why, if he had a scheme, if this was not an honest suit, should he **leave out** the facts that there were notes? If it was an honest transaction **you** would expect that he would mention it. If it were an honest trans-
action you would expect that Mr. Walsh would know exactly how much **Mr. Brady** owed him. If he had ever had the notes of General Brady and Brady had taken them from him under the circumstances that have **been** detailed, you would expect certainly that Mr. Walsh would know the exact amount of those notes and the exact number; yet he **commences** his suit here of \$28,000, and on the 14th of January, 1882, he **swears** that Brady owes him \$42,374, and there is no pretense that there was a single transaction between them from the 21st day of June, 1881, to January 14, 1882.

Now, gentlemen, Mr. Walsh says in June that Mr. Brady owed him \$28,058 and in January following, that he owed him \$42,374, and he **swears** to that on both occasions and in neither case, in neither suit does he in any manner mention that there were any notes in **connec-**
tion with this transaction. If Brady had stolen his notes, if Brady had taken them from him without his permission, why did he not in his **af-**
fidavit that he made and which accompanied his suits in both instances mention the fact that there were notes and that they had been taken from him by General Brady? I will tell you why. Because at that time Mr. Walsh did not know what he would subsequently swear to. Walsh brought his suit here on June 21, 1881. He went to the **de-**
partment in the latter part of June; nine days after he had brought his suit against Brady he files an application for a remission of fines, **de-**
ductions, and forfeitures. He stood back as the wise man, as the man who knew a great deal against Brady, as the man who had brought suit against him, as the man who shrugged his shoulders and refused to tell how this suit came about. He refused and did not tell to a **sin-**
gle soul the circumstances connected with this transaction. He stood back. He was the witness whom the Postmaster-General and the **At-**
torney-General had to angle for and take, and the bait that he would bite was to be the remission of fines and forfeitures which existed against him.

Those fines and forfeitures, strange to say, were remitted, and the money was in the pocket of Mr. Walsh. I say to you, gentlemen, that in my view this whole testimony of Mr. Walsh is simply a corrupt scheme and a perjury. He desired to do that with the department which would please the department. The department were anxious for news in regard to S. W. Dorsey and ex-Assistant Postmaster-**Gen-**
eral Brady. He brought suit against Brady, knowing there would be talk about it. He kept his mouth shut. He failed to mention the notes, because when called upon to make good his testimony he did not know then what he would swear to, and that is the reason the notes

were not mentioned. The difference between the amounts is for the same cause. Do you tell me that a man about commencing suit could be so careless of his property that he would bring suit for \$28,058 when the man against whom he is bringing suit actually owes him \$42,374?

Walsh made a general statement. Walsh left the door open. Walsh had one hand out to General Brady and the other hand out to the department, and he was willing they both should be filled. Walsh, in his testimony here, is contradicted by his own affidavits made elsewhere. Walsh, in his testimony here, is contradicted by Mr. Buell. Whatever the prosecution may say in regard to Mr. Buell, I say that as regards his testimony and his statements they are entitled to at least equal weight with the statements of John A. Walsh. He is contradicted by the circumstance showing that he did not attend the department on that day. He tells you that he sent his note by the boy Adamson. The boy Adamson tells you that he was not at the department at that time and he was the only white boy——

The COURT. [Interposing.] Mr. Williams, I would not interrupt you if I were sure that the counsel for the Government heard what you were saying; but Walsh did not say that the note was carried by the boy Adamson. He said the note was carried by a white boy.

Mr. WILLIAMS. That is what I am stating to the jury.

The COURT. You are stating to the jury that Walsh testified that the note——

Mr. WILLIAMS. [Interposing.] I say he is contradicted by the boy Adamson.

The COURT. You are stating now to the jury that Walsh testified that the note to Brady was sent by the hands of the boy Adamson. That is what you are stating now.

Mr. WILLIAMS. Oh, no. Your honor misunderstands me. I say that the testimony shows that Mr. Walsh testified that his note was taken there by a little white boy that was there in the department, and the boy Adamson is brought here and he says he was not there at the time; and I was going on to say that he also says he was the only boy there. We are entitled to that testimony as it was given here, as I understand it.

The COURT. I cannot allow you to misstate the testimony to the jury when I think the counsel does not hear.

Mr. WILLIAMS. I am trying to speak loud enough for Mr. Ker to hear. I noticed that Mr. Merrick had gone out.

The COURT. But certainly you stated to the jury within five minutes that Walsh testified that he sent his note to Brady by the boy Adamson. That is not the testimony.

Mr. WILLIAMS. Well, I will correct that by saying that Walsh testified here that he sent his note to Brady by a boy; a little white boy.

Mr. KER. A page, if your honor please.

Mr. TOTTEN. Brady's page.

Mr. WILLIAMS. Brady's page. We brought here the boy Adamson who said he was the only page, and who tells you that at that time he was not at the Post-Office Department, as I understand it.

The COURT. There again you are misstating the testimony. I cannot allow it.

Mr. WILLIAMS. If the boy Adamson did not say that he was not at that time at the Post-Office Department but was in December employed in some other place, then I certainly am mistaken. I appeal to the gentlemen who heard the testimony.

The COURT. The boy Adamson stated that on the 28th of December, 1880, he was not a page at the department, and that is all he stated.

Mr. WILLIAMS. Did he not say that at that time he was employed elsewhere?

The COURT. Yes.

Mr. WILLIAMS. Then, it is the statement that I am making to the jury, that the boy Adamson said that he was not employed at the department at that time but was employed elsewhere.

The COURT. Well, what does that prove?

Mr. WILLIAMS. I am about to say to the jury that, so far as that statement goes, it tends to contradict Mr. Walsh, and nothing else. It is to be considered by this jury with the other testimony; all of it, and they are to find the truth.

The COURT. You will please adhere to the evidence.

Mr. WILLIAMS. I am not purposely misstating the evidence. I am stating it as fairly and as justly as I can, trusting to memory, and not having read it accurately.

Mr. WILSON. I think your honor is mistaken about what this testimony is.

The COURT. Turn to the testimony. I know that I am not mistaken, because I was observing that point in the evidence with great closeness.

Mr. WILSON. Walsh's testimony was that he wrote a note in the Sixth Auditor's office that he gave to General Brady's page, a little white boy about twelve years old.

The COURT. Well, but he did not say what the name of the white boy was.

Mr. WILSON. No, he did not.

Mr. WILLIAMS. He said that that boy was still in the city and he had seen him.

Mr. WILSON. Mr. French testified that the only white boy that General Brady ever had for a page was the boy Adamson.

The COURT. Who testified that?

Mr. WILSON. Mr. French; that the only page that General Brady ever had there was the boy Adamson—the only white boy—and the boy Adamson testified he was not there during the month of December at all. That is his testimony, and the jury will recollect it, I am sure.

The COURT. I know that the boy Adamson was brought here and testified that he was not General Brady's page on the 28th of December.

Mr. WILSON. No, your honor; he gave the date when he left the department.

The COURT. I know; he proved that he was not there on that day.

Mr. WILSON. He was not there during that month, your honor. He left there on the 5th of October, and was not back there again. That is the testimony.

The COURT. Well, I am not mistaken at all about the testimony; that is exactly what I said.

Mr. WILSON. I think your honor was mistaken with reference to whether or not the boy Adamson—

The COURT. [Interposing.] No; the whole difficulty arose from the misapprehension of Mr. Williams in saying to the jury that Walsh had testified that he gave the note to the boy Adamson on the 28th of December.

Mr. WILSON. Walsh did not mention Adamson's name, and I do not believe Mr. Williams meant to so claim.

Mr. WILLIAMS. I do not claim it, and if I recollect my own statement correctly, I did not so say to the jury.

The COURT. It is hardly worth while to stand before the jury and make a statement of that sort.

Mr. WILLIAMS. I say to you, then, gentlemen, that in regard to Mr. Walsh, the reason he did not state as an honest man should state his testimony if he had any testimony against General Brady when he went to the Post-Office Department at the time he commenced suit here, was because at that time he did not know what he was going to swear to, in my opinion; and for that same reason he made only the general statement when he commenced his suit here and swore that \$28,058 was due him; and for that same reason, in January, 1882, in New York, when he brought his suit there, not content with one suit, perhaps, seeing that the case here was flagging a little, or for what reason I don't know, but when he brought the suit there he failed in the same way to state that there were any notes or to give the details of the transactions between himself and General Brady. I believe most emphatically that the reason of this was that he had not informed himself in regard to his testimony. He probably at that time did not know what credits were in the name of General Brady at Hatch & Foote's. He did not at that time know what he might be called upon to state in regard to this matter. He was willing to be a witness so that his fines and deductions should be remitted to him, but he had sworn already in the Kellogg and Spofford case that he never had any corrupt understanding with General Brady, and if he could not truthfully go before a jury and swear that he knew of a corrupt agreement he had to conceal what he intended to swear to until the time came when he should present it upon the witness stand. That was the motive, in my opinion, speaking only for myself. That motive shows him to be, as I stated in the beginning, a corrupt schemer, perjurer, and an attempted blackmailer. Viewing Mr. Walsh as a witness for the Government, there are some points that I wish to call to your attention to-day that may perhaps be considered points of recommendation. Mr. Walsh comes here upon this witness stand clothed by three indictments that were found against him in New Orleans or in Louisiana. They are now dead, but he is the same Walsh that was indicted there when Brady was the supervisor of internal revenue; the same man. He is the same Walsh, who, while a banker here, failed to keep his books. A banker without books; a banker lending money, as he says he did, to General Brady, and yet without books. Not an entry upon any book whatever is produced here to corroborate the statements of the witness. He is the same Walsh who testified in the Kellogg-Spofford case. He is the same Walsh who received from the department remissions of fines and deductions. He is the same Walsh who brought suit against General Brady in two cases, and the affidavits in the suits conflict with each other. He is the same Walsh who has been the subject of newspaper items and interviews. Taking all these matters into consideration, taking his conflicting statements, taking his failure to show any notes, his failure to state in his suits whether notes existed or not, are you to believe that he has told the truth upon this stand when he testified in this case?

Passing from Walsh, gentlemen, I desire to briefly note one more point, and that is as to the reasons which have actuated this defense in regard to the conduct of the case. You have seen from the testimony that the Government have brought here witnesses from the far West, who have testified to irregularities, and made statements tending to show disagreements, and tending to show various other matters connected with the mail service as performed there. You may ask, gentlemen, why have not the defendants brought witnesses here to show that

the statements made were not true, or the reason why this state of affairs existed. I will tell you the reason. It is plain and apparent because none of that testimony tends in any way to establish the charge of this indictment. Think for a moment. Suppose we were going to offset the testimony introduced here in regard to petitions, and we would do as the Government has done and send there for witnesses. Now it might be considered that we ought to show that these petitions expressed truly the voice of the people. How many witnesses would we want upon each route? Suppose we say five; five citizens, that lived along the route at different points, men that signed these petitions. Suppose we sent for them and brought them here to go upon the witness stand. Now, how many witnesses would we want in regard to the statements contained in the affidavits to show you that they were honest and fair statements? Suppose as a low estimate we say three. How many postmasters would we want to bring here in regard to the various circumstances tending to show the performance of this service? Suppose we say only the postmasters at the terminal points, and put it down to two. We have, then, got ten witnesses to be brought from the far West on each route to testify for the defendants in this case. How many routes are there? Nineteen. Ten times nineteen makes a hundred and ninety. How much does it cost to bring a witness here? The least calculation would be that they would have to remain here for a month. Their passage would have to be paid from the distant points in the West to this city and back again. They would be entitled to \$1.25 a day as witness fees while here. The expense of every witness could not be less than \$300, and I presume, in the case of the various witnesses that have testified here for the Government, the amount may be larger. But put it as I estimate it at \$300. Then we have 300 times 190 or \$57,000 to be expended by these defendants in the production of testimony here alone, testimony simply and solely in regard to affidavits, petitions, expeditions, and increases. If we had defrauded the Government of the United States out of large sums of money, and had it in our pockets, we might be able to stand that expense. But as honest men, trusting to the principles of right, trusting to the fairness of this jury, and not having defrauded the Government of the United States, we cannot pay \$57,000 to indulge in any such worthless and unnecessary testimony as that.

Gentlemen of the jury, I believe that the time is not far distant when these defendants will go forth from this court-room free and untrammelled. I believe that they will pass through the fiery furnace of this prosecution with their garments unsinged. I believe that their reputations now in the East attempted to be tarnished, but in the West shining with bright luster, will in the near future rest securely upon the pinnacle of honor and respect with the people of both the West and East. I thank you for your attention.

Mr. TOTTEN. May it please your honor, and you, gentlemen of the jury: It has been allotted to me, in the distribution of the labor, to follow Mr. Williams for a few minutes, and do what I can to enable you to arrive at a just and proper conclusion of this case. The charge made against the defendants here is the charge of conspiracy. The crime of conspiracy was an invention of the common law. It was a device resorted to by the monarchs of old who governed our mother country many years ago, when the lives and liberties of citizens were not respected. It is an offense that stands alone. It is the only crime known to the

common law that assails the mind and thought of the man alone. Every other crime requires that an act shall go with it; but this invades the secret recesses of the mind, and without an act undertakes to convict a man of an offense against the law. In my judgment, gentlemen, the offense of conspiracy was a device resorted to by despotism for the purpose of oppressing the people, and it is my opinion that in nine cases out of ten when you have a conspiracy indictment before you the prosecution is for some purpose other than the proper and fair administration of justice and the vindication of the law. If either of these public officers who are charged with this crime before you were guilty of receiving bribes, were guilty of corruption in the great offices which they held, why should they not have been charged with bribery and tried for that offense? The punishment attaching to bribery on the part of a public officer, is far more severe than the punishment attached to conspiracy. It is just as great a crime for a private citizen to bribe a public officer as it is to conspire with him to defraud the Government. Now, if these two public officers were guilty of an offense in connection with these nineteen star routes they must be found by you, before you can convict them, guilty of having received bribes or having been corrupt in some other way in the discharge of their public duties. I say if this was an honest effort to bring guilty men to punishment, if it was an effort on the part of public officers who are the conservators of the peace, to vindicate the law, and there was any evidence of a crime of this grave character then the men would have been indicted singly for bribery and would have been brought to punishment for it if they were guilty.

The court told you a long time ago—since the beginning of this trial and that has been so long ago that we have forgotten what was said in the early part of it—that the prosecution had undertaken a mighty task. Those were the very words that fell from the mouth of his honor, and I reiterate the same words. Whenever the Government undertakes to bind together eight men in a conspiracy of the character set out in this indictment, involving contracts over the length and breadth of the land, they do undertake a mighty task when they undertake to establish a criminal conspiracy against those men. You, gentlemen, have doubtless observed, for you are sagacious businessmen, that there has been a studied effort on the part of the gentlemen representing the Government here to avoid this indictment; to lead you away from the issues which we are called upon to try; to divert your attention from the issue here, and to ask your attention to something else; to tell you that there have been frauds here; that there have been fraudulent affidavits, fraudulent petitions, fraudulent this and fraudulent that, and that we do not explain them. That is not the true theory of this case. You are here for the purpose of trying an issue between the United States and eight of her people. The United States desires no victims, no punishment for the sake of punishment, but simply for the purpose of vindicating the law; and you are not to go outside of the issues raised by the pleadings of this case. The issue raised is whether on the 23d day of May, 1879, these men conspired together in the city of Washington to defraud the Government of the United States by criminal means; and subsidiary to this is the other inquiry, whether anybody committed an overt act to effect the object of that conspiracy. That is what you are here for, gentlemen, and it is my duty to tell you, and I shall avail myself of my liberty to tell you frequently during my few remarks to you, that your sole duty is to try that question and not to try any other question. You have doubtless observed the difficulties under which we have labored. We have been denounced on all hands by the public voice,

by public clamor, and by the public press. We have the whole Treasury against us, the prosecuting officers have ransacked this country from Dan to Beersheba to find witnesses to swear against these men. They have not hesitated at the expenditure of large sums of money; they have not hesitated at any trouble. They have sent men over and over this broad land to seek for testimony to establish the most trivial points. Wherever you find in this case a point that is not supported by the testimony, you may make up your mind that there is no testimony to support it or the Government would have gotten it. The parallel of this case is not known in this court-house, nor is it known in any other, regarding the amount of money expended to try these men and to bring them to conviction the number of witnesses that have been seen and brought here and examined, and the number of papers that have been read to you (*ad nauseam*, gentlemen, I have no doubt because it was so to me). Nine hundred and fifty-seven vouchers have been read to you, gentlemen, and I say that it was not right and it was not fair in the administration of justice that your attention should be called to all these papers, when but a very few of them were applicable, honestly and fairly, to the issue which you are to try.

I want to bring your attention, gentlemen, to another subject, and that is this: This case stands wholly upon circumstantial testimony. There is no direct proof even squinting towards a conspiracy, and I submit to your honest judgments that there is no circumstantial testimony that looks to the guilt of these men. If you will permit the remark, gentlemen, I want to say this: that there is one error into which jurors are liable to fall, who are not accustomed to the examination and weighing of circumstantial testimony, and that is to look at the number of circumstances rather than to look at the nature of them. That is not the true theory. Every circumstance must be weighed alone, and it must be proved to your entire satisfaction and convince you beyond a reasonable doubt of its truth. The case must be made out as if it were a chain of testimony. It is not like a bundle of switches, where every switch put upon the pile and into the bundle strengthens it and makes it more difficult to break; it is like a chain; every link must be perfectly strong; and the burden of proof rests upon the Government to see to it that there is no link missing, and that there is no link that is not strong enough to convince your mind beyond all reasonable doubt of the guilt of these men. It will not do to say that there are suspicious circumstances. It will not do for these gentlemen to tell you that there is a strong probability of guilt. The law frowns upon all such attempts. You must be convinced and satisfied beyond reasonable doubt. If you can account for any circumstance upon a hypothesis of innocence rather than a hypothesis of guilt, it is your sworn duty to so do. Before you can find a verdict of guilty against any man in a criminal court you must be utterly unable to reconcile his conduct with the theory of innocence. The testimony must lead your mind satisfactorily to the conclusion of guilt beyond any reasonable doubt. If there is a doubt in your minds, the benefit thereof goes to the men who are on trial.

As I said before, gentlemen, the issue here is, did these men conspire together in a criminal manner on the 23d day of May, 1879, for the purpose of defrauding the Government of the United States? That is the question. If a stranger unacquainted with the newspaper clamor which has been going on for the last year about this business and unacquainted with the case had come in and heard the arguments of the gentlemen who represent the prosecution he would have supposed you were called upon here to pass upon the question of whether there had

been too much money spent or not, whether there had not been more service put upon these lines in the far West than the people there deserved. He would have concluded that was the question which you were trying. You were told with a loud flourish of trumpets that from a few thousand dollars of original compensation provided for in these contracts the amount has been run up to \$448,000. You have been told that over and over again. Gentlemen, I say that is not true. I am arguing this case upon the indictment, and upon nothing else. I will not permit you, if I can help it, to go back of the 1st day of July, 1878, and make inquiries of this kind as to whether there has been more money spent than ought to have been spent. That is no part of your business. You are sworn to try the issue between the United States and these defendants raised by the pleadings. I delay here for a minute to read to you the result of a tabular statement I have had prepared upon the subject-matter of this vast expenditure that you have heard so much about. I begin at the 17th day of May, 1879, for convenience, because prior to that time the law under which this proceeding is going on was not in existence, and I stop on the 1st day of April, 1881, which includes every order that General Brady made during that period. He made none after the 1st of April, that are mentioned in this indictment. I have taken every order that was complained of, every order that is mentioned in this indictment, and will give you the result. The original pay per annum was \$41,135. That was the original pay mentioned in these contracts, and that is the sum total of the original compensation in all of them. Now, there was added during this period about which I have been talking for additional miles \$360.90, there was added for addition of trips, that is what we have been talking about here, as increase of service, \$202,730.95. There has been added by way of expedition, that is, increase of speed, the sum of \$55,828.82, and no more. That makes a very different statement from the other. Here is only \$55,000 of increase in public expenditure for increase of speed during the time about which we are inquiring, and during the period within which our inquiries are limited. I want to caution you also, gentlemen, against another error that you have also been led into by the gentleman on the other side who preceded us. You heard him, after expounding these various orders to suit himself, and after calling your attention to the extravagant expenditures of money, appeal to you to say whether these orders were not improvident, whether they did not convince your minds that General Brady was an inefficient officer and unfit for his place. Gentlemen, you are to make no inquiries on that subject. The question whether a public officer is efficient or inefficient is one for the Executive to determine, and it is not a question here. If he was inefficient that is not his fault. If he was careless that may have been his fault. If these orders were improvident that may have been careless, or it may have been the result of an innocent mistake. All those inquiries are to be excluded from the jury-box. You are to determine the question whether these men entered into a criminal conspiracy on the 23d of May, 1879. That is all you are to do.

I want to invite your attention to another question. It is a little matter, and my brother Williams has alluded to it in a general way, but I have been unable to understand all the way through this case why it was that, if these eight men entered into a conspiracy to defraud the Government they should have confined themselves to these nineteen routes. They had amongst them some ninety five or ninety-eight contracts with the Government to carry the mails. If they en-

tered into a conspiracy about nineteen routes, why did they not enter into a conspiracy about them all? If they started out into a conspiracy they unquestionably should have left modesty behind.

Mr. HENKLE. There were one hundred and twenty-six routes.

Mr. TOTTEN. That makes it still worse. They had one hundred and twenty-six routes amongst them. Why they should have selected nineteen particular routes, and on the basis of those nineteen routes enter into a criminal conspiracy to defraud the Government is incomprehensible to my mind, and I have heard no man suggest an explanation that was reasonable up to this time.

During the course of the few observations I shall make to you, gentlemen, I intend to confine myself to the acts that are included in this indictment. I intend to confine myself to the acts that are not put into oblivion by the statute, those acts about which you are forbidden by the laws of the land to inquire, that have been swept off into the misty darkness of oblivion never to be resurrected again, by the statute laws of the land made for your protection and for mine against unlawful combinations to convict us of crimes. The statute of limitations says that no man shall be prosecuted—and it ought to have said persecuted, too—tried or punished for any offense, that is more than three years old. Now, gentlemen, you understand by what I shall be controlled in my observations to you. I will not wander outside of this case, and I will not permit anybody else to wander outside of it. If you find that these people agreed and combined together according to the charges in this indictment, if you find that they are guilty, you may punish them. But I say they must be found guilty according to law, and they must not be found guilty in any other way.

At this point (12 o'clock 28 minutes p. m.) the court took its usual recess.

A F T E R R E C E S S .

Mr. TOTTEN. [Resuming.] I desire, gentlemen, briefly to call your attention now to what is charged in this indictment and to bring it to your attention specifically, not only as to the charges, but as to the means by which this alleged criminal conspiracy was to be carried into execution. One of the main charges is that these men were to write and sign, and cause and procure to be written and signed, fraudulent letters, communications, and petitions, and to have them filed; also false and fraudulent oaths as to the number of men and horses necessary on said route, and that General Brady fraudulently made orders for increase and additional service, he well knowing that such additional service was not lawfully needed and required for the transportation of such mails, nor necessary for the people residing upon and in the neighborhood of the routes, nor necessary and required for the just and lawful benefit of the United States, and that he certified such orders to the Auditor of the Treasury; that he made orders for extending service so as to include other stations, and made fraudulent allowances for such extensions, well knowing it was not needed, necessary, and required to make such orders; that he made orders for curtailing and discontinuing routes and allowing one month's pay for the indemnity, and so forth, and the allowance of pay without the contractors having performed the service and refused to make orders for deductions and refused to impose fines for failures to perform service; and by means of filing fraudulent subcontracts, and that Turner was to indorse on the fraudulent petitions, letters, and so forth, false

dates as to the filing thereof, to wrap petitions, &c., in jackets with false briefed statements of the contents and subject-matter, to the effect that such petitions were in favor of increased service, and so forth, and to procure such fraudulent orders to be made to the contractor.

There is one very remarkable charge in this indictment, and I want to call your attention to it briefly :

And by means of the said Thomas J. Brady and then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to make and file in the said office of the Second Assistant Postmaster-General, written orders for the increase of expedition in carrying the said mails on and over the said post-routes, and for reducing the time for carrying the said mails from the place of departure to the place of arrival, on each of said post-routes, to a schedule and number of hours less than mentioned and specified in each of said contracts and agreements as aforesaid, he, the said Thomas J. Brady, then and there well knowing that the said increase of expedition was not lawfully needed and required, and was not necessary and required for the proper and lawful conveyance and transportation of the said mails on and over the said post-routes, and was not necessary and required for the just and lawful benefit and advantage of the said people.

Now, that is a charge that on the 23d day of May, 1879, these men got together in the city of Washington and conspired that some time in the dim future, when application was made for the increase of service and the expedition of service, he would at that future time know that it was not needed for the public good. There is a specimen of pleading, gentlemen, that is rarely to be met with in the proceedings of any court.

I want now to invite your attention briefly to the subject-matter of fraudulent petitions. I have heard a great deal about fraudulent petitions during the progress of this trial. The right of petition, gentlemen, is one that is regarded as sacred by all of the American people, and one that is preserved to every citizen. These petitions are sent to public officers at all times and upon all occasions, to bring to their attention such matters as need the interposition of public officers. They are advisory. They are for the purpose of communicating facts to an executive officer of which he is not advised. There is no law on the subject of petitions relating to the Post-Office Department, and there is no way pointed out by any statute of the United States, by or through which a public officer shall obtain information. As long ago as 1792, in one of the acts relating to the Post-Office Department, the statute provided in relation to advertising of carrying the mails—I quote the language of the statute:

Before advertising for proposals for transportation of the mails to form the best judgment practicable as to the mode, time, and frequency of transportation on each route and to advertise accordingly.

Now that is all I find on the subject directory to the Postmaster-General upon this subject, and that is not found in the Revised Statutes, so that the Postmaster-General and his subordinate officers are left to grope in the dark to obtain information about these wild regions of country as best they can and as best they may. The most natural source for them to apply to for information is the members of Congress from those particular districts. The next best way is to apply to the people and receive their advice upon the subject as to how many trips they are entitled to and how much mail service may be needed and required there. We are told very seriously, at least with apparent seriousness by the learned gentleman who last spoke for the Government, that it was the duty of the Second Assistant Postmaster-General not to avail himself of these petitions, not to govern himself by the statements of the people living along these routes; that it was his duty to

go out and inform his mind upon this subject, and find out in some other way whether the statements made by these people were true. I suggest to your minds, gentlemen, that that is utterly unfeasible and impracticable; that no public officer charged with the duties that pertain to the office of the Second Assistant Postmaster-General could ever undertake to get information that way. He must rely upon the information he gets from these various sources, from the contractors, from the people, from the representatives of the districts where these routes are located.

Gentlemen, we were told by the court during the progress of this trial that it was perfectly proper for any contractor to apply to the people to get up these petitions, to hire men to get these petitions up, and send them in for the purpose of getting such service as might be necessary and needed by the people, and that he might engage the service of newspapers so long as the truth was adhered to; that there was no objection to that method of proceeding on the part of a contractor. The Post-Office Department was established for the purpose of carrying the mails to the people. It was established for the purpose of scattering information from one end of the land to the other, and it was established for no other purpose. The charge as to the fraudulent petitions, gentlemen, I submit to you is not made out. There are only five or six petitions that are assailed by the prosecution—only a few; and in every instance where they have assailed the petition there are other methods of information, there are other petitions, there are other letters from which the information might have been derived by the Postmaster-General, and he was not subordinated to these petitions and the wishes of these petitioners at all. The discretion of these officers is reposed in them by statute; and I am glad to be able to agree for once with Mr. Bliss that the Postmaster-General and his subordinate officers cannot abdicate their offices in favor of petitioners, of members of Congress, or of petty postmasters in the far West. He is put there for the purpose of exercising a discretion about this business, and I maintain to you and I shall maintain all the time that the discretion of the Postmaster-General is limited only by the legislative power of this land, the power of this land that controls the public purse, and that, when appropriations are made by law and put into the hands of the Postmaster-General to disseminate information to the people, it is the duty of the Postmaster-General to spend that money in the education of the people, and he is accountable to no man, no set of men, except the legislative power of this land.

There is one petition assailed, and that is on the Kearney route. I may stop here and call your attention to that. I think that when that petition was read to you it was submitted to you for your inspection, and if you look at it carefully you will have observed that the interlineation spoken of in that petition was written by that man Nightingale. I have no hesitation in asserting as the fact that that man Nightingale wrote every word of the petition, including the interlineation of those three or four words. I examined it carefully and with critical nicety under a magnifying glass, and I am satisfied in my own mind, and I think you are if you examined it with the care that I did, that the man Nightingale, the distinguished lawyer from Loup City, who was brought here to swear that he did not write it, wrote it. I say to you that in my judgment he did write every word of it.

There is another petition which comes in next, and that is on The Dalles and Baker City route, where they contend that the words "seventy-two hours" have been interlined. But that is an old petition. It

is out of date. It applies to an order that is sunk in the oblivion of years ago, and we have nothing to do with that, and we have had nearly a dozen of petitions indorsed by Senators and Representatives for the very orders complained about, and to which this petition was applicable.

We next come to the Toquerville and Adairville route, where W. D. Johnson, a very respectable-looking gentleman, was put upon the stand to swear that he did not write the word "seven," or make the figure "seven," or scratch out the figure "six." But he did tell you upon his oath that he had written the petition, and he had written it for daily service. Having forgotten there were seven days in the week in Utah, he made it six instead of seven. His attention was probably invited to the mistake, and he scratched out six and put in seven. But that is wholly immaterial. The action of the Government officers is substantiated by the indorsements of public men in office, who are charged with the guardianship of the Treasury, and who are charged with the duty of withholding the public money for the carrying of the public mails. If these petitions were the sole authority for a Government officer to act on, or to refuse to act on, there would be more importance about this question than I deem there is connected with it now, because the Government officer is put there to do his duty; to expedite the mails when he thinks they ought to be expedited, and to diminish the service when he deems it for the public good.

We have another petition about which a loud complaint was made, and it has been most frequently mentioned to you, and that is the petition known as the Utah petition. The great fraud about that, they tell us, is that this petition is signed by the people of Utah, and they put Nephi Johnson on the stand to point out the names of some people who lived in Utah. The petition was intended to bear upon the route up in Canyon City, and it was one of a system of lines, and the people of Utah, I submit to you, have as much right to have increases of the mail service upon any line that contributes to them as anybody else. I have as much right to express my opinion to the Postmaster-General as to the service in a country where I am interested as anybody else, although I live in Washington. I do not know what this indictment means when it says these petitions are not signed by people who live along the neighborhood; that the service was not needed by the people who live along upon the line. The mail service is intended for the body of the whole people, and the men who write letters from the East to the people in the West are just as much interested in that question as the people who live along or upon the line of the post-route, so that the people of Utah have just as much right to express their opinion and to desire the increase of this service as any other people have.

Then we have Hall, that model postmaster, the man who did not know his own signature under oath. Do you believe him? You saw those nine signatures that were there; all of them undisputed except one. Some of them he knew. Some of them he said he did not know, and if the signature which he said he did not sign was not signed by him, there was not one of them in the whole lot that was signed by Mr. Hall, this model representative of a western postmaster. If you believe such men as he is, who do not know their own signature, then, gentlemen, it is a hard time for people who are charged with crime in a criminal court.

You have heard upon this subject a great deal about Miner and Rerdell having written petitions. Why not? Why not write a petition? Why cannot I write a petition if I want to do so. I can write a promissory note for you to sign or a draft upon New York for your signature.

My handwriting has nothing to do with it. It is the man who signs that gives it vitality, and it is not the man who writes it. Now suppose, gentlemen, that these interlineations were made by some other man than Nightingale. Suppose that some other hand than Hall wrote his name to that petition, which I deny. What of it? How was General Brady to know this? How was Mr. Turner to know it? How was any other clerk of the Post-Office Department or any other officer of the Government to know it? The presumption of the law is that every paper is genuine until the contrary is proven, and if the rule is adopted which these gentlemen have insisted upon in this trial, we can send every lawyer of this bar to the penitentiary on such a wretched presumption. You may go into the files of this court and look at the papers in each case and you will not find one case in nine that is not scored and scratched and underlined and worn out; and I know of no man upon this bench who is so liberal in scratching my orders as the distinguished jurist who presides over this trial. You can send me to the penitentiary for interlineations his honor has made if the presumption is that I forged the order because there is an interlineation.

Now, gentlemen, I tell you that the law is not so. Every paper is presumed to be right until the contrary is proven, and it was the duty of the Postmaster-General to assume that those interlineations were made before the signatures were fixed to the paper, and there was no other rule for him to adopt, and there is no other rule for you to adopt. These petitions are gotten up by being circulated by all kinds of people. They are not models of clerical beauty and clerical accuracy as a general rule. You have all seen petitions. We are called upon here every day to sign petitions for our friends and our neighbors. We sometimes sign petitions that we do not read. But the presumption is that the petitions are genuine until the contrary has been established by the testimony that is undoubted in your minds. Now, that is all of this. What man did they put upon the stand to show that in any of these affidavits, or any of these petitions, except Hall's and Nightingale's, these interlineations took place afterwards? Now, Nightingale swore that he did not write that, that he wrote the original. But I say he did write it, and I assure you, gentlemen, if you take that petition and look at it again and compare the letters, you will recognize them as the letters of Mr. Nightingale, the distinguished lawyer from Nebraska, who did not know of the existence of a public statute allowing a subcontract to be filed for the protection of his clients. He does not know what the public statutes of the United States are, and he is a practicing lawyer, brought down here over a thousand miles to swear that he did not make that interlineation or that addition to the petition. Why, gentlemen, he never saw so much money in his life as he got for coming down here to swear to that petition. He probably never saw so much money as he saw when he was paid off and sent home with the admonition "Well done, thou good and faithful servant, here is your 8 cents a mile and \$2.50 a day for sixty days." Such lawyers are a great honor to the profession, gentlemen.

"And false, and fraudulent, and corrupt affidavits." Now, all that I have said to you on the subject of petitions applies to these affidavits. There has not been a witness put upon the stand to swear that any alteration that was found in an affidavit was made after the oath had been administered to the affiant—not a witness. And you may take the oaths on the records of this court, and they present a worse appearance than the affidavits which were produced here before you about these nineteen routes. What are affidavits

for, anyhow, in connection with the mail service? They are simply to give the opinion of the man who makes it. That is all. There are eleven affidavits mentioned in this indictment, and no more, and I want to caution you not to go beyond the affidavits that are mentioned in this indictment. They are all, and if not all, nearly all—perhaps there are two that are not made upon the belief of the affiant. They do not swear positively that it was true. No man could swear that an affidavit of that kind was absolutely true. No man could swear that so many horses were necessary to carry the mail over a given route at any time. Your opinion might be that nine horses were necessary, and I, being a stingier man and more cruel to horses, might say six were enough. It depends upon the weather, it depends upon all kinds and sorts of circumstances, and it depends a great deal upon the man who is driving your horses whether he can go four miles an hour or fourteen, and endure for months under it; so that every man has his own opinion, and when this rule was established requiring the oath of the contractor, which was on the 1st of July, 1879, it was intended to get the advice of the contractor in order that the judgment and minds of the public officers who had to make the orders might be informed.

Brother Bliss tells you it is the duty of the Second Assistant to go out and inquire. Where would he go? Go to Utah? Go from Bismarck to Tongue River and inquire how many horses it would take? Or would he send a special agent out there to travel from one end of the route to the other and make an estimate? How was he to find out? He had to find out as best he could, and the Supreme Court tells you that when the duty is imposed by statute upon a public officer to pass his judgment on a given state of facts, there is no tribunal upon earth that can review his judgment. It is absolutely the last and final judgment upon that subject. When the Postmaster-General or his subordinates examined into the question and read those affidavits, and he passed his judgment upon it that was the end of that question.

Now, gentlemen, one of the most frequently recurring charges in this indictment is that these orders were not needed, not lawfully needed and required, not necessary and required for the convenience of the mails, not necessary and required for the just and lawful benefit and advantage of the people, &c., residing and living upon and in the neighborhood of the route, not necessary and required for the just and lawful benefit and advantage of the United States. Who is to decide that question? Who is it who is to determine whether a given mail route is entitled to one trip a week or ten. Where does the statute repose that confidence? In whom does it repose that power? In the Postmaster-General. And it holds him to an accountability to Congress and to no other power upon earth. He is required at the beginning of every session to make a report as to the condition and state of the postal service under his jurisdiction, to tell them how much expedition is made, how many increases of trips, how much of fines and deductions he has levied, how many remissions he has made; in fact, he is bound to submit a tabular statement, and a written report, giving to Congress all the information he has in regard to these subjects, and they pass upon his acts, and confirm or reject them, and that is the end of the matter. There is no other power that can inquire about that. He is the man to determine what is useful and necessary for the people of New Mexico. He is the man to determine how much money he shall expend in sending information to the people of Utah. He is the man to determine whether he shall send mails over the route from Bismarck to Tongue River three or six times a week, and no power upon the earth

shall say that the people there and the people of the United States did not need it, and it was not for the benefit of the public mail service. Congress is the power that will tell him when to stop, and there is no other power, and he may use all means that are reasonably necessary and appropriate for that purpose, and I quote the language from McCullough against Maryland.

The COURT. That language is applied to the powers of Congress.

Mr. TOTTEN. The Constitution.

Mr. MERRICK. To carry out the granted power.

Mr. TOTTEN. Suppose the Postmaster-General in the exercise of his discretion makes a mistake. Suppose he thinks that it is only two hundred and fifty miles from Bismarck to Tongue River. Who is to call him to account for it? Suppose he thinks that mail ought to be carried twice a day over that route, who shall correct his errors of judgment but Congress? He makes his report to Congress and tells them how much money he is spending, and they either appropriate the sum again that he may continue the service, or they cut it down, and he is required by law, and it has been the universal custom of the Post-Office Department to make provisions in the contract, and in every contract, allowing the Postmaster-General to control every man who undertakes to carry the mail. So that the moment Congress refuses to give him the appropriation all he has to do is to cut down the service in order to come within the provisions of the appropriation laws.

Mails are carried in the West not for our benefit, not for their benefit, but for the benefit of the whole people, and he is given money for that purpose, and I contend that the sole limitation upon the Postmaster-General consists in the appropriations made by law. I may observe to you, gentlemen, in support of my assertion, that these mails were needed, that the service was just and proper, by saying to you and bringing to your attention the fact that a great many of these routes have been swallowed up by the railroad service, and have been carried since then over the railroad and the lines have been discontinued. This Bismarck and Tongue River route was swallowed up long ago, and the Northern Pacific Railroad, instead of stopping at Tongue River, has now penetrated the forests of the north, three hundred miles beyond Miles City, and they are carrying the mails there to-day. That is the most conclusive argument that can be made that this service was needed, and it makes no difference to us, so far as our inquiry is concerned, whether they were needed or not. A statute of the United States passed in 1877, established that route, and it became the bounden duty of the Postmaster-General to supply it with service. The route was established, the money was put into his hands and subject to his orders to transport the mails over that route, and he did it.

Now, we are told, gentlemen, in one breath, that the Postmaster-General had, at the time he made these orders before his eyes the advice of postmasters, the advice of a man by the name of Beene, that the service was not necessary. We are told in the next breath that the Postmaster-General cannot abdicate his power, cannot abdicate his position and surrender his powers to the Senators and Representatives of the United States, and I add to that, that he should not abdicate in favor of the postmasters. If these postmasters are the men to determine whether that mail shall or shall not be carried, why were they not made Postmasters-General? Why were they not consulted about it? Those men are not relied upon with the accuracy which my learned friend seemed to think, for information is not obtained through postmasters about a route. Information is obtained by officers intended for that ser-

vice and kept in Washington, and when information is desired about any particular route a man is dispatched, by the order of the Postmaster-General, to examine the facts and report them to the Postmaster-General.

We are told that the Postmaster-General violated his duty in not observing the letter of this man Beene. We are told that he violated his duty in not pursuing the advice of a man named Ingersoll, who seemed to have kept a little post-office at the cross roads down below Pueblo. Another postmaster by the name of Trew we had the exquisite pleasure of looking at, and he was a nice looking man at all events and a fine man to testify. We had better than that, the postmaster Ward. He advised the Postmaster-General what to do and what not to do. He is the man who had the perambulating pos-toffice and loaded it up on a cart when he wanted to go away and moved it into another part of the country. Yet we are charged with dereliction of duty because the Post-Office Department was not governed by the advice of such people.

One of the charges, and one of the means charged as having been used to carry out this wicked conspiracy, is that General Brady was extending routes to include points not in the contract. We established, gentlemen, I think beyond question, that it is the custom, and always has been, of the Post-Office Department to extend lines and take inside post-offices. I think we established that beyond any question, and it is a reasonable thing that it should be done. These post routes are not confined at any place except at the termini, and they may be varied on one side of this mountain or the other side of this mountain, as the Post-Office Department may consider for the good of the service, and where the post-office is established within the region the line may be curved in order to take in that route, and if there is any increase in the service the man must be paid for it pro rata, and if there is any diminution in the service it is the duty of the Post-Office Department through the inspection division to take off the extra pay. And right here I want to call your attention once for all to the provision in every contract that the Postmaster-General makes with the people in this country for carrying mails, and I want to invite your attention here to the assertion that was made, the bitter comments that were made, that Mr. Brady had always gone clear up to the extent of the law by allowing pro rata. Now, to show how hollow a pretense that is, to show you how unmanly it was to argue such a thing to you, let me read this provision in the indictment, which is an extract from the contracts made in all these cases, and the extract is in all contracts.

Postmaster-General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service in accordance with the law, he allowing a pro rata increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is rendered necessary; and in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay, on the amount of service dispensed with, and a pro rata compensation for the services retained; provided, however, that in case of increased expedition the contractor may, upon timely notice, relinquish the contract.

Now, how would General Brady look making an order for increase of service and not allowing the man pro rata? It has occurred in three or four instances in the case in this indictment, and I am not talking about any other case, where the contractor and General Brady have made a specific bargain, and it is always mentioned in the memorandum order which is set out in the indictment as a pro rata allowance, or being less than pro rata, but in accordance with the agreement between the parties.

The COURT. Looking at the paragraph on page 13, it seems to be one of the grounds of complaint that the contracts were in that form.

Mr. TOTTEN. I think not, your honor. This very question came up before the Supreme Court, not six months ago, where the Postmaster-General undertook to curtail the service on the Chicago and Northwestern Railroad, and the Supreme Court said the Postmaster-General could do no such thing; that he must allow them the month's indemnity if he curtailed the expenses.

The COURT. But if he extends the service or increases the expedition he is not obliged to allow pro rata.

Mr. TOTTEN. He is, under that provision.

The COURT. Under that provision of the contract; but there is no such provision of law.

Mr. TOTTEN. I did not say there was, your honor; I say it is a custom of the department.

Mr. WILSON. It is part of the law, your honor.

The COURT. No, it is not.

Mr. MERRICK. Oh, no; it is not part of the law.

Mr. TOTTEN. It is part of the regulations anyhow, and it was part of the advertisement.

The COURT. The contracts seem to be drawn in that way.

Mr. TOTTEN. If the contract is drawn in that way——

Mr. MERRICK. [Interposing.] If it is the law I would like to see it. It has not been produced yet.

Mr. TOTTEN. It don't make any difference whether it is law or regulation. My notion about it is that it is regulation, your honor.

The COURT. No, it is neither law nor regulation.

Mr. TOTTEN. But at all events that provision is in these contracts and they were made in 1877, and both the Postmaster-General and his subordinates were bound by these contracts; and the Supreme Court has decided that they cannot disturb their integrity.

The COURT. The Supreme Court does not say any such thing.

Mr. TOTTEN. What? Your honor did not hear what I said.

The COURT. Yes; I did.

Mr. TOTTEN. I said the Supreme Court decided that the Postmaster-General could not disturb the integrity of any contract. Your honor did not hear what I said. The Supreme Court had this very clause as I understand it. You will find the case——

The COURT. [Interposing.] That is where the contract was an honest contract.

Mr. TOTTEN. But there is no contract here that is a dishonest contract.

The COURT. It is charged in the indictment——

Mr. TOTTEN. [Interposing.] No, your honor; that they were lawful contracts that were held for the benefit, gain, and profit of all these people.

Mr. KER. It states merely that they were contracts. It does not say whether they were lawful or unlawful.

Mr. TOTTEN. That is equivalent to saying they were lawful, I take it. Now, the Postmaster-General is clothed with authority by law to establish post-offices, and he does that through the instrumentality of the First Assistant Postmaster-General's office, and when a post-office has been established it is the plain and bounden duty of the Second Assistant to supply that office with service. There has been no successful impeachment of the honest performance of that duty by the testimony in this case.

The COURT. That is the only question. There is no doubt about his power and there is no doubt about his right.

Mr. TOTTEN. And his duty.

The COURT. There is no doubt about his duty. Whether he has made a mistake in regard to the policy is not a question here.

Mr. TOTTEN. No, sir. I am glad your honor has said so. Your honor has always said so.

The COURT. I have held so.

Mr. TOTTEN. Yes, sir. I do not want, your honor, to come down to your idea now. I see what your idea is. I am not ready to strike it yet, but I will be in a few minutes. I am following this indictment. This is the paper we are trying, and I am going through with it now, with your honor's permission.

The COURT. God speed you.

Mr. MERRICK. May I ask my learned brother a question? He stated that there was a law. I have not seen the law mentioning the provision to which he has referred. Mr. Wilson also interrupted me, stating that it was the law. Now, if there is such a law, or such a regulation, I think at this late day in the case we are at least entitled to know it from the other side. I ask the counsel on the other side, your honor, and I think if they have it we should have it.

Mr. TOTTEN. I do not believe there is a statute on the subject.

Mr. MERRICK. Mr. Wilson said there was.

Mr. TOTTEN. I do think there is a regulation, but I am not certain about that. I will tell you what I know there is. There is a provision in the back of the book containing the advertisement of 1877 that I am told is in all the advertisements, saying that that provision will be made, or something of that sort. At all events, it is not an important question whether the matter is one of statute or regulation. It is in these contracts, and these contracts are unassailed.

The COURT. This form of contract was devised by Brady.

Mr. TOTTEN. Oh, no. Who said that?

Mr. WILSON. Not at all.

The COURT. In 1877?

Mr. TOTTEN. No, sir.

Mr. WILSON. No, sir.

Mr. TOTTEN. There is no such proof, and it is not so at all.

The COURT. You have just stated in the presence of the court that the form was adopted in 1877.

Mr. CHANDLER. The contract was adopted in 1877, but not the form.

Mr. TOTTEN. I say these contracts were made in 1877.

The COURT. I understand you to say that the form was made then.

Mr. TOTTEN. Oh, no, sir. I think these forms are prescribed in the back of every advertisement, for seven or eight years past. I have not looked back any further; probably it runs through every advertisement. The Postmaster-General, your honor, could not possibly get along with the business of his office without that provision.

The advance in railroad interests is always causing change in the service, curtailments, &c., and that has got to be provided for in some way; and this is the rule that was adopted.

The COURT. Undoubtedly, there must be a provision for increase of service and expedition in proper cases; but here is an act set out in the Revised Statutes, section 960, which declares that in cases of that kind the increase of compensation shall not be in excess of pro rata.

Mr. TOTTEN. Yes, sir; that is right.

The COURT. That is, that it shall not exceed it; but it may be as much less as the Postmaster-General can arrange.

Mr. MERRICK. Does that statute use the word *pro rata*?

The COURT. It says it shall not be in excess of the exact proportion which the original compensation bears to the original service.

Mr. MERRICK. *Pro rata* is all the way down from that, or from one cent up to that point. That is what *pro rata* means.

The COURT. Shall not be in excess of the exact proportion.

Mr. MERRICK. Yes, sir.

The COURT. It may be within that.

Mr. MERRICK. Certainly; but the word *pro rata*——

The COURT. [Interposing.] I do not think there is any difference.

Mr. MERRICK. It shall be *pro rata* to the increase of service relative to the original service, and that *pro rata* shall not be in excess of the exact proportion; but where the *pro rata* is, is a matter for his judgment.

Mr. TOTTEN. Now, there is no dispute about that. Brother Merrick has said a good deal about something we all understood perfectly well. There is no quarrel about it.

Mr. MERRICK. You said he had to put it up there because it was in the contract.

Mr. TOTTEN. I do say so. The contract itself says so.

Mr. MERRICK. That is not what it means.

Mr. TOTTEN. They are entitled to it. If the bargain was made for less it is nobody's business but the contractor's.

Mr. MERRICK. They have not made a bargain for that.

Mr. TOTTEN. It says so.

The COURT. It looks a good deal like it in your indictment.

Mr. CHANDLER. It says it must be *pro rata* in the indictment.

The COURT. This section, on page 13 of the indictment, says:

And in which said contracts and agreements so made and signed by and between the United States of America and John W. Dorsey, John R. Miner, and John M. Peck, as aforesaid, it was further stipulated, agreed, and set forth that the said Postmaster-General might discontinue or extend this contract, change the schedule or termini of the route, and alter, increase, decrease, or extend the service in accordance with the law, he allowing a *pro rata* increase of compensation for any additional service thereby required, or for increase of speed if the employment of additional stock or carriers is rendered necessary.

Mr. MERRICK. Certainly.

The COURT. That is in the contract.

Mr. TOTTEN. Mr. Merrick just denied that.

Mr. MERRICK. No; I did not.

The COURT. The contract seems to have gone to the full limit of liberality in the law.

Mr. MERRICK. The question is as to the construction of the term *pro rata*.

The COURT. There will be a chance to deliberate over this further on probably. My attention had not been called to that paragraph before. I had not heard it.

Mr. WILSON. I want to say, if you honor please, that that is a provision of the contract that is not new to these contracts at all, but it is a provision that has been in them almost from time out of mind.

The COURT. Is there any proof of that?

Mr. MERRICK. Not a particle.

Mr. WILSON. I think so.

Mr. TOTTEN. We do not want any proof. We have got the contracts set out in this indictment and that governs us. They are not assailed.

They start out on the foundation of nineteen lawful and legitimate contracts constituting the subject-matter of a partnership, and upon that basis these alleged conspirators started out to work. That is the point about it.

Another charge, gentlemen, is that these orders were made fraudulently by General Brady for curtailing and discontinuing the service and allowing one month's extra pay. There is not much complaint about that except in one instance, and the learned gentleman who pressed upon your minds so vigorously and so ably the infirmities of the *modus operandi* of doing business in the Post-Office Department the other day told you that he did not instance that allowance except for the purpose of operating on Vaile or Miner. That was the curtailment that took place from Adairville to Pahreah, and he said there was an allowance of \$12,000, being one month's pay for indemnity under the terms of the contract. You have heard a good deal of testimony upon that subject, and it comes back to this question: Somebody had to determine whether or not in the fair construction of a contract the contractor was entitled to be paid one month's pay as an indemnity for that curtailment, and upon all the evidence that was before the Postmaster-General he determined that that allowance should be made, and it was made. It was not made by General Brady. He had nothing to do with it. It was made by Mr. French, while Mr. French was acting as Second Assistant Postmaster-General in his absence, and in addition to that it was made in 1878. It is not complained of in the indictment, and you have nothing to do with it. I will say to the gentlemen, without fear of contradiction, that under the terms of this contract whenever a curtailment was made, whenever a discontinuance was made, it was the bounden and plain duty of the Postmaster General to allow one month's pay as an indemnity for throwing the contractor out of service and his property out of use to that extent. That is what this provision was put into these contracts for, to protect the citizen against the despotic power of a public officer wherever he might undertake to use it. The clerk on the witness-stand said that whenever the contract was made and filed the right to this indemnity accrued, and no matter whether the service had been put on or not he was allowed, according to the custom and rulings of the department, one month's pay, and it was right and proper that that should be the construction, because the man was ready and the presumption of the law was that he was ready to do his duty the moment the 1st of July came around.

Now, the next charge in the indictment is that they made orders for allowance of pay without service. Where was this done? Where is there one syllable of proof to show that the like of this was done anywhere? Not one word of testimony in all these three months of labor that we have gone through. There is no way, as I said before, of avoiding the month's pay. There is no way. If that is what is meant by these words, "allowance of pay without service," it was the duty of the Postmaster-General to make the allowance and to pay the man for his services.

The next charge is that Brady refused to levy fines and make deductions from these contractors. That stands upon the same footing. The judicial power over that question was reposed in the Postmaster-General, and it was exercised through the machinery of his office, and when his judgment was passed upon the question whether or not a fine should be imposed or a deduction made that was the end of it so far as all other powers outside were concerned. When he heard the testimony of those who suffered by those fines, and who were obliged to stand the deduc-

tions, and saw proper to exercise the judgment which the powers of the law gave to him, there was no appeal. The contractor is entitled to the money if remitted, and he is not entitled to it if it is not remitted. These deductions and fines, gentlemen, are imposed, it appears to have been taken as conceded, through the inspection division. Those officers act upon the reports of postmasters whose duty it is to report to the Postmaster-General any failure to arrive or any failure to start. The fines and deductions follow the failures with the regularity of clock work. No man can fail to come in on time without being reported here, if the postmaster does his duty. He cannot escape a fine where he misbehaves himself or violates his honest duty as a contractor. The fine and the deduction must follow any misbehavior on his part. The charge that these officers refuse to impose fines and deductions is wholly unsupported by the evidence. I have taken the trouble, and it was not very much, to go over these tabular statements that were presented to you by the gentlemen on the other side, and find out how many fines and deductions were imposed upon these routes. I found that the amount is \$172,593.07. Of course there is a little inaccuracy in this, because the officers of the prosecution have persisted all the time, notwithstanding the declarations of this indictment, in going as far back into the past as they could get, and these fines and remissions reach back further than you are allowed to go by the limits imposed by the pleadings in this case. We submitted for your consideration a table showing the fines and deductions and remissions that were made during the period covered by this indictment, and the remissions that were made during that period were \$22,669.41, being considerably less than the amount of remissions according to the tabular statement submitted by the other side. So that you see that it is not true that anybody refused to impose fines and deductions. There is no testimony to support that theory. There is not a word to support the allegation in the indictment that on any occasion or in any instance anybody refused to impose a fine or make a deduction where it ought to have been made. The fact of the remissions has not much to do with this case, because the word remission is not mentioned in the indictment, and that is not one of the questions that you have to consider in respect to the issues that we are now trying.

The next charge in order is the certifying of these fraudulent or alleged fraudulent orders to the Sixth Auditor of the Treasury, otherwise known as the Auditor of the Treasury for the Post-Office Department. Upon that subject there may be a good deal said. Every averment in the indictment that mentions a fraudulent order is followed by the averment that it was certified, or caused to be certified, by this public officer to the Sixth Auditor of the Treasury. That was necessary, because without the orders going to the Sixth Auditor of the Treasury there could have been no outcome from any of the frauds resulting from this alleged conspiracy. I want to submit to you now, gentlemen of the jury, as a matter of fact, right here, that there is not one order in the proof before you that was made by General Brady—not one. I argue to you as a matter of fact that the allegations of this indictment are wholly without proof in that respect. Every order that you have seen here indorsed on the back of an envelope or jacket was a memorandum order, which was not signed by the Second Assistant Postmaster-General, because his name is Thomas J. Brady, and the name you find there every time is merely Brady. It is a memorandum. We took the trouble to bring the records here from the Post-Office Department to show that these orders are not the orders that are effective in the matter of taking money from the public Treasury. They are mere memoranda. They are

mere indications to the Postmaster-General for his approval or disapproval, and when the orders are carried to the Postmaster-General and by the clerks rewritten and put upon the daily journal of the Postmaster-General and by him signed, they receive their first and only vitality. So I say that the averment in this indictment that General Brady did make these orders is unsupported by testimony and disproved by the records of the Postmaster-General. You have observed, gentlemen, upon the back of these papers that have been displayed before you with so much gusto and so many bland and child-like smiles, "Do this—Brady," the memorandum on the back of the paper in red ink, and then the order in black ink, signed Brady. Those orders are not the orders that were given vitality to by the Postmaster-General. I read them to you. There is nothing there in red ink. There is nothing like what is upon the back of those envelopes. There is a simple order digested by the proper officer of the Postmaster-General himself and recorded in the great book of the journal of the day. That is signed by the Postmaster-General and then becomes an order, and not until then. I submit to you as a question of fact, that the order signed Brady is nothing but a memorandum, and is nothing but suggestive and advisory without the approbation of the Postmaster-General. It is of no effect, and it is not the same order that goes upon the daily journal of the Postmaster-General.

Now, another thing: Where have you got a word of testimony to show that General Brady ever certified one of these orders to the Sixth Auditor. There has not been a syllable of testimony that he ever certified or caused to be certified one of these memorandum orders to the Sixth Auditor; not one syllable of testimony. You are left to guess that that was done. The presumption of the law is that the Postmaster-General's orders went to the Sixth Auditor and the Sixth Auditor paid out the money according to law from the appropriations for that purpose. There is no presumption here against General Brady. There is no presumption that he ever certified an order or ever caused an order to be certified. There is not one syllable of proof that he did. One of the witnesses said it was the custom of the office that an abstract should be made; but we were never treated to the sight of an abstract. Why? Was it because there were none, or was it because if they were produced in court they would be found to be signed and authenticated by the Postmaster-General? No matter what the reason was, there is not a word of testimony that the Second Assistant Postmaster-General ever certified or caused to be certified a single order complained of in that indictment; not a word. Now are you to *guess* men into prison? Are you to *presume* your fellow-citizens into jail? I say there is the chain broken, if ever there was a foundation for a chain, by the omission of this important and necessary link. There can be no money extracted from the Treasury; there cannot be a dollar gotten out of the Treasury until the proper officer of that department has before him the records of the Postmaster-General, saying that these orders were made and giving him authority to pay the money. The law says that the Sixth Auditor shall countersign the warrants of the Postmaster-General when warranted by law, and not otherwise. It is his duty as such, to register, charge, and countersign, says the statute, all warrants upon the Treasury for payments issued by the Postmaster-General when warranted by law. Not a dollar can ever be drawn from the public Treasury by the Postmaster-General without the approbation of that distinct officer; not a dollar can be drawn from the Treasury by all the men in the Postoffice Department without the approbation and signature of the Sixth Auditor. I say that you are utterly destitute of

anything like testimony to show that General Brady ever sent an order of any kind to the Sixth Auditor.

I have before me, gentlemen, upon my memorandum, "Charges against Turner." What, in the name of all decency and of all propriety, was poor Turner dragged into this trial for? What has he done? What position did he occupy that made him the subject of envy of any man? A poor clerk, living or starving upon a miserable salary, a maimed and lame soldier of the war; without reason and without cause he is brought before you, charged with a grave and wicked crime. What word of testimony is there against him? What has he done? Why, even my friend here (Mr. Ker) was compelled to admit that he could say naught against him. Oh, yes; he did do something. He made a mistake amounting to \$4,000 in the Saguache contract, and Sanderson got the money. Sanderson was let go. He was turned out of this court without ever having been brought to trial, although he was once indicted. We have had no explanation of the cause of it, but in this indictment, where Sanderson's name does not appear as a defendant, poor Turner is made a defendant, and that route and all its orders are gathered together for the purpose of blackguarding Turner, because he made a mistake. Now his honor told you and he told me and he told us all, early in the trial, that no man in this court or any other court should be punished because he made a mistake. This mistake was corrected, and the man who undertook to correct the mistake whilst he was doing it made another one. You remember that on the stand he made a mistake in the figures of a thousand dollars against the Government; he made it a thousand dollars more than Turner did; yet Turner is subjected to all this calumny, to all the anxieties of this trial, to sit here day after day and hear this ringing about jackets and ringing about indorsements in red ink; all because he made a mistake. The Government never lost a dollar or a cent on account of it, and yet Turner is indicted and indicted over again and made to stand his trial here before you. Gentlemen, I think this is the grossest outrage that ever was perpetrated upon an innocent man. "False brief statements!" Where and when? Not one.

One of the charges in this indictment, gentlemen, is that these people caused to be fraudulently sent to the Post-Office Department subcontracts which are not charged as being unlawful. I would like to know, if you will not consider that I am too inquisitive, how in the world any man could undertake to fraudulently send a subcontract to the Post-Office Department? I think there are five of these contracts mentioned in the indictment—not more—and two of them were subcontracts of Sanderson. They were fraudulently sent to the Post Office Department. How? Not a particle of proof about it. This business of subcontracts, gentlemen, is a very important business so far as the public mail service is concerned. The business of carrying the public mails is a great business. We have gotten to be a great people. We are a reading people. The postal service is expanding its lines every day to follow the crowds of pioneers who are rushing in the West for timber, for gold, for silver, and for precious stones, and it is the duty of the Post-Office Department, guided by the legislative power of the land, to pursue every company of miners and every mining camp with a postal road and to furnish them with letters and newspapers that they may improve as citizens and may become intelligent and worthy of the nation to which they belong. That is what the Post-Office Department is for. It is not established for the purpose of making a few dollars. It is not established for the purpose of subserving the interests of a few people, of those who dwell in the great cities and have their mails brought to

them every morning and their daily papers by a boy in the livery of the United States. It is intended for all, whether they be pioneers in New Mexico or millionaires in Boston. Now, a subcontractor, gentlemen, occupies an entirely different attitude from the contractor. He is an independent man, and he is wholly free from responsibility to the Government. It takes no note of him except when he files his subcontract; it will see that he gets the pay that he is entitled to from the contractor, provided there is enough money in the Treasury. He gives no bonds and takes no trouble. From the specimens of subcontractors which have been produced to regale our sight during this trial, I should say they were a pretty hard set. Entering into conspiracies to defraud their principal, one fellow throws down the mail and sneaks off, whilst his partner gets a subcontract or a temporary contract from the postmistress, who is his aunt or cousin, or something like that, and he carries the mail until the contractor gets out there with his agents and takes up the service and carries it along. He makes a new contract with the contractor, and when he gets tired or wants more money he flings down the mail, and the contractor's bondsmen are bound to take it up and carry it. That is the difference between a contractor and a subcontractor. The subcontracts went into operation according to law in the latter part of 1878. They were recognized by law then for the first time. Until that time the statutes contained the general provision that any claim or interest or anything of that kind in a contract with the United States was absolutely unassignable; and the Post-Office Department recognizes no transfer of any interest whatever in a post-office contract, except it be through a subcontract. It is recognized by the statute. Now, the business of carrying the mails on these star routes has become as much a business as making shoes, manufacturing reapers and plows and harrows and guns. Men combine their capital together for the purpose of conducting this business according to the true rule of business men. They hire their superintendents; they get their capital together; they are ready at all times when the subcontractors from any cause throw down the mails to pick them up and carry them on in order that there may be no default. It requires capital to carry the mail. These men who bid upon the postal service are bound in the first place, where the amount reaches a certain extent, to file in the Post-Office Department a certified check for \$5,000, and it lies there for weeks and months. No man can go into this business without a large capital at his back. In the first place he must lie out of \$5,000 for weeks and months until he can get the service started. Until these 9,000 contracts are written up they are waiting with this pile of money in the Post-Office Department, for which no interest is paid. It is not every man that can go in this business. He is obliged by law to furnish bondsmen, men to sign his bonds as sureties. Every one of these men must own real estate that is free from incumbrance, and they are required to go before a notary and take a solemn oath that their property is free from incumbrance, and to state upon the record where it is located. Now, gentlemen, it is not every man that can wield as large a capital as this. It is not every man that can send his bid into the Post-Office Department, accompanied by a check for \$5,000, certified by a respectable, responsible bank. I wish I could send in three or four bids accompanied by such checks. It is a great deal better business than practicing law, I presume. Every man who bids is required by law, before the bid can be considered by the Postmaster-General, to submit that certified check in token of his good faith and capacity to carry out his contract. Now, these subcontractors, of course, make their contract with their principals for the purpose of making money.

They usually live in the locality of the route. They carry the mails conveniently. They have no responsibility. They always agree that they will carry the mail for so much, subject to fines and deductions. That is the contract. If a man agrees to carry the mail properly in accordance with the rules, and does not do it, it is proper that he and he alone should stand the burden of the fines and deductions. When a remission is made it goes to the subcontractor. My learned friend from Philadelphia, Mr. Kerr, who spoke so eloquently to you would have made you believe that you were put here to settle the equities between some subcontractors and their principals. Gentlemen, let me warn you against that; let me warn you against the seducing voice of my learned friend; you are here to try no such issue. The courts of the country are open to these men, if they have suffered any injury. Let them go there and make their complaints. If any party has refused to pay his subcontractors, the place for them to assert that is in the courts of the country in a proper way, and not to come here and go upon the witness stand and undertake to send to prison some of their fellow-men with whom they have no acquaintance or very little. We had several spectacles of that kind here upon the stand. It would have been to the credit of human nature if they had not appeared. They were all sharks, many of them were liars, mad because they did not get as much money as they wanted, and they came here to wreak vengeance upon the men who would not give them all they demanded. Fie upon such people!

I want to call your attention, gentlemen, to a remedial statute which stands upon the books, and which was enacted for the protection of the public Treasury. It provides that wherever any money shall be wrongfully or improperly paid to any contractor with the Post-Office Department in any way or in any manner, it shall be the right and duty of the Postmaster-General to institute a suit to recover back the money. There is an ample remedy. If the United States has been deceived, if the United States Treasury has been subjected to too heavy drains for the services which were rendered in pursuance of these contracts, there is an ample remedy. The statute of limitations never runs against the United States on a contract of this kind. For all time the men who sign these bonds as sureties, and their heirs even to the third and fourth generation, may wake up some morning and be called upon to respond to an action at law for money improperly paid to their ancestors or to their ancestors' predecessors. There could be no better remedy devised by law makers than stands upon the statute book on this very subject. If any one of these men, Vaile, Miner, or either of the Dorseys, got more money than they were entitled to have, or if they got money wrongfully out of the Treasury in consequence of the operations on these lines, all the Postmaster-General had to do to recover it back was to institute suit, so long as the service was going on, and he could recoup the amount on any line that he could find with a credit standing to them. So that I submit to you that this criminal indictment was not for the purposes of the public good and was not in the interests of the administration of justice or for the vindication of the law. There was an ample remedy. If anybody was guilty of the crime of bribery the criminal laws were made to reach just such men. If there had been a scintilla of proof that Turner or Brady ever stooped to so base a thing as to receive money to guide their official action, they would have been indicted for bribery and punished according to law. The fine is as great as it is for this crime, and the further penalty of utter and eternal disfranchisement follows a conviction against the public officer. There was some other motive than the vindication of the law in instituting this most

extraordinary proceeding, this most astonishing grouping together of men from all parts of the land. I am ready, gentlemen, to make a wager that this very identical kind of a prosecution can be maintained against any public officer who is charged with the disbursement of money and the doing of important duties. It can be said with just as much force, and it can be commented upon with just as much eloquence and with just as much venom as these things have been commented upon, that the Secretary of War had no business to send the regiments of infantry and the regiments of cavalry up on Tongue River to defend the settlers. let them go. Why, brother Bliss could talk to you from morning till night and from night till morning upon the monstrous extravagance of sending twelve regiments of infantry and cavalry up to Fort Keogh. Why, he would make you believe, if you were not reading and intelligent men, that one regiment was enough; that the commanding officer of the Army was in a bargain or conspiracy with the transportation men, and that he had paid out a million dollars to defend these few settlers when they might have been killed with a great deal less money. The very same kind of a prosecution, the very same kind of talk can be made against the General of the Army, who sent these men out to Fort Keogh to defend the poor emigrant when he was being attacked by the Ute Indians. What is the use of sending these men mail? What is the use of defending their lives against the demonstrations of hostile Indians. Let the Indians kill them. Let them stay in their ignorance. It costs too much. The Post-Office Department must save its money and distribute the mail at the doors of the rich men in New York and Boston. The Army must protect the coast. The officers must lead the german in the great cities. Do not spend the public money to send the Army out to take care of these emigrants and pioneers who are digging riches out of the bowels of the earth and clearing away the forests. Let them take care of themselves.

Gentlemen, I do not believe in that kind of policy. The same kind of an indictment can be gotten up against the Chief Engineer of the of the Army, who has been charged with disbursing the money appropriated for rivers and harbors, an appropriation about which we have heard a good deal lately. What is \$20,000,000 for the improvement of navigation, gentlemen? We have plenty of money. Let us put our rivers and harbors in order so that we can make more and become richer and more powerful, educate our children better and make them wiser and stronger men and better citizens. The same kind of an indictment can be gotten up, and brother Bliss can talk to you louder about the twenty millions than he can about this imaginary \$448,000 which he says we have squandered. You cannot find a river and harbor in the United States save that of New York City where he could not make an eloquent and logical speech to show that they might have gotten along with one quarter of the money.

Now my answer to all this is, that the money is in the hands of the legislative power of this country. It is disbursed by the representatives of the people, to whom the money belongs, and if they squander the money let them be answerable to the people who sent them here. If they spend it to carry mails all over this land, to disseminate the public newspapers, to teach children, to take care of the lives and property of the pioneer, to build up the rivers and harbors in order that the lives of sailors may be protected and that the interests of commerce may be preserved, that is what our money is for. You will readily see, gentlemen, that the same kind of a prosecution can be gotten up against any public officer charged with the duty of disbursing public money and probably get just as much proof against any of them.

I want to invite your attention, gentlemen, briefly to the enormous business that the office of the Second Assistant Postmaster-General has in hand. The number of star routes on the 30th of June, 1878, was eight thousand eight hundred and eleven; the length was two hundred and six thousand seven hundred and seventy-seven miles. The whole number of miles of carriage was sixty one million four hundred and thirty-seven thousand six hundred and eighty-two. The steamboat routes were one hundred and six. The length was eighteen thousand and sixty-nine miles. The railroad routes were one thousand, and they were in length seventy-seven thousand one hundred and twenty miles, and each one of these routes had a contract.

All these were in the Second Assistant's office. And brother Bliss told you with apparent seriousness that in the investigation of these thousands and thousands of contracts it was his duty to run out upon the public street and inquire how many horses were necessary and how many men were necessary to carry the mail from Rawlins to White River; from Ojo Caliente to Animas City; that he must run out and find out about this matter. You were told by brother Wilson, in his opening argument in this case, that it would require him to dispose of the business relating to five of these different contracts every day in order to get over them all in a year. Now, how could a man in that predicament examine with care the affidavits? How could he inspect the handwriting of these various petitions that are inclosed in these various jackets? How could he do that? I say the presumption, gentlemen, is that he could not do it, and the presumption is, until it is broken down by testimony, that he did not do it, and that he never saw an affidavit and he never saw a petition. All that he had time to do was to look at the back of some envelope and see what some other man had said. It is astonishing that a man should be held up to a criminal trial because he cannot read all these petitions and attend to all the papers inclosed in the jackets pertaining to more than ten thousand contracts. I was in a public office only a few days ago in the afternoon, in the office of a gentleman whose duty it was to sign drafts upon the public Treasury, and while I was there there was a pile of drafts brought in as high as that [illustrating], and I asked him "What are you going to do with those?" "Why, I have to sign those between this and 3 o'clock." It was as impossible for him to read them as it is impossible for a man to fly to the moon to attend to his business. There was the boy as soon as he signed his name slipping off a draft, then another, then another, he writing his name as fast as he could, and I presume it took him until 10 o'clock at night to sign that pile of drafts and get them in the mail, and all he did and all he could do was simply to write his name. Suppose one of those drafts was wrong. Suppose instead of taking one hundred dollars out of the Treasury it took a thousand dollars. Would you send that man to prison for violating his duty? Would you charge him with a corrupt combination with the man who was to receive the draft, and on presumption ask a jury of his countrymen to send him to jail? No, sir.

The total miles of the carriage of the public mails amounts to one hundred and fifty-eight millions one hundred and eighty-five thousand three hundred and seventy-five miles, more than six times the distance around the earth. You will observe, gentlemen, that, therefore, it is impossible for a public officer in the position of the Second Assistant Postmaster-General to have any idea of the contents of the jackets and the contents of petitions and the contents of affidavits. It is mere bosh to say that General Brady ought to have gone out and informed his mind. Where in the world would he go? That is one of the diffi-

culties of the Post-Office Department. It cannot be reduced to system until the railroads shall have traversed the whole land along every post road to supply all the people with mail. It cannot be reduced to system. You cannot predict what kind of winter you are going to have next winter or what kind of a summer is to follow it. You cannot predict what kind of trouble you will have upon the line. You cannot find out what kind of people live along the line, and whether petitions are honest or dishonest, and the public officer called upon to exercise his discretion and to do it quickly must do his best, and when he has done his best he ought not to be subjected to a prosecution of this kind.

You have heard during the course of our proceedings here since the 1st of June a great deal about productiveness. At the end of the history of the proceedings in every route you will find a tabular statement of productiveness. Well, what of that? As I said before, the Post-Office Department was not organized to make money. It is organized to keep up communication between the people, to educate them, and it is not an instrument for the making of money. Why I have no doubt that if this rule that no man could get mails unless the service paid for itself were applied to the District of Columbia that the District of Columbia would never get a letter. I will make a wager that the District of Columbia is short \$60,000 every year. I will make a wager that there are not fifteen States in this Union which pay the expenses of the postal service which they receive, and the reports of the Postmaster-General will bear me out, I doubt not. The State of Maryland, where my learned friend (Mr. Merrick) resides, and where he is so popular and where he is so much thought of, I presume is short \$50,000. How would we like it to have the State of Maryland subjected to the rules that she should have no mails unless she paid for the service herself? We would not like it. How do the people of New Mexico like to hear such talk? That is not a new subject with them. It is a matter that in the legislative history of this country has agitated the mind of legislators year after year until finally there has been established the rule that every American citizen shall be entitled to his postal communication whether his service pays for it or not. You might as well say that the people of Dakota ought to be called upon to pay for their defense against hostile Indians; that the people of Colorado ought to be charged with the expense of sending the Army there and bringing the Ute people to peace and order, as to say that every man cannot get his mails until he pays for the service. What kind of ethics and law would that be? I say that a government that organizes and pursues a niggardly policy is an enemy and a foe to humanity, an obstacle in the way of human progress, and I flatter myself, gentlemen, that we live under a flag where no such doctrine can prevail. Every man who takes upon his shoulder his ax and goes into the forest of the West is entitled to just as much protection as the millionaire upon Fifth avenue.

The COURT. They ought to be stopped from cutting the trees down. Destruction of the forests is against public policy.

Mr. TOTTEN. That may be, your honor, but it is not against public policy to dig open the earth and to bring out the silver and the gold that makes us wealthy in the eyes of nations. There is no public policy against that, and every man who takes his shovel and his pick and his knapsack on his back and goes over the hills of Colorado prospecting is as much entitled to his newspapers and his letters as you or I are, who are here under the shadow of the Capitol. I was amazed at the gentleman who last spoke for the Government talking about the monstrous performance that was detailed by the man Pennell. He said

that these hundred and fifty men who were up there at work were organizing a post-office, as if they were entering into a conspiracy to kill some of their neighbors and rob them. Why should not those men who were sent out there to build this line of post-roads be entitled to post-offices and be entitled to communication with the rest of the world? Was there anything wrong in those men joining in a petition to the Postmaster-General and asking that a post-office be established there? What was there wrong about that? If I had been there I should have done that thing, and I should have felt outraged by the Postmaster-General if he had not organized the post office and sent me the mail. Because a man is out on the broad prairies at work, honestly earning his living, that is no reason why he should be deprived of the luxuries of civilized life, so far as they are attainable. Productiveness indeed! I think, gentlemen, that this question of productiveness is not going to hurt you. I do not believe it will cause you any trouble in arriving at a just and fair conclusion in this case, and therefore I pass on.

I want to invite your attention, gentlemen, to another statute. You will observe by the time you get through with this case that the Government of the United States and its Treasury is hedged about so strongly with statutes that it is hardly possible for any man to obtain money from the Treasury without giving a *quid pro quo*. This is a general statute and applies to all departments. It prohibits any public officer from entering into any contract to bind the Government beyond the appropriations made by law. I say that in connection with the talk you have heard about the deficiency in the Post-Office Department in 1879. It was within the power of the Postmaster-General to prevent it under this very clause of the statute which you have heard discussed to day, and it would have been his duty to have done it unless Congress had provided the money to execute the contracts and carry them out to the end. This application was made by the Postmaster-General, as you will remember, for you have heard his letter read to you on that subject, asking Congress for this appropriation to enable him to carry out his contracts, and you have heard read to you order after order where the Postmaster-General had directed the diminution of service upon various routes in order that the appropriations might not run out until others were substituted in their place. That application was made to Congress. A report was made of all the transactions in 1879 and in 1878, in pursuance of the statute. The officers of the legislative department, who had the matter under immediate consideration, knew all about what had been going on in the Post-Office Department. They knew how often these trips were made; they knew how fast these men had to carry the mail by the contract. Did they condemn the action of the Postmaster-General? Did they refuse to appropriate the money? No; they appropriated the money, and the mail service went on, and the people of the West were not cut off from this little bit of a luxury, but were provided with the mail until the next appropriation was made, and then it was renewed again, and so on. The Post-Office Department is not subjected, as I said before, to any man's opinion. It is the mere instrument to subserve the will of the people. It knows no master except the legislative power of the land, and when the legislators say, "We will give you so much money to distribute the mails of the United States to the people," the Postmaster-General has to distribute the mails and to pay for it as long as the money lasts, and I say that all this talk about extravagance, and all this labor and eloquent effort to throw dust in your eyes is the merest balderdash for the purpose of leading you astray, and carrying your minds away from the issue that is presented to you to try. That is

what it is for. It is no matter to you, it is no matter to me, it is no matter to this court how much money was spent by the Post-Office Department, so long as he and his actions received the approbation of his masters.

This star service, gentlemen, was, until a few years ago, swallowed up in the other branches of the service, and it was not until 1876 that there was a separate appropriation made for the star and steamboat service; and until the appropriation of 1879 the star service was amalgamated with the steamboat service and they were in conflict with each other.

Now, I want to invite your attention, gentlemen, to a table which I had prepared showing the appropriations for the star and mail service as taken from the statute book for the year ending June 30th, 1878. By the act of March 3d, 1877, there was appropriated for the star and steamboat service, \$6,237,993, and by the act of December 15th, 1877, the same year, there was appropriated the additional sum of \$500,000, making a total for the year ending June 30th, 1878, of \$6,737,993. There was the Congressional indorsement, the approbation of the legislative mind for this very service, and it was not in the power of the Postmaster-General to cut it down when the legislative department said that it should be kept up, and furnished them the money wherewith to keep it up.

For the year ending June 30, 1879, by the act of June 17, 1878, there was appropriated for the star service alone the sum of \$5,390,673, and then there was subsequently made a smaller appropriation of \$20,467.74, making a sum total of \$5,411,140.74 for the year ending June 30, 1879.

For the year ending June 30, 1880, by the act of March 3, 1879, there was appropriated for the star service alone \$5,900,000 at one time, and \$1,100,000 by the act of April 7, 1880, and by another statute \$100,000, making in all for that year \$7,100,000.

For the year ending June 30, 1881, there was appropriated for the star service alone \$7,375,000.

For the year ending June 30, 1882, by the act of March 1, 1881, there was appropriated for the star service—and that was a year after General Brady had gone out of the service—\$7,900,000.

Now, gentlemen, I may invite your attention to another fact that is important in the consideration of the questions which we had here, because you are by the speeches of the gentlemen, by the side remarks of the gentlemen, by their smiles and their looks invited to go into an examination of the extravagance of the Post-Office Department, and you are invited to condemn the manner of doing business there, and I frequently stopped and looked and considered what a great fool President Hayes was. Why, gentlemen, did he not appoint brothers Bliss and Merrick, and Ker to run the Post-Office Department. Why I was astonished at the more than information that they presented about the Post-Office Department, what they said was right and what they said was wrong, and I failed to discover that they ever said anything about what was right.

Now, gentlemen, I have taken some little trouble to find out with accuracy the action of the legislative power of the country touching the star route service. I have shown you in detail the amount of money that they have appropriated from year to year for this service. I now want to invite your attention to another fact: that all the time, and long prior to any of the matters that are mentioned in this indictment, Congress was every session, and every month in the session nearly, creating and establishing new star routes. In 1874, Congress established 1,082 new routes. In 1875, Congress established

463 new routes. In 1876, Congress established 510 new routes. In 1877 they established 1,051, and that 1,051 new routes that had never been heard of in the Post-Office Department had to be taken up and advertised in the advertisement of the fall of 1877 by General Brady personally and the other men in the Second Assistant's office. Tell me that the star-route service is not the favorite service of the legislative power of the land! It is the service that reaches the people. The poor men that are obliged to work from the rising of the sun until the going down thereof to support themselves and their children are the men who are benefited by the star service, and the denizens of the great cities, where they roll in wealth and luxury, are all fond of the railroad service.

In 1878 Congress established 302 new routes. In 1879 Congress established 2,418 new routes; 1879 was about the time that this indictment for this grand and unlawful conspiracy was formed. There were 2,418 new star routes cast into the business of the Second Assistant Postmaster-General's office, and he was obliged to care for them and to supply them with service as best he could. In 1880 there were 915, and in 1881 there were 1,024 new routes, making in all those years from 1874 to 1881, inclusive, 7,765 new star routes established by law, over which the Postmaster-General had no more control than he had of any other service that had been running for years. He was obliged by law and by his oath of office to put service upon these routes for the accommodation of the people living along them. In the years 1877, 1878, 1879, 1880, and 1881 there were 5,710 new routes established.

Now, gentlemen, that shows the extent in a feeble way of the business of that office, of the favors shown by the legislative power and the purse-holder of the country to the star-route service. The legislative will was manifested by these repeated acts of Congress increasing the number of star routes and these repeated acts of Congress making the most liberal appropriation, and there never was an appropriation made that was not made after a careful examination of the annual report of the Postmaster-General, showing every increase, every expedition, every fine, and every deduction.

Cost of original service and additions made by Brady from May 17, 1879, to April 1, 1881.

Number of route.	Date of order.	Amount allowed for original service.	Amount allowed for additional miles.	Amount allowed for additional trips.	Amount allowed for expedition.	Remarks.
34149...	July 10, 1879	\$868 00	.....	\$1,122 41	\$2,200 00	2 additional trips to Loup City, 75 miles. F., "Do this." Brady.
35015...	July 10, 1879	398 00	.....	1,635 60	3,608 10	4 additional trips. F., "Do this." Brady.
35051...	Aug. 2, 1879	2,350 00	.....	35,000 00	.....	2 additional trips, \$4,700, and expedition, \$27,950—\$32,650; order of Dec. 23, 1878.
38113...	Mar. 8, 1881	1,700 00	.....	18,275 00	.....	On letter of Billing, "Increase to 6 t. a. w." Brady. 2 additional trips, \$3,400, and expedition, \$8,606.25—\$12,006.25; ordered May 1, 1879.
38134...	July 8, 1879	388 00	.....	2,328 00	5,432 00	Embrace Pueblo, add. 12 m., and \$328.80. French. Aug. 30, 1878. Agate embraced. Omitted Dec. 14, 1880. Pueblo embraced. Add \$328.80. Aug. 30, 1878. French.
38135. {	June 26, 1879	548 00	\$369 90	438 80	2,630 40	
	Nov. 10, 1880					

Cost of original service and additions made by Brady, &c.—Continued.

Number of route.	Date of order.	Amount allowed for original service.	Amount allowed for additional miles.	Amount allowed for additional trips.	Amount allowed for expedition.	Remarks.
38140....		338 00				Raton embraced June 6, 1878. Additional, \$172.75. Expedit additional, \$2,758.05. May 9 1879.
38145....	Feb. 26, 1881	2,745 00		17,910 72		Curtailed to Ojo Caliente. Deduct \$1,105.66. Curtail to Animas City. Deduct \$171.56. Embrace Pagosa Springs, and add \$190.62. April 24, 1879.
38150....	Aug. 24, 1880	3,426 00		986 57		2 additional trips, \$3,316.80, expedition, \$8,457.84, added April 12, 1879, \$11,774.64 additional pay.
38152....		348 00				4 additional trips, \$4,568, and expedition, \$15,437.12, \$20,005.12. Sept. 20, 1878.
38156....		1,488 00				October 1, 1878, curtail 21 miles and deduct \$5,179.51. July 26, 1880, reduced to 3 t. a w. Deduct \$10,429.48. No increase ordered.
40104....	July 23, 1880	2,982 00		29,733 33		Embrace Animas City and allow \$215.65. French. Jan. 23, 1879.
40113....	June 3, 1879	1,568 00		3,186 00	9,408 00	5 additional trips, \$4,259.12, and expedition, \$10,549.51, \$14,808.63. French. June 12, 1879.
41119....	July 8, 1879	1,168 00		4,672 00	12,718 22	Reduced 1 trip, \$2,358.89. French. April 17, 1880.
44140....	June 26, 1879	2,468 00		4,649 86	14,486 10	2 additional trips, \$5,964, and expedition, \$13,554, \$19,318. Dec. 24, 1878.
44155. {	June 27, 1879 } July 16, 1880 }	{ 8,288 00 }		{ 41,440 00 10,360 00 }		4 trips deducted, \$29,733.33. Jan. 28, 1880.
44160....	July 16, 1880	2,888 00		28,666 66		4 additional trips. French, "Do this—Brady."
46132....	June 24, 1879	1,888 00		2,376 00	5,346 00	2 additional trips, \$2,336. French. October 10, 1878.
46247....		5,988 00				July 10, 1879, curtailed 10 miles, \$1,582.89.
Total		41,135 00	369 90	202,730 95	55,828 82	Curtailed 12 miles, \$143.07. April 21, 1879.

RECAPITULATION.

Original pay per annum.....	\$41,135 00
Added for additional miles	\$369 90
Added for additional trips	202,735 95
Added for expedition	55,828 82
Total additions	258,929 67
Total cost.....	300,064 67

Whereupon (at 3 o'clock p. m.) the court adjourned till to-morrow morning at 10 o'clock a. m.

TUESDAY, AUGUST 22, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. TOTTEN. When the fathers of the Republic prepared the Constitution of the United States, they were careful of the liberties and the rights of the people, and one of the fundamental doctrines that they laid down for future preservation was that when a man was charged with a crime he should be informed of the nature of his accusation. That information is contained in our practice in what we call an indictment. That indictment is for the purpose of informing every man of the nature and character of the charges against him, and it lays down and fixes the boundaries of the inquiry during the trial. In this case the gentleman who prepared the indictment was aware of the fact that he was to be confined to the allegations in this indictment, and that he must state in his indictment only such acts as could be inquired of by the court. You have therefore observed that in all these charges, in all these means which are charged as having been resorted to to accomplish this criminal conspiracy, the date is fixed either on or after the 23d day of May, 1879, when it is alleged this criminal conspiracy was formed. They were not allowed, and they knew it would not answer the purpose to charge that any of these offenses were committed, or any of these acts done more than three years before the filing of the paper, and therefore the dates were fixed and they thereby escaped the effect of a motion to quash. My learned friend told you that it was a matter of amusement to fix the date on the 23d day of May, but if he had fixed it much earlier than that it would have been a matter of amusement for us to have turned his indictment out of court, so that he has fixed his dates in order to escape the inquiry under a motion to quash. Now, what I complain about, gentlemen, is that all through the course of this trial we have been held up to the examination of facts that are outside of this indictment. The prosecutors have persisted in having you try questions that were not in the case. They seem to have been as afraid of this case as men ordinarily are of scarlet fever and small-pox, and have invited your attention to old acts that have gone by and been buried in oblivion for months and months. They have put together all that great mass of orders which they found upon the Post-Office Department records, and have held them up to you and said, "How can you escape the conviction that these orders were instigated by corrupt motives? How can you escape the conviction that a man who made such orders as these was either inefficient in the discharge of his office or that he was corrupt in doing these things?" Now, gentlemen, what I desire, as I told you yesterday, is to get your minds fixed upon the fact that we are trying this case and we are trying no other. If these men are to be punished at all they are to be punished for what is charged against them in this indictment and for no other acts. They are to be informed of the nature and character of the accusations against them, and they are to be tried upon that charter. You cannot go outside of this paper and make inquiries as to what was done before or what was done after. It is entirely immaterial in our inquiry how many crimes may have been committed by any one or more of these men at some other time and in some other place and under some other circumstances. You are sworn to try the issue raised by these pleadings, and to try the issue according to the evidence that is produced before you here in court and not elsewhere.

Now, gentlemen, I propose to read over these charges. I propose to expedite myself over these star routes and to point out to you as I go what charges are in this indictment alleged to have been the instruments and the means by which these men sought to accomplish this criminal purpose with which they are charged. I begin as they began, with the Kearney and Kent route, and I shall end as they ended, with the last route, the name of which I have forgotten, away up in Oregon.

NO. 34149, FROM KEARNEY TO KENT.

The route from Kearney to Kent is No. 34149, and it is one of Vaile's routes. The charge in that case is, first, that on the 10th of July, 1879, they filed certain fraudulent petitions, and that on the 10th of July, 1879, a false oath was filed, and that on the 10th of July, 1879, Brady made an order for the increase and expedition of the service, increasing the price for trips \$1,122.41, and for the expedition \$2,200. Now, gentlemen, Mr. Brady did not make that order at all. It was made by Mr. French. If anybody denies that I will show you the record. There was somewhere on a jacket a "Do this—Brady," but Brady did not make the order, although he is charged with having made the order; so that, you may dismiss from your mind.

NO. 38135, FROM SAINT CHARLES TO GREENHORN.

Now I go to the next route, from Saint Charles to Greenhorn. The complaint in that case, gentlemen, is not about the orders that were made, but the complaint is that Brady made an order to supply a post-office which the Postmaster-General saw fit to establish within three or six miles from the line. The charges are, first, that on the 8th of July, 1879, Miner sent a fraudulent affidavit; that a fraudulent petition was filed on the 26th of June, 1879; that a fraudulent order for increase followed that; that there was one trip per week put on, and also that the time was reduced from sixteen hours to seven hours, and \$2,630.40 was paid for it; that a subcontract with Dorsey was filed on the 11th of November, 1879; that an order, embracing Agate, of the 10th of November, 1880, was made, and that an order excluding Agate was made on the 14th of December following. Now, gentlemen, there is not much about that case that I care to invite your attention to. You have probably heard as much about it as you want to hear. The great wrong that was inflicted upon the Government was in the fact that Agate was discontinued and that a month's pay was allowed. I think \$92.86 was the amount of the swindle, and that was recouped just as soon as the proper information was put into the Post-Office Department, which was elicited by the inquiry made by Callegahan. Remember that on the 6th of December, 1880, Callegahan sent out the inquiry to ascertain whether the mail had been carried, and the report came that the driver was there but once and never came again. Then the route was taken up and the money was recouped from the contractor and paid back into the Treasury. That was the sum of thirty dollars and some cents, the total amount of the loss to the Government in this matter. You were told that here was the report from a postmaster showing he had nothing. Brother Ingersoll denominated it the nothing report. You were told twice in a loud tone of voice by the distinguished counsel from New York, that here was a paper from the inspection division, part of General Brady's office, and still he allowed this state of affairs to go on. Gentlemen, that was a mistake. That report is re-

quired by law to go to the Treasury Department and not to the Post-Office Department, and it never was in the inspection bureau. There was no information of the circumstances connected with that case before the Second Assistant Postmaster-General until it was brought there by Callegahan's inquiry. Now, inasmuch as a great deal has been said about the extravagant expenditure of money, I want to tarry here a moment and call your attention to some figures which I have made. There were seven witnesses brought here from Greenhorn and Pueblo and all along that route, a distance of, say, three thousand miles. They were paid 8 cents a mile and \$2.50 a day, and were here on an average sixty days. Three thousand miles at 8 cents a mile amounts to \$240, and sixty days at \$2.50 a day \$150, or \$390 for each witness, and \$1,950 for the five witnesses brought here to prove to you that somebody had got \$32.61 out of the Government. Now, whose hand is into the Treasury up to the shoulders, to borrow an expression from a distinguished jurist who will be heard before we get through? I have dropped that route, gentlemen. I think you will have no trouble with it.

That brings me to

NO. 41119, FROM TOQUERVILLE TO ADAIRVILLE.

The complaints in that case are that there was a fraudulent oath by Peck, and a false petition, and an order by Brady on the 8th of July, 1879, for an increase of service. But the main complaint about it is that the \$12,000 for one month's pay was allowed for the curtailing of the service from Pahreah to Adairville. That was done by French; we have nothing to do with that. The order was made by Brady, based upon most substantial authority. The only sources to which he could safely go for information were consulted, and they all confirmed the necessity and propriety of the increasing of this service, and the witnesses upon the stand, both of the Johnsons, said that the service was needed and that the mail was large, the bags weighing from one to two hundred pounds every day. We are told that the expedition was too fast, that instead of making it forty-eight hours they made it thirty-three. Now, I submit to you, gentlemen, for your consideration, the question of whether the Postmaster-General was running the service or whether somebody else was. When expedition is made the Post-Office Department has its rule by which to measure the speed. They do not allow these men to go along at the rate of a mile an hour. When there is an expedition to seven times a week I say to you that such a route as that is entitled to fast time. One hundred and thirty-two miles in thirty-three hours is just four miles an hour, and no man could have had any difficulty in conveying the mail at that rate. Forty-eight hours would make the time two miles and three-quarters an hour.

Mr. MERRICK. Did any of the petitions ask for that?

Mr. TOTTEN. No, I have not said they did. I said they did not. You do not hear me.

Now, gentlemen, I submit to you that this is peurile. No boy would make such a charge against a playmate. I told you yesterday about the erasure of the figure 6, and the substitution of the figure 7 on that route. I say nothing more about it.

NO. 44145, FROM THE DALLES TO BAKER CITY.

The next is The Dalles and Baker City route, No. 44145, which is another of Vaile's routes. I may remark here that all these Vaile routes

are outside of this charge of conspiracy as I look at it. The first charge is fraudulent petitions. The second charge is an order of increase and an allowance of pay on the 27th of June, 1879, seven trips a week from July 14, and \$41,440 additional pay. There was a month's pay of \$10,360, but that is not in the indictment. That was done by French, and French did it because the Postmaster-General ordered him to do it, as the record shows. Now there was another order made on the 16th of July, 1880, increasing the service to seven trips, that is simply restoring the one trip which been taken off, and allowing the same pay that had existed before, being \$10,360. Brother Bliss declared in one of the arguments in this case, when we were discussing this route, that he expected to throw doubt, by this testimony, upon the honesty of Brady. Gentlemen, you are not here to inquire about doubts. It is no part of the prosecution to throw doubts upon the honesty of public officers. This man and all these men are charged with a corrupt crime, and the question is, not whether there are doubts about his honesty, but whether these proceedings were instigated by corruption. They undertook to show that the service was not performed, and that the money was paid. They utterly failed to establish that by any proof, because when they had their own witness upon the stand we sent him off the stand to inquire whether there were any reports from the postmasters in those places saying that the service had not been performed, and he said there were none. I invite your attention to the fact, gentlemen, to show that these men were treated as all other men, that the fines and deductions were \$7,407.20 on that route.

NO. 38145, FROM GARLAND TO PARROTT CITY.

The next is the Garland and Parrott City route, No. 38145. This is the case where it is said that an order was antedated. You will remember that there was an order made on the 26th of February, which directed that the service should begin on the 15th day of January preceding; but it turned out that on the 13th day of January there was an order made by telegraph requiring Sanderson, the subcontractor, to increase his service, and he accordingly did it. When the order was made, instead of increasing the service on part of the route from Chama to Animas City it was increased all the way. But, gentlemen, if the contractor got pay for that service which he did not perform it was the fault of the inspection division, and the records show that the deductions were made according to law and that he got no pay for any part of that service that was antedated before the order of the 26th of February, 1881. That expedition was made in pursuance of the most urgent pressure from officers of the Army, officers of the State, and officers of the United States Senate. The deductions made on that route for the first quarter of 1881 were \$3,421.18; so the Government lost nothing. We had in this case the testimony of Trew, the testimony of Ward, and, above all, the testimony of Anthony Joseph. Joseph had a grievance. He had been employed by three different contractors to render service over part of the route and he had failed to perform his contract with every one of them, and had got into trouble all round, as he expressed it, and some of his difficulties had not been settled when he was on the stand. He was brought here at an expense of \$390 or \$400, to tell you about his grievance and to complain to you that he had not been paid for services which he agreed to perform and did not perform. Gentlemen, do you infer from these orders and these things that are set down about this route that somebody was guilty of a great

crime? Is there anything in any of the orders or any of the facts you have heard here to lead you even to suspect that there was criminal conspiracy on the 23d of May, 1879?

I go now to route

NO. 38156, FROM SILVERTON TO PARROTT CITY.

Silverton is one of those places that sprung up in a night like Jonah's gourd. One day it was a wilderness and the next day it was a bee-hive of busy men. The charges are that there were false affidavits filed; that there was a subcontract fraudulently sent to the Post-Office Department; that on the 12th day of June, 1879, an order was made for increase and expedition, increasing the pay \$4,000 for the first and ten thousand and odd dollars for the latter. That order was made by French. The testimony shows that the affidavit, instead of being false, was true. The subcontract has no charge made against it as being wrong in any way. There is another charge here of December 28, 1880, to embrace Fort Lewis at an expense of \$716.62. It was an order very properly made, I suppose; but there was not a word of proof submitted to you to show that there ever was such an order, and all the evidence we have is the charge in the indictment. On this route, on the 17th day of April, 1880, the Postmaster-General directed Mr. French to diminish the service by one trip and he did so, and allowed one month's pay, showing that the Postmaster-General approved all that had been done before and diminished the service by one fifth for the sake of economy, I suppose. This is the route upon which Mr. Trew had his post-office. He got into a quarrel with the mail contractor because he moved his post-office a mile and a half off the route and required the contractor to carry the mail three miles to accommodate his perambulating disposition. Do you want to hear any more about that route, gentlemen?

NO. 46132, FROM JULIAN TO COLTON.

The next route is the Julian and Colton route, and the only charge that is made about that route seems to be, that instead of making the time thirty-six hours the Post-Office Department took the liberty and exercised its discretion and made it twenty-six hours, in order to carry the mails between two railroad lines in the vicinity. The charges are, first, the filing of a fraudulent affidavit, and that is set out as having been filed on the 24th day of June, 1879, as the indictment says; that a subcontract was fraudulently sent to the Post-Office Department; that Brady, on the 24th of June, 1879, made a fraudulent order for increase and expedition, increasing two trips, at \$2,376, and expediting from fifty-four to twenty-six hours, and paying \$5,000 therefor. This is one of Vaile's routes. That is all there is in that, and the figures show that a particular and special bargain was made with the contractor to carry this mail at the rate of twenty-six hours, for a little less than it would have cost at the regular price. Without expedition, it amounted to a little over \$7,800 to carry it in the ordinary way, and it was carried for \$7,722, or about the same price it would have cost at thirty-six hours. The exact figures are, in the ordinary way, at pro rata, \$2,376 for two additional trips, and \$7,128 for the expedition, making \$9,504 in the ordinary way, at the pro rata rate prescribed by the contract. Instead of that, the work was done for \$7,722. The fines and deductions were \$804, and that is all. The rate of speed was four miles and a half an hour, or twenty-six hours on a straight road and a short line.

NO. 46247, FROM REDDING TO ALTURAS.

Now, gentlemen, I go to the Redding and Alturas route in California. This is a most extraordinary complaint. We are told deliberately, not only in the later arguments but during the course of the trial, that there is no complaint made here about the increase of service—that the increase of trips was all right. I want you to note right here, gentlemen, that there was one order that received the approbation of Mr. Bliss, and he made no complaint of the increase. Let us see what the charges are, because in this case, in order to make any complaint at all, he had to go away back into 1878 and attack an order for expedition that had lain in oblivion for months. The first charge is that fraudulent petitions were made. There is not a word of truth in that charge, as you know. The second charge is that an order was made for increased and additional service and allowance—an order dated on the 11th of February, 1881, for expedition to seven trips a week, for \$5,980 and \$2,000. There is not a word of proof that there was any such order made—not one word. But the complaint is made that the mail was being carried in sixty-five hours instead of one hundred and eight hours, and that if the Government had kept its mouth shut the stage-line men would have carried the mail in sixty-five hours just as well and for the same price as at one hundred and eight hours. That is one of the complaints on the Kearney and Kent route, also. I want to say a word about that right here. The Postmaster-General, as I have told you before, is put in the Post-Office Department for the purpose of regulating the business of conveying the mails. He is not to allow stage-drivers to carry the mail in sixty-five hours when they are told to carry it in one hundred and eight hours. It is his business to keep control of his mail bags and to see that the men perform their engagements. That is one suggestion that I want to make to you. The stage drivers are not the men to regulate the business of carrying the mails and delivering them to the people. Another thing: I submit to you that a Postmaster-General who will allow a stage-driver to carry the United States mails for nothing is a scoundrel. The United States is able to pay its citizens for carrying its mails, and the money is provided by law by the legislative department to pay for carrying the mail; and the postmaster who will sit still and let a man carry the mail and perform service for the United States without paying for it, when he has got the money to pay him with, is not an honest man. That doctrine applies to the Kearney and Kent route as well as to this route. There is not one syllable of proof in this whole case about this order set out in the indictment; not a word. The petitions on this route were very numerous. We had two gentlemen on the stand who applied to the Postmaster-General to have this service restored to what it had been. I submit to you that there is nothing on that route upon which you can rest even a doubt of anybody's honesty connected with the Post-Office Department, or connected with the business of carrying these mails.

NO. 38134, FROM PUEBLO TO ROSITA.

The next is route 38134, fifty miles long, from Pueblo, by way of Greenwood, to Rosita. The first charge is that fraudulent petitions were filed; the second is that false affidavits were filed, and the third is that on the 8th day of July, 1879, an order for additional service and increase was made. The increase was from July 14, 1879, to six trips per week, and allowed the contractor \$2,328, being pro rata.

The expedition was from fifteen hours to ten hours and the allowance \$5,432. There were a large number of strong petitions urging this. There were some objections made to it. There was a man by the name of McGrew who was a contractor on a competing route, who insisted upon it that this adverse route to him should be discontinued; that the people of Colorado did not want it. The postmaster, whose name was Monroe, I suppose you remember. He made some complaints about the matter, and the court was moved to say to you in relation to these things, that where orders were made by the Post-Office Department and some petty postmaster made a complaint about it that it raised no obligation upon the Postmaster-General to heed his advice and cut down the service in the face and eyes of petitions of men of the character we have on these routes in that part of Colorado. We had a large number of summer drivers brought here at the rate of \$400 apiece, and kept here sixty days to tell you how many horses were required to carry those mails. They turned their horses out to grass, had no men to take care of them, and rendered very unfaithful service.

NO. 38140, FROM TRINIDAD TO MADISON.

I pass that route, gentlemen, and I come to Trinidad and Madison. Here is another charge as to the means to be resorted to to carry out this criminal conspiracy which is wholly without foundation. The complaint here is that a deflection was made to reach Raton and supply a new post-office that the Postmaster-General saw fit to establish. Mr. Brady made an order on the 6th day of June, 1878, nearly a year before this conspiracy was thought of, to embrace Raton and Raton was embraced. The order goes on to say that it should be embraced without additional pay. It was so done, and that state of affairs continued until it was modified by French on the 13th of November, 1878, increasing the distance twenty-three miles and paying \$172.75 additional annual pay. Now, that is the complaint that is made here, gentlemen, and I ask you to exclude it all from your consideration because it is stale, it is flat and unprofitable, too. The charges are, first, fraudulent petitions without number. The proof shows that they are all genuine. There is not a word of assault made upon any of them. That a fraudulent affidavit was filed, that on the 23d day of May, 1879—mark the date, gentlemen—Brady made an order increasing and expediting the service, reducing the running time from nineteen and three-quarter hours to twelve and paying \$2,758.05 for it. That was an order for expedition. Now, gentlemen, the record shows and the proof which was submitted by the gentlemen themselves shows that instead of being made on the 23d day of May, it was made on the 8th day of May, long before the statute under which these proceedings are being carried on became a law. But my learned friend who drew this indictment knew very well that if he set out this as one of the criminal means to carry out this criminal conspiracy it would be struck out by the court on sight, and he therefore, as a matter of amusement, fixed the date as the 23d of May, 1879, to get the case within the statute. The proof shows that it was on the 8th day of May, so that it is out. There were deductions on this route amounting to \$668. I believe that in this case and in the Saint Charles and Greenhorn route the only two complaints are found about deflecting the routes and carrying the mails outside. I have explained to you about the Agate complication, where it cost them about \$2,000, to show that the Government had lost for about six months the sum of \$36 and then they got it back. They never lost anything by

Raton on account of the deflection of the line. A mail route, gentlemen, is not described by the internal offices. It is described only by the termini, and it is the privilege and the duty of the Postmaster-General to vary the line whenever it is necessary in the conduct of the mail service. He did it in this case as the testimony shows and as has been done in a thousand cases.

NO. 38113, FROM RAWLINS TO WHITE RIVER.

I now come to route 38113, one of the routes where great complaints were made. Mark the charges. The first is that there was fraudulently filed a subcontract from J. W. Dorsey to S. W. Dorsey, on the 11th day of November, 1879. The second is, that on the 8th of March, 1881, Brady made an order for increase of service, making it daily. The order is set out in the indictment. The service was increased to seven trips a week and an allowance of \$18,375, being pro rata, was made. The only order for expedition in that case, about which there has been so much talk, was made on the 1st day of May, 1879, and is beyond the reach of your consideration. It is not complained of in the indictment, and the loudest complaint was made because, instead of having the time eighty-four hours it was diminished to forty-five hours. It turned out that instead of being one hundred and eighty miles long the route was one hundred and sixty-five miles long. Eighty-four hours on the line, as it actually was, was one mile and seven-eighths an hour. On a schedule of forty-five hours, the time was three miles and two-thirds an hour, considerably less than the ordinary time required to carry the mail over a reasonably good road. You see that the only complaint in this route is about the increase of the service and allowing \$18,000 for it. There is no expedition complained of, and there is no complaint made to you in the addresses of these gentlemen about this order. The complaint is made about an order long before that. I submit to you that upon the theory of the law and the rule that is laid down for government in all trials of this kind, there is nothing to be considered except those things that are charged in the indictment. To show that these orders were more than proper, you will not forget, gentlemen, that the officers of the Army, by the most urgent application, demanded that the time should be diminished to thirty-six hours instead of forty-five hours. The Ute war broke out; that Territory became a scene of hostility and the soldiers were there to protect the inhabitants, and they wanted their mails, they were an adjunct to all military operations; they were needful to the people and they were needful to the Government of the United States; but there was no expedition, although, I think, the time ought to have been expedited to forty-six hours. Now this order of March 8, 1881, which is complained of in this indictment is the order over which the conversation arose between Brady and the new Postmaster-General, Mr. James. And yet after all that was said, after all the complaints that were made by Mr. James, not only here but elsewhere, he permitted that order to stand unrevoked until some time in December, 1881, six months after he had been in office, when his attention was invited to it the very day it was made. When the book was presented to him to give vitality to this order, he saw the order upon the book reduced to form, and he gave vitality to it by his signature, and then undertook to quarrel with Brady about it, and instead of having it revoked, as he ought to have done if it was wrong, he let it stand until the December following—six months—until the war was over and there was no particular necessity for any such

service. Gentlemen, I say that that is hardly evidence from which you can reasonably be asked to infer that somebody entered into a criminal conspiracy in the city of Washington on the 23d day of May, 1879. We have had a great deal of talk in that case about horses and men. Eugene Taylor was put upon the stand and he said sixty-one horses were necessary, or sixty, I do not remember which. The proof showed that the affidavit was far below the number of horses needed. The petitions were all right. Governor Hoyt and the Army officers indorsed the action of the Postmaster-General and the propriety of these orders. We had a large number of witnesses brought here about this route. We had a lawyer and his name was Smith, and he was a nice young man. He administered an oath to a man, as he testified here, to a blank affidavit. What do you think of a notary public, gentlemen, who administers an oath to an affidavit with the blanks left to be filled up by somebody else afterwards? I say he is a greater rogue than the man who fills it up. Now, that affidavit never was used. It never became a part or parcel of this matter. He is the man who swore that a letter had been exhibited to him which showed an arrangement which somebody said they had with General Brady. An arrangement. That was the common expression which he used. He thought the letter was lost, but fortunately there was a press-copy of it, and he was confronted with it with the result, gentlemen, that you know. I pass that route, gentlemen. If you can find anything there to send the man to prison on, do it. You do it on your responsibility, and not on mine.

Now, I am getting way up into Dakota, way up in the cool waters, and I come to the

ROUTE NO. 35015, FROM VERMILLION TO SIOUX FALLS.

That is one of Vaile's routes. The complaints about this route are various. They are varied verbally. They are various in the speeches that you have heard; but the indictment has been brought down, as it was necessary to bring it down, to the proper dates, and the charges are these: That on the 23d day of May they filed a corrupt affidavit, which the proof showed was strictly untrue; that they filed fraudulent petitions. The only fraud about those petitions was that somebody got a man by the name of Shaw to sign one of them, and he was brought down here at an expense of five or six hundred dollars to tell you that he had signed it, but that he had not read it—a valuable postmaster to give advice to the Postmaster-General as to the conduct of his business. The charges are, first, that on the 23d of May a corrupt affidavit was filed; second, fraudulent petitions; third, that General Brady on the 10th day of July, 1879, made a fraudulent order for increase and expedition; that he increased the service to six trips per week, and paid for it \$1,635.60 additional. That route is seventy miles long. That he expedited the service to ten hours, and that he allowed for the expedition \$3,680.10. Now, gentlemen, that order was made by French. The last order that General Brady made, except notifying the auditor about a subcontract, was made in 1878. My learned friend on the other side undertook to make you believe that there was a great crime in taking in Brighton and paying \$10.90 for it. That was done on the fifth of October, 1878, and was done by French, and, I suppose, by order of the Postmaster-General. I think I can safely leave that route. I do not believe that you will find anything there to lead you to infer that a corrupt combination was made on the 23d day of May. The last order made by Brady was made on the 2d of May, 1878.

ROUTE NO. 38152, FROM OURAY TO LOS PINOS.

Now, I am coming to another route, 38152, from Ouray, via Hot Springs, to Los Pinos. Well, you know what that route was put in for, but you do not know why Sanderson was left out. You do not know anything about that. You do know Sanderson was left out, but why he was left out you do not know. Very well. Now, let us see what this was put in for.

It seems that the Congress of the United States in the multiplicity of these star routes that it was establishing, established a long route running pretty much over the same line mentioned in the contract here, which was only a short line of twenty-five and one-quarter miles, and Sanderson was the contractor on both of them, or in other words, he was the subcontractor on the short line, and had been for many months.

Mr. WILSON. And he got the whole pay.

Mr. TOTTEN. He got the whole pay, got every cent of it, and had been getting it for months and months. Nobody had anything to do with it who is connected with this case, either directly or indirectly. And what happened? Sanderson carried the mail, as he said, over both routes. Dr. McDonald set himself to inquiring about it, and right there on the ground it took him more than three months to find out what was the situation of affairs and report it to the Post-Office Department. How soon that report got before the Second Assistant Postmaster-General, or whether it ever got before his eye, there is no proof to show. But the route was abolished in the course of two months, and the complaint was that one month's pay had been allowed.

Now, let me read the charges in this indictment, because I want you, gentlemen, to stick to this indictment, and not go beyond it. Brady discontinued it, of course. The charge is that on the 3d of August, 1880, Brady made a fraudulent order discontinuing the service. That is the charge, and the complaint made to you verbally was that he let it run and did not discontinue it; that on the 15th day of August, 1880, twelve days afterwards, somebody of these defendants sitting about here applied to the Post-Office Department and collected one month's pay under that contract, which is iron-clad in its requirements, one of which is that when a route is discontinued a month's pay, as indemnity, shall be allowed, and it was done, and Sanderson fraudulently applied to the Post-Office Department and got not a million of dollars, but \$29, and they brought at least two witnesses here, and I do not know how many more, at an expense of from four to five hundred dollars to tell you about that, and from the record which they put in it was shown that it had been recouped and recovered again from some other route. The Government did not lose a dollar.

Now if there was any fault about that it was the fault of the legislative department that created that new route and run it along so as to take in the same territory. How could the Post-Office Department know until the information had come in this regular and slow way? Twenty-nine dollars! Why I suppose it cost \$2,000 to show you that \$29 had been taken by Sanderson for service which he says he rendered, and which they say he did not, and they took the money back from him. Dr. McDonald was brought here to tell that, and one other man. These deductions were made in October, 1881.

ROUTE NO. 35051, FROM BISMARCK TO TONGUE RIVER.

Now, gentlemen, here is the route that has furnished food for the

newspaper men for weeks and months and years—Bismarck to Tongue River. There is no escape from this route, I suppose, in the judgment of these gentlemen who are managing this prosecution, so we will begin at the beginning and find out what the charges are that we are to answer.

This is one of Miner's contracts. The schedule was first eighty-four hours. The length of the route was three hundred and one-half miles. It was advertised originally at two hundred and fifty miles. Turner is to be sent to prison on account of these indorsements on the back of these shirts or jackets or whatever you call them; yet Brewer was the man in charge of these routes.

The charges are, first, that on the 2d of August, 1879—all the time you see the dates, gentlemen—fraudulent petitions were filed. Which petitions were fraudulent? Those signed by the officers, those signed by General Sherman, those signed by General Miles? Which petitions were fraudulent? Oh, no, gentlemen, they do not contend now that they were fraudulent. They want to divert your attention from the issue in the case we are trying and carry you back to July, 1878, and have you listen to the gabble of that man Pennell, a discontented man, who came here probably at an expense of \$2,000 to tell you what he knew about building a post-office line. First, that there were fraudulent petitions, and second that Brady, on the 2d of August, 1879, ordered increased and additional service. There was no expedition. He increased the service three trips per week and added \$35,000 additional pay. That is the charge. There was no expedition. There was \$35,000 added for additional pay for three extra trips a week. Now, gentlemen, French made that order. Brady had no more to do with it than you did.

Mr. DICKSON. [The foreman.] Is that the order of October?

Mr. TOTTEN. It is the order of the 2d of August, 1879. That is the order mentioned in the indictment. It is proper for me to say, gentlemen, that on this order of August 2, 1879, or that amongst the papers contained in this order of 1879, there is a letter written by Mr. Billings, the president of the Pacific Railroad, and at the bottom of that are these words signed by Mr. Brady:

Make the order to increase as quickly as the contractor can put on an increase of service.

That was a recommendation made by Brady and put upon the letter written by Billings, and then he went away. When the time came for making the order Mr. French made the order and Brady did not. Now, gentlemen, Mr. French made the order, and Brady did not; so that the fact that Billings's letter had this indorsement, showed that if Mr. Brady had been there he probably might have made the order. But it is charged in this indictment (and he is on trial on a charge of criminal conspiracy) that he made the order as charged in the indictment. It may be taken for what it is worth against him, but inasmuch as he did not make the order it cannot be taken at all.

Now, this route, gentlemen, was established by the act of Congress of March 3, 1877, and it was established for a purpose. You have heard the testimony of General Sherman and of Mr. Maginnis as to the necessity for that route, and of the great saving in time and travel made by it. That explains the reason why the act of Congress of March 3, 1877, establishing that route, was passed. Now, the Postmaster-General had just one thing to do when that act of Congress was passed, and that was to put upon that route the service which he thought it required, and he started it as they always do on a new

route, with one trip a week, and the great difficulty the contractors had in carrying it was that it was only once a week.

To show, gentlemen, that there was no conspiracy about this, let me invite your attention to the letter that Mr. Miner wrote, that Mr. Boone wrote, begging of the Postmaster-General to discontinue this service; and Boone testified upon the stand that this route absorbed their money to a great extent, and there is no sort of doubt about it, because there were one hundred and fifty horses required by the affidavit of the man who files it, and by the testimony of the witness Ketchum it is brought up to two hundred and one horses to carry the mail as required by the contract and the order. Here were men whom they say were in a conspiracy, writing letters and begging of the Post-Office Department to discontinue the service, or, in other words, asking the Postmaster-General to repeal a law of Congress and set them at defiance. That was the inquiry. Now, we have the testimony of Mr. Vaile as to this route, that it was a losing concern from the outset to the very end, and there were fines and deductions put upon that amounting to \$46,299.89, and there were over \$32,000 of those fines and deductions still standing. Yet Brady was a coconspirator with these men.

Mr. KER. When were they put on?

Mr. TOTTEN. They were put on according to your case. They were put on all the time.

Mr. HENKLE. All put on by Brady.

Mr. DICKSON. [The foreman.] You stated that there was no expedition on this route.

Mr. TOTTEN. After the 23d of May.

Mr. DICKSON. [The foreman.] None after the 23d of May?

Mr. TOTTEN. No, sir. Oh, there was expedition before.

Mr. DICKSON. [The foreman.] Let me ask you for information. The original contract was \$2,250. Increased in October, 1878, to \$4,700, and then expedited at \$27,950 by an order dated August 11, 1879. Am I correct?

Mr. TOTTEN. Here are my figures. On December 23, 1878, the order was made by Brady for increase at \$4,700 and expedition \$27,950, making \$32,650, which, added to the original price, made \$35,000.

Mr. DICKSON. [The foreman.] That was the order of December, 1878?

Mr. TOTTEN. That was December 23, 1878.

Mr. DICKSON. [The foreman.] Thank you.

Mr. TOTTEN. I am insisting upon confining this inquiry to the dates set out in the indictment, and trying this case and not any other.

ROUTE NO. 40104, MINERAL PARK TO PIOCHE.

Now, we come to another route, Mineral Park to Pioche. I do not know the name of any route that seemed to do our friends on the other side so much good as to sing out in varied tones "from Mineral Park to Pioche." They had some trouble with this route evidently. It was a bad route to start with, and the service that was rendered was pretty bad. It was two hundred and thirty-two miles long, and the original compensation was \$2,982, on a schedule of eighty-four hours twice a week. The charges are, first, that on July 23, 1879, a subcontract was filed. Second, that on the 23d day of July, 1879, a fraudulent affidavit was filed as to men and horses. The third charge is that Brady on the 23d day of July, 1879, made an order for increased service and allowance, to wit:

From August 1, 1879, increase the service four trips, and allow \$29,733.33, being pro rata.

That is the charge in the indictment, and that is the question with which we have to deal. There is another charge in the indictment which is that on the 10th day of April, 1880, Brady made an order for one month's pay for curtailed service, and allowed \$11,928. This order was amended January 28, 1880, but there was no proof offered of this order, and it is not true that Brady made it. That is the reason they did not offer you any proof.

Now, the order about which the charge is made is dated the 23d of July, 1879, and that was the order of the Postmaster-General, and was made by French. That is all there is of that. There are a great many other orders here running back into 1878, which you heard a great deal about, gentlemen, but I am asking you to exclude those from this inquiry. About this route you had those two affidavits which they made so much noise about as being in the same handwriting, and signed by the same men, one over the Ehrenberg route and one over this route.

I have said all I wanted to say to you about altered papers. There is no proof submitted that anybody had altered a paper before it was signed, and I have undertaken to impress upon your mind that the fact that a paper is altered is not proof that the alteration was made after signature. But those two papers were evidently drawn by the same hand. They were for the benefit of the same people. They were submitted at the same time to the same people, and were signed by each man at the same time, and the papers were filed and found by these learned gentlemen in their investigations of this case, and put together for the purpose of deceiving the jury. You will remember that these routes ran right together, the Ehrenberg route coming from the west and the other from the north and south, and forming a junction, and all the people right along in that vicinity were as much interested in the Mineral Park as they were in the Ehrenberg route.

I have said to you all I care to say about productiveness, but proof was offered here and submitted to your consideration that in 1880 the amount of the mails was very small. The report of the postmaster at Pioche shows that the average weight of daily mails discharged was five pounds and those received four pounds, making nine pounds a day. But it is a very singular circumstance, gentlemen, and it is possibly beyond your comprehension why there should be such a small quantity of mails passing from Pioche to Mineral Park, because that line did form a link in the line of communication between the two Pacific railroads, and why there should not be any more mails there is a conundrum which perhaps you can answer in your own imagination. We are told by this witness Kidder, who was brought here to testify, that there was a four-horse wagon load of mail on the 25th of December, 1878, brought over from Signal, and Signal was only one hundred miles from Mineral Park, so that there was a four-horse wagon load of mail matter accumulating at one station in that country. That was a mining district. Mineral Park is a place of two hundred and fifty population, he said, and is the county-seat. Now, how this limited number of letters only should go over this route I do not understand, unless it occurred in this way. It was to the interest of the railroad people, instead of sending the mails over the Mineral Park and Pioche line through the country, to carry them to San Francisco, where they would be weighed, and they would get the benefit of the transportation. That is my explanation of that, and I cannot conceive of any other way, because it is not possible that two hundred and fifty men living in Mineral Park, and a thousand people living

in and about Signal should write only one or two letters a day. If they write only one or two letters a day they are a class of people by themselves. You can find no parallel for them in this country.

There were imposed, gentlemen, as fines upon this route, \$34,191.80 for bad service. The service was put up. It became a failure. As soon as that became known to the Post-Office Department it was reduced, but afterwards it was established at three trips a week, and there it remained. But these men were heavily fined, and the Government lost nothing, and it got all the service that it paid for, and probably a great deal more.

ROUTE NO. 44160, CANYON CITY TO CAMP M'DERMITT.

I go on, gentlemen, to the next route, which is Canyon City, by Camp Harney and Alvord, to Camp McDermitt. The original schedule was one hundred and thirty hours, the length of the route two hundred and forty-three miles. This is one of Vaile's routes. The charges are, that on the 16th of July, 1880, fraudulent petitions were filed. The 16th of July, 1880, is brought down pretty near to us. And on the same day General Brady made an order increasing it by four trips a week, and allowed \$28,666.66, being pro rata. That is the crime that is charged, gentlemen—\$28,666.66 for four trips a week over a line two hundred and forty-odd miles long, backed up by the most extraordinary number of petitions and indorsed by all the Senators of the country up there and by the members of the House, by the people who had charge of this work, by the people who were supposed to know how much service was needed, how much money Congress was willing to appropriate to pay for it. They were there advising this increase. The Postmaster-General had received the money to pay for it, and the service was needed. The principal difficulty about this, gentlemen, is the fact that that Utah petition was found here, and that Postmaster Hall was postmaster at Canyon City. That is about the subject-matter of complaint, and that is about all there is of it. There is no inquiry about expedition. That is not a subject-matter of controversy here. The simple increase of four trips a week and paying \$28,000 for it is all that is complained of.

There is another little circumstance perhaps I might notice as I pass along, although it will be attended to by others, and that is a letter written by Miner to a man named Abbott. That was paraded before your eyes with a great deal of gusto, but there was not a word said about the fact that the man was not a postmaster, and the office had been discontinued long before the letter was written. He had once before complained that he had been compelled to carry his mail for the benefit of these contractors thirty miles; and he charged \$30 for it, and he subsequently got his pay and the voucher is found among the papers. Then he made another call upon these men for some purpose, and Miner wrote that letter to a citizen of the Territory where that route was located. I take it that Miner had a right to buy his peace if he wanted and pay \$30. At all events it is no fact from which you can infer conspiracy on the 23d day of May, 1879. It is no matter how many offenses Miner may commit, it is no matter how many robberies and burglaries and murders these men have committed at the same time and same place. The question we are trying is, did they enter into a criminal conspiracy on the 23d day of May, 1879. Why should Miner have been so fearful of the effect of Mr. Abbott's letter complaining about the service if Brady was a conspirator with them?

Why should he be afraid of Mr. Abbott's letter? I would like to have somebody explain that.

ROUTE NO. 38150, SAGUACHE TO LAKE CITY.

Now, we have another route; this is the celebrated Saguache route, a route with which no man acquainted with this indictment has had anything to do since some time early in 1878. The charges are that on the 26th of July, 1880, Brady made a fraudulent order reducing the time to three trips per week and allowing \$10,429.48. That order was made by the Postmaster-General as the order shows. There is another order complained of, but I never understood why the complaint was made, for there is nothing said about it in the testimony. That was the order of September, 1880, which increased the service to seven times a week for seven miles, between Powderhorn and Barnum, and allowed \$988 a year for it. I do not know what that was put in for. There was an allusion made by some of the gentlemen who put this testimony in, to the effect that the indorsement on some paper in some other route, I think No. 38216, would explain why this order was made increasing the service between Barnum and Powderhorn; but we never were permitted to look at those papers, and therefore we have a right to assume that they were all right, and that there is no complaint about it. This is the route where the error is made upon which Mr. Turner was indicted, and about which you are asked to send him to prison. Sanderson is not here. The order and the figures upon the jacket, although they were long since buried in oblivion by the statute, are paraded before you for the purpose of blackguarding Turner. This route is Miner's, and is also out. None of them have had anything to do with it since 1878.

I next come to route

NO. 40113, FROM TRES ALAMOS TO CLIFTON.

The charges are that on the 3d of June, 1879, false affidavits were filed, and that on the 3d of June, 1879, fraudulent petitions were filed. There is not a word of proof submitted about either of those charges; not one syllable. On the 3d of June, 1879, there was an order made by Brady for increase and expedition, and for the first \$3,136, and for the next \$9,408. This is supported by an innumerable lot of petitions and indorsements by men of prominence. Another order is complained of, dated January, 1881, by Brady, decreasing the distance thirty miles and allowing one month's pay. There is not a word of proof offered about that charge. There is another charge that on February 11, 1881, Brady made an order for increase to seven trips or a daily mail. There is no proof of that order. The fines on this route were \$4,069. Gentlemen, if you can find anything to complain of on that route you can do more than I can. I now come to route

NO. 44140, FROM EUGENE CITY TO BRIDGE CREEK.

The first charge is that on the 24th of May, 1879, they transmitted fraudulent affidavits. On the 26th of June, 1877, Brady made an order for increase and expedition. The fines on this route were \$17,755.90. This route seems to have been kept in this indictment for the purpose of allowing a man by the name of Powers, who was a dissatisfied contractor, to come here upon the stand and make a fool of himself. He

came here and swore that it was impossible to carry the mails on a schedule of fifty hours, and we produced a letter in which he said that it could be done and he could do it. He kept bleeding the contractors day after day and month after month, and when they did not give him money enough he threw the mail down and extorted more from them, receiving \$900 at one time and \$500 at another time. All the fines and deductions that were remitted went to him.

Gentlemen, I have finished with the routes and said all about them that I care to say. I now come to the testimony of Blois, upon which you are asked to decide as to handwriting. If you can find anything in the testimony of Mr. Blois, or his manner of giving it, to impress confidence in your minds that he knew anything about what he was talking of you can do more than I expect from you.

Now, gentlemen, having gone through these routes and said all about them that I care to say, all I ask of you is to confine your inquiries to the issue that is made up for you to try, and which you are sworn to try. What is the evidence of a conspiracy? What is the evidence that these men's minds met on or about the 23d day of May, 1879, and that they agreed directly or indirectly to defraud the Government by criminal or any other means? Where is the proof? Where is there a word? No eye ever saw these men together in convention. No eye ever saw part of these men together in convention under any circumstances that were calculated to create suspicion. No ear ever heard a word said by one of them to raise even the idea that there was an unlawful combination amongst them or any kind of an agreement or concert to defraud the Government of the United States in the manner set out in this indictment, or in any other manner. These men made their bids in 1877, and one hundred and twenty-five of them were accepted and the contracts entered into in the spring of 1878. There is no intimation and no charge that any of these contracts were improperly made or entered into in any other way than in an honest way. Mr. Vaile took charge of all the work under all the contracts mentioned in the indictment and he kept possession of them. He had the work and received every dollar of the money and he knows exactly where it went, and he says that no dollar of it ever went to any place except for the purpose of paying debts and the expenses of the transportation. About the 1st of July, 1879, less than two months before the time when this indictment says we entered into a conspiracy there was a contract of separation and an agreement in writing, which has been read before you. Vaile took his six routes and went off by himself and Dorsey and his companions took the remainder of the routes and went off by themselves, and they retained those routes on their own account. The subcontracts show that there could have been no conspiracy. The very tables showing the payments here show that there could have been no payments made to anybody except to the people engaged in the business of transporting these mails. I say there is no evidence of conspiracy. It is asserted to you and you are invited to believe and you are invited to act upon the belief and to infer from the fact that what are called extravagant expenditures are sufficient evidence to form a foundation upon which you may convict these men of the criminal charges made against them. I say it is not so. I say the burden of proof is upon the Government to satisfy you beyond all reasonable doubt in such a manner that you can account for these acts upon no hypothesis of innocence before you can do any such thing, and when they tell you that these are extravagant orders, I say that it is not so. That there never was a cent paid for the service more than what it was worth. What proof have you that any order was

extravagant? What evidence have you of how much oats and wheat and corn and hay cost? What do you know about the price of horses on the Saguache route? What do you know about the price of horses and the number of horses, and the salaries of men and drivers and the price of wagons on the Bismarck route? How can you sit down with your pencils and find out whether these orders were extravagant or whether they were not extravagant? There is not one word of proof offered to you to show that there was any extravagance in the service anywhere. They simply go back to 1878 and figure up with their pencils and say that these orders were run up from \$48,000 in two or three years to \$448,000. I say you are not allowed by law to look at this case in that way. I have shown you that the expedition only amounted to \$55,000. I have shown you that all this money that was paid out was paid for increase of service, for increase of trips, amounting to about \$220,000. It makes a very different showing when confined to the issues that you are sworn to try, and when you do not wander all over the field of speculation and pick out one thing here and another thing there. Truly, gentlemen, this is a case of shreds and patches. They take up a little switch here and add to the bundle and they say, "See what has been done. Explain this if you dare." They hold up before your faces an order that has been scratched, a petition that is dirty, an affidavit that has been altered and they say "Look here at this. Here is evidence of a fraud. Here is enough to convict any man of any charge under the sun." I say, gentlemen, you can do no such thing. The law requires you and your oath requires you to try the issue that is presented by these papers and no other. You are to try the crime charged against these men. You are to try this case according to the evidence that is here before you and none other.

Gentlemen, time and I are going along together. I will be through in a few minutes. It is a great thing to keep even with time. I want now to ask your attention briefly while I discuss the testimony of a man by the name of Walsh, John A., otherwise known as Perfunctory Walsh. Walsh was a banker and a broker. He served many years as a curbstone broker in the city of New Orleans; in fact, he was born there and was raised there. The State of Louisiana and the people of New Orleans are both somewhat famous, famous for their bayous, famous for their levees, famous for their yellow fever, famous for the character and kind of their population; and, above all things, famous for their witnesses, and Eliza Pinkston and John Walsh outcap them all. Walsh is a man of education, a physical man rarely equaled, a perfect specimen of physical health and strength, a man of undoubted good education, and a man of undoubted capacity. He comes upon the stand and tells you the most extraordinary story about an interview he says he had with General Brady on the 28th day of December, 1880. He first became acquainted with General Brady in 1876, and the result of that first interview or of the second was, that John A. Walsh was indicted for frauds upon the Treasury, or frauds in relation to the violation of revenue laws, or something of that kind. He afterwards came to the city of Washington and established a bank and staid here until some time in the latter part of 1880, or the first part of 1881. He could not fix the date when he stopped being a banker. He says he kept some books. He says he kept such books as would serve to guide him. He wished to avoid the expense of having a book-keeper. He had one clerk, and he kept some books, as to business paper that perhaps did not amount to a great deal. I am giving you his words, gentlemen. "Perhaps did

not amount to a great deal." He kept a book himself. Mr. Wilson asked, "What kind of books did you keep?" "Well, sir, it would be very hard to say; I should say probably a ledger." He should say probably a ledger! If he kept a ledger, gentlemen, he *probably* knew what it was.

There is always at the foundation of every human act of any importance some kind of a motive. There is some kind of an inducement. Mr. Walsh was a thrifty man. He was a man evidently fond of revenge, so that the incentive, if you want to look for one, was not only hire and salary but it was revenge. He had been fined eleven thousand and odd dollars for not performing service on the Santa Fé mail route. He had had deductions made from his pay, and he had his pay suspended. He had in addition to that a civil suit pending in this court, and in the city of New York against Brady to recover in one case twenty-eight thousand and odd dollars, and in the other \$42,000. There is no man so deeply interested, so anxious to break down General Brady as John A. Walsh. He says he lent him money, and it is important to get rid of General Brady. Now on the 21st day of June, 1880, Walsh instituted suit in this District to recover \$28,000 from Brady, and in a few days afterwards he filed an application—

Mr. HENKLE. [Interposing.] Was it not 1881?

Mr. TOTTEN. Perhaps so. I will give the date in a few moments. A few days after that he filed an application in the Post-Office Department to have these fines and deductions remitted and to get one month's extra pay. About that time he had an interview with somebody by the name of Gibson. I do not know whether you have ever heard of Mr. Gibson or not, but it followed as the night follows day that this application was made to the Government. He says he made a statement to a man by the name of Gibson in the course of the month of July, and he thought it was about a year before the date when he was testifying, that he actually received from the Post-Office Department in a mysterious way the sum of \$25,000, or about that sum. Now there is one peculiar circumstance here. You may examine this indictment and its parent indictment out of which it grew and look upon the back of it in vain for the name of Walsh. Walsh was not a witness before the grand jury when this indictment was found. Why was he not there with this story about the admissions of General Brady? I would like to know how the grand jury could get along without him, and I would be still more glad to find out how anybody could get along with him. But Walsh had never matured that story until after he went before the last grand jury that had its sitting in this court, or the one before it subsequent to the finding of this indictment. That is a curious conundrum. Now what does Walsh say? You have probably heard his testimony repeated so often that you do not care to hear it again, and so I will not go over the averments that Mr. Walsh made, except to refer to the fact that he said Brady was to get 20 per cent. of expeditions and 50 per cent. of remissions. Now we know from the table of fines and remissions which I read to you yesterday, that that part of it was not true. Even if Brady said so he told what was not true. That he had gotten 20 per cent., and that it was his custom to get 20 per cent. of expedition, could not have been true. It cannot be evidence to show that there was any criminal combination between him and these men anyhow. It is rather proof to the contrary, because it would show that Brady had been in the habit of levying toll and tribute upon every contractor in the United States on star routes numbering over nine thousand. According to this story he had been accustomed to levying tribute upon

nine thousand American people, and yet no man's voice has been raised **to** complain about an act of Brady's; no man has come forward in this **court**, or in any other court, or in any other place, to say that he has **ever** had money extorted from him by the Second Assistant Postmaster-General. Is it possible that for more than a year and a half tribute **could** be levied upon nine thousand American citizens by one man without complaint having been made? I say the very idea of it is monstrous.

Let us come down now to this interview. We are told that this interview was brought about by a note dated on the 28th of December, about which I shall have something more to say, that Mr. Walsh's affairs were not encouraging, that they were not as good as they had been financially, and he called upon General Brady to have a settlement with him as to their private affairs and they quarreled; that he had two notes in his pocket which he put upon the table, accompanied by the data, these notes amounting to \$25,500; and that General Brady, for the purpose of making a settlement, as he said he asserted, picked these two notes up and put them in his pocket and carried them off. There was Walsh, a man who was brought up amidst bloodshed and assassination, in a land where boys are taught to go with a pistol in one hand and a dirk in the other, a man of courage and of gigantic frame. He sat there quietly without hardly as much as a protest, and allowed a man half his size to rob him of \$25,500 and go away. Perhaps you believe that, gentlemen, perhaps you believe it.

There is a very queer circumstance about these notes. This man employed two lawyers to institute two suits, and those suits were instituted and he never told either of the lawyers a word about these notes, not a word. His explanation of that extraordinary circumstance is somewhat peculiar. He said when he employed lawyers he did not employ them to tell them everything that he knew; he told them "what was probably pertinent." That is what he tells lawyers. Mr. Walsh produced on the trial a note bearing date the 28th of December, without any year. He testified to you that was the 28th day of December, 1880. On cross-examination he said it was his impression that it was 1880; that he wrote the note in the Sixth Auditor's office; that he looked through the door and probably saw, I think his statement was, that General Brady was busy, and he sent this note by Brady's page. "Where did you find Brady's page?" was the question put to him. "I probably went into the hall and found him there." He says it was a little boy who was a page for General Brady in his office, and a white boy about twelve years old. He was invited to tell you how he fixed the date as 1880, and he said he did it because it was after the time General Brady had invited him to lend him twenty-four or twenty-five thousand dollars in Chattanooga stock, which he had refused to lend him, and he produced a note to refresh his memory on the subject of the year. The note was examined by brother Wilson, and Walsh's attention was invited to the fact that that note bore no date, which was conceded. He said he had no other way, none whatever—those were his very words—to fix the year when that happened. Now, I say that that note was not December 28, 1880, but was 1879 or 1878, if it was dated at all, and if General Brady ever wrote it. I want to call your attention to the testimony of Mr. French, the Second Assistant Postmaster-General, or rather acting as such on the 28th of December, 1880. He swore that he was acting in that capacity, and he testified that George Adamson was the only page that General Brady ever had. We put George Adamson on the stand and he said he was discharged from Brady's service on the 5th of Octo-

ber, 1880, and he was not there on the 28th of December, 1880. I told you at the outset of this case that if there was any testimony that bore against the defendants of any kind, in any place, that a man who could get his arm into the Treasury of the United States as far as he could reach, could find that testimony and bring it here, and that he would do so. So we have Prior. Prior was brought here with one set of books out of four. He was brought here because it was found that on the 28th of December, 1880, one letter had been signed by Brady. Now, Mr. Prior, on cross-examination made a very satisfactory explanation to that, in support of our theory. That letter was written after office hours by some industrious clerk, who was making a fool of himself by working after hours, and left on the table, and was signed in the morning. They also found one on the 27th, but I shall not trouble you about that. There is not enough of this testimony to spend much time upon. I submit to you that that one letter of the 28th of December was signed on the 29th, because it is a conceded fact that Mr. Brady did sign the letters on the 29th. Now, why were those other three sets of books not brought in? They would show that they were all signed by French. If that accident had happened in all those books it would have been a circumstance against us; but as it stands it is

Confirmation, strong as proof of Holy Writ

that Brady was not there on the 28th of December, 1880.

Now I am coming down to the loans, gentlemen. I want to talk to you a little about these loans, because we have all borrowed money if we have not lent money. When you come to borrowing money we know something about that. We do not know very much about expeditions and increases except what we have learned in this case, but we do know something about ordinary business life on the public streets and in the offices of the city of Washington. It is a matter entirely immaterial so far as the question you are examining is concerned, whether Brady borrowed money from Walsh or whether Walsh loaned money to Brady or not. Walsh had a perfect right to lend Brady money if Brady was willing to pay interest enough to satisfy him, and Brady had a perfect right to borrow it from him. These circumstances go, however, to give you an opportunity to find out how much value can be put upon the testimony of such a man as Walsh. He sued Brady on the 21st of January, I think. I had better fix the date. [Referring to the record.] It was sworn to on the 21st of January, 1881. In this bill of particulars, which was filed on the 21st day of June, 1881, are four items. The first bears date July 21, 1879, and he charges \$12,000 and interest; the second bears date January 7, 1880, and is \$12,000 and he charges him interest; the third is April 8, 1880, for \$13,500 and interest; the next is July 20, for \$5,400.

This is less the credits of \$300 of the date of the 8th of November, and on the 19th of November, \$4,700.

Now there is a curious circumstance connected with this man's testimony to which I want to invite your attention, and he has his peculiar notion about data. He seems to have fixed his mind upon the subject of data when it was necessary to make his story plausible; that he should have some kind of data from some place for this first loan and he produced a check for \$12,000. For the second loan he produced a small check to Buell—two small checks, one dated the 5th of January, 1880, the other the 7th or 8th of January, 1880, one for \$75 and the other for \$125. For the third charge of \$13,500 he produces a check drawn by himself for \$12,000 on Winslow, Lanier & Co., and for the

fourth charge of \$5,400, after he had had three or four days to think about it he hunted up two Price drafts and fixed the dates by those.

Let me begin back. The first time he loaned him money was in the fall of 1878, which was \$3,000, and he paid it back in a few days. Then thirty days after the first loan he loaned him \$2,500, which he says was paid back in a few days—I do not care to trouble you any more with the fact.

Now, he testified that on the 23d day of June, 1881, there was \$28,050 due him over and above all just grounds of defense and set-off from General Brady. That is what he swore to in the testimony. He told you that the loan of July 21, 1879, was made by him in person; that he handed the money to General Brady at the Post-Office Department; that he drew a draft for \$12,000 on Winslow, Lanier & Co., and deposited it with Lewis Johnson & Co.; then he drew a check on Lewis Johnson & Co., for \$10,000, not \$12,000, put it in his pocket, went somewhere else and got \$2,000 and made a loan of this money to General Brady for which he subsequently took a note. He says at that time that General Brady said that he did not wish to have the check. General Brady, he says—I am quoting his very words—expressed a desire not to have the check for obvious reasons; yet he subsequently says he took a note for \$12,000. The reason he took that note was that he was about to proceed to the West and desired the note to be ready in case of accident. Now let us hear what he did with that note. He did not have that note at the time of this famous interview. He says in the first place that the first note was returned to Brady because of his having paid it after his return from the West. Subsequently he says the note for the loan of \$12,000 of July 21, 1879, was returned to Brady when Brady paid Walsh \$10,000 on account of the Price drafts. Now Brady never gave him the Price drafts, he said. He says that Kellogg gave those to him. Then he says again that on turning over to him the Price drafts amounting to \$10,000, his half, “I returned him his first note.” He says Kellogg gave him \$15,000 in postal drafts and \$5,000 in a note of J. B. Price’s. Now of the Kellogg draft Brady’s half was only \$7,500, and Walsh said in one place that this \$7,500 was collected and credited to Brady. That is the way of this credit of \$3,000 and \$4,500.

Now, I come to the loan of the 7th of January, 1880, of \$12,000. He said in the first place that this was in the early part of January, 1880; that it was \$10,000 or \$12,000, he did not recollect which. Now, gentlemen, is it not incredible that a man cannot tell you within a few short months whether he loans another \$12,000 or \$10,000? He remembers all these other little details with great accuracy, but he does not know whether he loaned him \$10,000 or \$12,000, but he did know at that time it was not \$1,200, as he had sworn on the 21st of June, 1879, in this paper that it was. He is not quite sure, he says, that the amount was \$10,000 or \$12,000. He afterwards took a note in Washington, long subsequent, in the latter part of January, 1880.

Now he calls up his data in support of his theory in this case, and he produces proof, the checks that were given early in January to Mr. Buell. We put Mr. Buell on the stand, and he said that the money had been paid to him by Mr. Walsh; that he had received those checks, but he denies the story of Walsh *in toto* that the thousand dollars was to be paid to him by Walsh for Mr. Brady’s account, and he said, and that has been uncontradicted, that he even had no acquaintance with General Brady at that time, and did not form his acquaintance until the next month; that he did not know him, and had had no business trans-

actions with him. Mr. Buell has been entirely uncontradicted on that subject. He has been entirely uncontradicted on all subjects. You were told, gentlemen, by the learned lawyer who last discussed this question on the part of the prosecution, that Mr. Walsh was uncontradicted, that you were bound by your oaths to believe him, and if you are bound by your oaths to believe any such story, I feel sorry that an oath of that kind should have been administered to any man.

So far as Mr. Buell's testimony is concerned, it is uncontradicted, and it shows the fact that he did not know Brady; that he did not receive a thousand dollars from Walsh for Brady's account, and that he had had no dealings with him up to that time. Why was Mr. Buell not contradicted by Mr. Blackburn when he was on the stand? Mr. Buell says he got the thousand dollars for services. He had already received five hundred, which probably Walsh regarded as a bad debt, and he received five hundred for his services, which he agreed to render, and which he swears he did render by delivering a written argument upon the subject-matter in controversy to the chairman of the committee, which he had a perfectly good right to do. And that chairman was put upon the stand upon the part of the prosecution, and he was not asked about it, and he would have been if it were not true that he had given him the opinion and the argument as he said he did.

But here is the queer part of it. Walsh is not quite sure at the outset whether he loaned \$10,000 or \$12,000 to Brady at that time, but he comes to the conclusion before the end of his cross examination that it was \$12,000. He had sworn on the 21st of June, 1880, that it was only \$1,200. Now, if there was a thousand dollars of that sum, or whatever it was, due to Buell, the amount he paid to Brady was \$200. Is it not incredible that a man cannot remember whether he pays \$200 or \$12,000 to a man in the short space of six months. Is it not incredible that a man shall stand upon the witness stand, in the presence of this grave and solemn court, and make such a statement as that to the jury? Do you believe such a man? Do you believe that he did not know at any time whether it was \$1,200 or \$12,000? Do you believe that there was ever a moment that he did not know whether it was \$10,000 or \$12,000? He has sworn twice that it was \$12,000, and he has sworn once that it was \$1,200. He has held up his hand and called upon Almighty God to witness the truthfulness of his statements that he had loaned this money to Brady, \$12,000 before you, gentlemen; \$12,000 before the magistrate in New York, and he has, with equal solemnity, sworn that it was \$1,200 in this court. Gentlemen, can you believe such testimony? Can you consent to sending any man to prison—can you consent to render a verdict against any man, even for a few dollars, upon such testimony? I do not believe you will.

Mr. Walsh was invited to correct his testimony. No; I want to be accurate. He was not invited that I know of, but he voluntarily came upon the stand twice to make corrections of his testimony, and he had some trouble in correcting this matter. He asserted with the utmost positiveness, on Friday, that it was not \$1,200 in this suit; that it was \$12,000, and that the fact that it was \$1,200 was the result of a clerical error made by a young man in Mr. Hine's office. He swore to that on Friday. He said it was a clerical error. I am quoting from him. "Very certain of it; it was not the amount that I filed; certainly ought to be prepared to swear to it; sure it was \$12,000, and not \$1,200; the \$1,200 was \$12,000; sure of that."

Then, he had an interview with Mr. Hine on the next Thursday a week, and he came into court and he said that Mr. Hine's account was made up

from an account which he made himself. "I evidently furnished him, Hine, a memorandum wherein that amount through error of myself is \$1,200 instead of \$12,000." He footed it up, and he solemnly swore that the amount was \$32,100, less the credits, and that the balance due him was twenty-eight thousand and odd dollars. Now, is it possible that a banker of experience, a man who had been a broker for many years in the city of New Orleans, who has been accustomed to make his money by the computation of errors, can deliberately sit down and make out a bill of items, foot it up, compute the interest, deduct the payments, and declare a balance, and make a mistake of as much money as this? He footed up the sum in New York, and he makes it forty-two thousand and odd dollars. He swears positively there that that is due to him over and above all counter-claims, and he swears here that it is over and above all just defenses and offsets. Do you believe that? Do you believe he was telling the truth when he was on the stand here?

The next loan was April 8. There were three dates, April 8, April 12 or 13. It is charged here in this paper as April 8. Now he was in some trouble about the date here. He produces here a check for \$10,000 on Winslow, Lanier & Co. He says that Brady called upon him to lend him \$10,000 by letter and by telegram. He does not produce the letter and he does not produce the telegram and he does not know where they are. Gentlemen, he never got them. He never had any such request.

Now he tells you the most extraordinary story of them all; that he was told by Brady to deposit \$10,000 to his credit; that he was too discreet a man to do that, and that Brady said it was a fair transaction. Yet he told you only the day before when he was on the stand that Brady refused to take his check because he thought it was not discreet for obvious reasons. He changed his mind in a very few days. Now he says that he drew a check for \$10,000, and he produced it upon the stand and you saw it. It bears date in the city of Washington on the 8th day of April. Now, when Walsh sat down to make out that account for Mr. Hine to base his suit upon it, he had before him that check, because he thought it would be better to have some kind of data, and he did not observe that it was stamped on the face with a bank stamp showing that it was paid by Winslow, Lanier & Co. to himself on the 12th day of April, so that his date in this account was several days wrong, according to the theory of his scheme. So he had to change it. Then he says it was either the 12th or 13th, and he did not know which, that he carried into the bank of Hatch & Foote the sum of \$13,500 and there handed it to Brady. He had drawn \$10,000 out of Winslow, Lanier & Co.'s bank and he had \$3,500 in his pocket; he had had it in his pocket for some time, and did not know where he got it. He said that he was in the habit of and frequently carried around in his pocket greater sums than that. Truly, gentlemen, he must have been a man who had no regard for money. He is a good man to have for a friend. He takes no account of the little matter of \$2,000, and carries about in his pocket sums of money greater than \$3,500 in the city of New York, a city, gentlemen, where the less a man has in his pocket the better he is off.

Now Brady was here on the 8th day of July. He says Brady telegraphed to him he wanted \$10,000. He gives him \$13,500. How did that happen? It is a curious thing that he should give him \$13,500 when he only wanted \$10,000, and make no explanation of it. He took his note at the time for \$13,500. There is one curious thing that occurred to me when he was giving this testimony and I

have thought a good deal of it since. If Brady was in a conspiracy with Vaile, Miner, and the Dorseys, and if he was levying tribute on nine thousand American citizens, who were doing business with the contract office, what did he want with that pitiful sum of \$10,000? Why should he be a borrower? Why should he be endangering his safety by sending telegrams and notes to John Walsh to lend him money when all he had to do was to make an expedition or an increase and get his money? Gentlemen, that kind of a story does not do. If Brady was a criminal, if he was a conspirator, a man who was the custodian of large sums of money of the public funds he need not be a borrower. He need not be calling upon such people as Walsh to borrow money and he was not a conspirator, he did not borrow money from such people.

Now we come next to the loan of July 20, and July 17, and August. He swears here that it was July 20. That is his first swear. He swore before Mr. Meigs that the sum of \$5,400 was due to him with interest from July 20, 1880, and he swore on the stand that it was some time early in July. He did not know how much it was when asked the question. He said it was four or five or six thousand dollars. That is what he said. Four or five or six thousand dollars some time in July, 1880, and he could not give the date. He handed it to Brady at Delmonico's, in the city of New York, and took no note, had had the amount in his pocket probably a day or two.

Now, that is what he said on Friday. On Saturday, he tells you, he went to the city of New York and came back here on Sunday night, and stood upon the stand as fresh as a bridegroom. What did he say then? Why he had forgotten about his data, and that data business had escaped his mind about so small a sum as four, five, or six thousand dollars, and he slipped up to the Post-Office Department and found two drafts that were given to him by Price, dated on the 16th day of July, 1880, and he says Brady gave them to him on the 17th at Helmus's, and he loaned him there about the 17th \$2,000, and a few days afterwards \$2,000 more at Helmus's. So he did not have \$5,400 in his pocket chasing about the city of New York. He changed his mind in order to suit the date and to make a plausible story to you. He got his data out, but had forgotten it up to that time, and he gave him the other \$1,400 in August at Delmonco's. He makes another mistake there of a great many thousand dollars, and did not know it on Friday, but found it out on the following Monday.

Now, Mr. Walsh testified, gentlemen, that he was a banker, that he discounted paper, that he had books, that he had a clerk, that his name was Sheckels. He did not say that his name was Ben Sheckels, but I say it was, if the court will allow me. We all know Ben Sheckels.

Mr. MERRICK. Is he the man?

Mr. TOTTEN. I suppose so. He said he was Sheckels. He had a man by the name of Sheckels, who was his clerk, and who kept books in which he made entries of minor paper that probably did not amount to a great deal. Now, gentlemen, is it possible that he could have made loans of \$48,400 in a few months to one man, and that he made no entries of those loans in his book as a banker? He had a ledger which he kept himself. He had books which Sheckels kept—minor books. Did he have no books upon which he made entries of notes that were out and when they came due? Did he not put them in his bank, or in some other man's bank to be collected? There was nothing wrong he says about these loans. Why should there not be an entry of \$48,400 loaned in four, or five, or six sums at these different times? Why, if he made

these loans, was not Sheckels brought here to show that there were no books, that there were no entries made of these things?

Mr. MERRICK. Why did you not bring him to show there were?

Mr. TOTTEN. Why did I not bring him to show there were?

Mr. MERRICK. Yes.

Mr. TOTTEN. I am not here for that purpose. It is the business of my learned friend, and he has not found it out yet, to submit proofs to you to show that these men are guilty of the charges, and he says "Why do you not bring the men here to show that this was not true." I say he is called upon by the law, and you will insist upon it, to prove from circumstances beyond all reasonable doubt, before you can give any weight to it in a case of this kind. Sheckels was not brought here. There was no reason given why he should not be brought here, and the lame excuse was given that Walsh could not find his books; could not produce them when the grand jury called for them. Now, do you believe that kind of a story, gentlemen? Do you believe that any man lends \$48,400 to one man in a few months, and how much more to other people I do not know, and makes no entry upon his books? Do you believe it? Perhaps you do.

Now, gentlemen, there are several wonderful things about this matter. Here is a banker of experience, the possessor of a large fortune, lending money to people, discounting their notes, discounting drafts. He lends \$48,400 to one man, and I do not know how much to other people, and he has no book account. Here is a man who carries about in his pocket large sums of money day after day, lending thousands and no account kept of it, and carrying his money about upon his person in the city of New York at all times in the day and at all times in the night, and he takes \$3,500 out of his pocket to make up the amount of a loan from \$10,000 to \$13,500. He gets a draft from Lewis Johnson & Co., for \$10,000, and puts his hand in his pocket for two thousand more, and he lends it to Brady. The note is paid in one breath and it is not paid. It is returned to him when he gets \$10,000 and no account taken of the two thousand. He is 37 years old, was born in Louisiana and raised there. He is over six feet high, and his probable weight is two hundred and twenty-five pounds. He is a man of unquestionable courage, for he could not have stood there if he was not, and he allows a man half his size to rob him of \$25,500 at noonday and he makes no outcry for the police. He hardly makes a protest against it and lets him get off with it. Gentlemen, as small as I am there is no man big enough to carry \$25,000 of my money out of my house without at least an outcry and most probably a fight. I get my money by too hard knocks for that.

Another strange thing. He employed two lawyers within the short space of seven months to bring two suits in two different jurisdictions. He says not one word about this robbery of \$25,500 in notes, and does not tell the lawyers that it was reduced to a contract in the shape of a promissory note, which was very important, exceedingly pertinent, to use one of his own expressions, in the management of a lawsuit. Not a word. The first one who was able to bring that out of this man's bosom was Woodward, the mild and soft-voiced Woodward, the man with the gentle smile.

Another queer thing. He makes two affidavits. He states two accounts, and he actually foots up the amount and strikes the balance. Now, if he had not footed it up and had not told his lawyer that the amount was so and so, and the lawyer had footed it up and calculated the amount it would have been different. But he swears he got out the

amount for Mr. Hine himself, and swears to it after he had been to Mr. Hine and seen it, although he had stated a different state of facts Friday of the week before. A queer man Mr. Walsh is, a worthy son of the State of Louisiana, a worthy witness to graduate from that country. He will never disgrace them. The footing in the New York suit was \$42,374. The balance which he struck in this suit before us here in this court was \$28,058 exactly, after he had given credit for \$300 as of November, 1880, and of November 19, \$4,700. Those were payments that resulted from the payments by Mr. Price of his note of \$5,000.

I have had some experience, gentlemen, in footing up accounts. It is a kind of work I do not like, but I have industry enough to figure up Walsh's account as he stated it here, and you can take as the basis of the debt whichever suit you please—\$42,374 or \$32,100 or \$28,058. According to Mr. Walsh's testimony Brady is entitled to credit for two postal orders, dated on the 16th of July, 1880, drawn by Price for \$1,250 each, making \$2,500. He gave Brady credit for that. He is entitled to credit for the amount of the Price note which was handed to him by Walsh and collected by him, and which he gave him credit for, and the only thing for which he did give him credit. He is entitled to credit for one-half of the Price drafts which were handed to him by Kellogg, amounting to \$7,500, according to Walsh's statement. He is entitled to one-half the amount which he says he collected on the Peterson drafts, something we know nothing about, because under the rules of evidence we could not get Peterson's statement; but he says he collected five or six thousand dollars on the Peterson drafts. He got \$15,000, he said; but he says that he loaned Mr. Brady \$2,000. That makes a difference of \$1,000, and that makes a credit of \$16,000 instead of \$5,000, as he has given here. So that, according to the amount of loans stated in this, Mr. Walsh was entitled to \$16,100 and not more. If his oath made in New York is true, then he is entitled to only \$26,374. Now, gentlemen, what do you think of such testimony? What do you think of a proposition put to you to convict an honest, decent, respectable citizen, one of your neighbors, on the testimony of such a man? Why, if Walsh had been present Ananias and Sapphira would have got away.

Now, gentlemen, I have said all to you that I want to say about the facts. I want to say to you that these men, if they are convicted, must be convicted on this indictment and the charges therein contained and upon none others; that you are not to go outside of the issue you are sworn to try. That is the trouble we have had through this case. We have never been able to get to it until now. These men will not talk about the case; they talk about expeditions and increases for 1878, and I do not want to talk about that. I want you to try this case according to your oath, and I want to beg of you to give this case serious and solemn consideration, because it is no trifling thing for a man to be put in the jury-box to be the arbiter between the Government and a fellow citizen. The Government desires no victim; it wreaks vengeance upon no man, and all that you are asked by the law and your Government to do, is to observe the duty which is imposed upon you by your oath, and when your judgment is rendered it will stand for all time until the judgment day, so far as anything you can do is concerned. Your verdict will always stand upon the record of this court whatever it may be, and you cannot disturb it. The court may disturb it if it is in one direction.

I awoke very early this morning and I went to work and endeavored to reduce what I had to say to the closest space. I know your patience has been drawn upon. I saw the bright sun come out from his hiding

place in the eastern horizon, and I was reminded when I saw all the glory and splendor of that luminary, of the closing lines of Mr. Theck, in one of his most entertaining poems, descriptive of a storm on his journey from America to England. He was full of bright hopes to meet his wife and his little girls, and he reduced this scene to a poem, and he closed it with some entertaining and touching lines, which I am about to read to you, and I remembered then that these men who are indicted here, our clients, are almost relieved from a storm that burst upon their heads three years ago, which has been raging over and around and about them with the most malicious and furious violence. I thought that they, too, were turning towards home, and their wives and little children, in hopes that they would be discharged, that their deliverance would be found, and they would be told to depart hence without day, not to homes that were filled with lamentation and woe, but to wives who were glad in their faces and to little children who had tearless eyes, and I remembered this poem :

And when, its force expended,
The harmless storm was ended,
And as the sunrise splendid,
Came blushing o'er the sea,
I thought as day was breaking,
My little girls were waking,
And smiling and making,
A prayer at home for me.

At this point (12 o'clock and 25 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. MCSWEENY. With submission to the court, gentlemen of the jury, I shall commence my remarks, which I hope will be brief, by wasting a few moments on the smallest subject connected with the case, and after the moments have been thus spent I will try to have you from thenceforward consider the case and it only. The indifferent subject that I refer to is myself. It was stated by the counsel who opened for the prosecution, whether out of the complimentary nature of the gentleman, based upon the warm friendship that I have formed for him during my abode with you, or from whatever reason, that when the undersigned came before you, you had got to look out; some intellectual acrobatic performance was predicted; that there were powers possessed by me, *by me* to steal away the minds of men, to move them at will, with a magician's wand, to laughter or to tears. Now, I would not by silence lay myself open to the absolute and disgusting egotism of appearing to appropriate any compliment of that kind as based upon any quality of mine that it attempted to describe. I am not an orator as these Philadelphia Bruti are (that is the plural of Brutus). [Laughter.] I am a plain, blunt man, not skilled in wit or word to raise the stones of Rome or to steal from men their judgment. I am a plain, bog-trotting, slow of speech—until I get started and then I am reasonably fast—person that speaks to a man just as he would wish to be spoken to. I come before you with no prepared sentences, no flowers of rhetoric culled along the paths of literature, no gems to ornament my few plain blunt expressions to you. I shall give you no flowers. I wish I had them to strew along your weary path as you have walked in and out, and sat during the long, long, more than forty days and forty nights, in the wild wilderness of this case. I have no such thing to offer you.

Another almost unkind remark was, "Don't let him"—that is, Mack—"go home to Ohio and boast around there how he fooled a Washington jury." I will tell you one thing Ker need not have any warning about. He can go home and tell them he didn't. [Laughter.] Brother Ker devoted a quarter of an hour of his opening to the immortality that is attached to these books (the record), that your honor punctured by saying nobody ever read. He said there never was such a case as this, and he took three days to see that he is laid away in it like flies in amber for preservation. But the most curious thing, if they ever read the concern out West, will be the compliments of my brother Ker warning you down East against such powers as he imputes to me. They will wonder out there what the man meant, for there is nobody out there who would recognize the intellectual portrait. Enough of this, and somewhat too much. If he speaks of pathos and tears that are in the case, he has struck upon one truth. There have been tears in this case. They have for some year or two left their marks on furrowed cheeks. Households have been darkened, lights have gone out, and little ones have been followed under this disaster and laid away in the silent tomb. They are dead and there are tears, but they are not from the poor words of mine. They are in the pathos of woe. Hearts have been made to ache, children to look up in wonder, whilst mother is keeping up a brave face, and keeping back the tears until the silent midnight hours come, when the pillows are wet with them. Women keep back the tears and try to be brave before the children. Men that have faced battle break down in agony in their homes. Men can buffet and stand the world, but when home comes and sadness and darkness, and the hearthstone is blighted, then the tears come. Yes, brother Ker, there are tears in this case, and if they help to adorn the garlands upon your brow, you have that victory. You did make tears to flow.

Brother Ker, furthermore, is a good-hearted man, after all. His thunder was rather in the index. I do not wish to compare him, with my friend Bottom, in *Midsummer Night's Dream*, but you know Bottom was going to play the lion, and in the old plays the players come out beforehand and explain to the audience the parts they are to play. Bottom comes out with a lion's skin on and says, "Ladies and gentlemen, I play the lion to-night. You will hear me roar; but it is only Bottom, the tailor, and I will roar as gently as a sucking dove. Now do not be scared." So with my friend, Bottom—Ker, in this matter. He roars as gently as a sucking dove, and for all that he calls some men thieves and others some very ugly names, that it is not in my heart to complain about it, because at the last in the distribution of the defendants he nearly let us all go. Let me call your attention to the fact. He said, "John Dorsey, you don't look like a very bad man. I guess you are pretty square. You don't look, you old Vermonter, as if you had rolled in a great deal of star-route wealth. There don't appear to be much star dust about you." He about let him go. He turned then and looked with compassion on Turner, and said he, "Turner, you here yet?" That was on the third day of his speech. Says he, "Turner has faced the music. He has stood all this. Let him go," having reference to the constitutional provision that no man shall be visited with cruel and unusual punishment; it was enough that he had sat three days. [Laughter.] "Take your certificate and go on that limping Gettysburg leg. I guess we don't need you, colonel." He almost let Senator Dorsey go, but I will show you where the hitch was. Says he, "I was awakened to a deep sense of sympathy about Senator Dorsey." Rather a nice fellow, because he is the brother of a man who

is a very nice man, as he had already described, but says he, "My indignation was aroused"—He was about to let him go—"when I found that he had employed a fellow from Ohio to come on here and attend to him, and left nobody but poor Bob Ingersoll and some more common stock around here to see about John." That he said turned the current of his thoughts, and I think he finally concluded on that account he would rather hold on to the Senator. He exonerated the dead. That is greatly to his credit. He said that Mr. Peck had not a stain upon his garments, or words to that effect. He said there was no act of impropriety against brother Peck. You have a right to examine him as a conspirator just as much in his grave as though living. He says that he trusts and believes that he is in that better land; that he has seen naught against him here. But brother Bliss, ghoul-like, tore open the soldier's grave, brushed away its flowers, and being a little hard run and short up to make a pair in this case, for you must have two, this game goes by pairs, says he, "If Ker is letting everybody off, who, in the name of God, will we hitch to Brady? We have got one;" but, as the Yankees say, "We must get another to hook up to him to make a team." He sees that Ker is letting them go too freely, and he calls a halt and goes to scratching in dead men's graves to bring up Peck, and denounces him as a perjured affidavit-maker. These gentlemen had better conspire together. They had better go out and agree upon some of these things. The fact is that brother Ker found he was letting everything go, and he had to raise himself up and say, "Halt! I must not let my sympathies run away with me. Brace up, Mouser; brace up, Ker; don't be giving everything away in this way! Think of per diem! Think of subcontracts under the Department of Justice! Brace up! Roar again! Don't be so sucking dove!" He finally winds up by saying, "I guess you had better convict as many as you can get hold of; at least, it is a great case and a big book, and we have done our duty, and I guess nobody can complain. We are in the book." That is about the way my brother Ker left us. He did appear as if he would like to let go and he did not know exactly how to hold on. There was a young gentleman out in the western country who was attacked by a bull, and as the safest place and the greatest distance from the horns he seized upon the tail and it swung him round and round the field, and as the taurine monster came on one of the swings some fellow outside of the fence very safely said, "Why don't you let go?" "Let go, the devil! Don't you see it is all I can do to hold on?" Mr. Ker has been holding on and letting go in a beautiful state of uncertainty as to the result of the three months without knowing just exactly what to do or how to do it. So here we are. Whether they want anybody convicted, how they want them convicted, where they said they conspired, what monuments they gave you to proceed upon and base your judgment upon, we will infer as we go along.

Now, if the court please, there has been much flippant talk upon the part of the prosecution to the jury about "Don't this look suspicious?" "If this didn't go there where did it go?" and "Isn't there something suspicious here?" You will find that Mr. Ker, on several pages of the record, says: "Now this is very suspicious. Why don't they prove their innocence?" That is repeated time and again. On account of this style of arguing this criminal case I propose enforcing more than by a mere sentence that your honor would feel bound to give to the jury the doctrine as to the distinctions in criminal and civil cases. I say I should say to the jury more than the mere sentence that you would feel authorized or required to give, and will elaborate

it somewhat for a few minutes and state to the jury the difference between criminal and civil trial. I turn to the court and say that these matters are all as familiar as household words. They come trippingly to the tongue. Lawyers and judges, we who spend our lives in this kind of talk and lingo, cause the words by the very repetition of the sound to lose their sense. Familiarity, if it does not breed contempt, does breed a want of appreciation of the deep meaning that lies in the well-founded distinction between a civil and criminal proceeding. And though, whilst I may apparently turn to the jury and talk law, yet it is that plain law, as to the interpretation of which your honor and I would have no trouble at all and no word between us, but simply by way of argument and to illustrate the importance of the distinction between civil and criminal cases, I would respectfully turn rather to the jury than to your honor in laying down a few of those principles which mark the distinction.

Gentlemen, we approach a criminal case, first, with the idea of every man being innocent who is brought to the bar for trial. The presumption of innocence accompanies him at the commencement of the trial and proceeds with him until its close. You do not hear that kind of talk in a civil case. The mere laying down of an indictment is nothing. If the Government would say, "There is our indictment," and the court ask, "Is that all you are going to do?" "Yes." The court would then say, "Gentlemen of the jury, the indictment, the accusation is nothing; you must find not guilty." The indictment is a mere conduit, a mere convenience for the purveying of any testimony for the prosecution. It is a mere bill of particulars, found *ex parte* in a grand jury room where the defendant has no right to introduce testimony, and where it would be malpractice for the prosecuting officer to permit the defendant to offer a witness, however truthful he might be. Such is the process of finding an indictment. The defendant has no right to send his witnesses into the grand jury room. If he would meet the prosecuting officer on the street and say, "Look here, I want to send a witness there that will explain all that for me," the prosecuting officer would properly turn from him and say, "Sir, this is an *ex parte* proceeding. Never mind that. Not that injustice is to be done you. There is nothing in the indictment except merely a process to be sent down to a trial jury, and there, if we have got any evidence, and if you have got any, we will meet at the bar of conflict." So that every defendant comes before you with the presumption of innocence in his favor. That is not a mere sentiment. It walks with him through the dark valley of the shadow of his trial, down in the depths, it follows him on and on until he ascends in his triumph to the delectable mountains, and goes forth in joy with a verdict of not guilty at your hands. Wherever the proof is doubtful, wherever you make pause over a question and it is in doubt, the presumption of innocence comes marshaling up and says, "Throw that in the scale; it makes for the prisoner." Again, it is founded on good philosophy. It has been found that poor human nature, bad as it is, is not as a general thing prone to violate the criminal laws of the land. The presumption is founded on the average of human conduct, that although men may go a canon wrong here and there and every day, although they are—

Prone to evil as the sparks to fly upward,

yet it has been found in favor of even this poor degraded human nature that the presumption is that the great body of our citizens are not law-breakers nor violators of their country's criminal enactments. Theolog-

ically we may be all wrong. Statutorily we are presumed to be right. I think it is Tom Moore who says in his *Paradise and the Peri*:

Poor race of man, said the pitying spirit,
Dearly ye pay for your primal fall,
But some flowerets of Eden ye still inherit,
Though the trail of the serpent is over us all.

So that though the trail of the serpent is left upon us all, there are flowerets of Eden that bloom fast by the throne of God that are left to His creatures; and it is written in the law books that there is still something good in man which warrants the presumption to be stated to every jury and enforced that he is presumed to be innocent of crime. That presumption, as I said before, is not merely announced to pass with the breath that utters it, but is to be evoked from these books, there is to be breathed into it the spirit of life. It is to walk with us a pillar of cloud and a pillar of fire, whether light or darkness prevails to guide in the one and to illuminate in the other until the conclusion of this trial.

There is another characteristic which distinguishes this sort of trial from a civil trial. It is this: Not the quality, because the quality of proof is the same in civil and in criminal law, but the quantity of proof, say the books, is different in criminal from civil law. The same rules of evidence, gentlemen, that would guide you in excluding hearsay, and all that, guide you in hearing a civil suit. But in a criminal trial, the quantity, as it is called, of proof is entirely different from that required in a civil suit. I read from 3 Greenleaf on Evidence, section 29:

A distinction is to be noted between civil and criminal cases in respect to the degree or *quantity of evidence*—

Not quality—

necessary to justify the jury in finding their verdict for the Government. In civil cases their duty is to weigh the evidence carefully and to find for the party in whose favor the evidence *preponderates*—

Ponderation is simply weight. Here are the scales. Who weighs down? Who has got the most? Where does the beam kick? It is a matter of weight. Now, mark you the distinction when I come to criminal law—

although it be not free from reasonable doubt. But in *criminal* trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law, that the *guilt of the accused must be fully proved*. Neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt. The oath administered to the jurors, according to the common law, is in accordance with this distinction. In civil causes, they are sworn "well and truly to try the issue between the parties, according to law and the evidence given" them; but in criminal causes their oath is, "you shall well and truly try, and true deliverance make, between" the king or State, "and the prisoner at the bar, according," &c. It is elsewhere said that the persuasion of guilt ought to amount to a moral certainty, or "such a moral certainty as convinces the minds of the tribunal as reasonable men, *beyond all reasonable doubt*." And this decree of conviction ought to be produced, when the facts proved coincide with and are legally sufficient to establish the truth of the hypothesis assumed, namely, the guilt of the party accused, and are inconsistent with any other hypothesis.

I will elaborate that a little more before we get through.

For it is not enough that the evidence goes to show his guilt; it must be inconsistent with the reasonable supposition of his innocence.

This is also well put in Burrill on Circumstantial Evidence. In 8

Ohio State is also an announcement of the doctrine in elegant language, but I read now from Wills on Circumstantial Evidence, page 157:

In penal jurisprudence there can be no middle term; the party must be absolutely and unconditionally guilty or not guilty. Nor under any circumstances can conditions of supposed expediency ever supersede the immutable obligations of justice; and occasional impunity of crime is an evil of far less magnitude than the punishment of the innocent.

It is said in the books, and the meaning of it often goes unappreciated, that it is better that ninety-nine guilty men escape than that one—that is, the hundredth man—be improperly convicted. Now, what is the meaning of that? It means that by adherence to this rule of law never to convict unless the evidence is beyond all reasonable doubt, ninety-nine guilty men may escape. What if they do? Let us change it. Let us modify it a little. You might figure up the statistics, and say: "If the court please, if you will let us relax that rule we will catch the ninety-nine rogues that are escaping by your holding us to that rule. Now, just relax that rule." "Yes," says the judge; "but what if that hundredth man comes along, and you relax the rule and he is convicted?" "Oh, yes; that is true." So that you see the necessity of the rule. It is better that you let ninety-nine, or nine hundred and ninety-nine, rogues escape, says one of the law-book makers. Those figures are used for an indefinite quantity, an indefinite number. It is better to let all who are tried by that rule escape than by the relaxation of the rule to catch ninety-nine rogues that are going unwhipped of justice, and let one innocent man perish by your violation of the law. That is the philosophy of the oft-quoted phrase, "It is better that ninety-nine guilty men escape than that one innocent man suffer," to wit, it is better that they escape by adherence to the law than that in punishing them you run the risk also of convicting the hundredth innocent man. The proof must be beyond all reasonable doubt. In 8 Ohio State Reports—there is no particular necessity of our friends taking any note of it, as it is a simple point upon which we all agree—the doctrine is laid down:

The presumption of the law is that the defendant is innocent, and this presumption continues until his guilt is established by evidence. He is not required to establish his innocence, but has a right to rely on the legal presumption in his favor.

And to call upon the Government to prove his guilt.

In order to convict the defendant the evidence must satisfy the jury beyond a reasonable doubt that he is guilty as he stands charged. And as the defendant's guilt is only established by sufficient proof of several material particulars, the proof must satisfy the jury beyond a reasonable doubt of the existence of each fact necessary to constitute his guilt, or the jury must acquit. * * * If, when the jury have considered all the evidence in the case, *the guilt of the defendant is not fully proved*, then that reasonable doubt exists which should acquit, for the legal presumption of innocence would in such a case demand an acquittal.

I admonish you, then, to give to the defendant the benefit of every reasonable doubt, as I have thus defined it, for that is his right. If any one juror should entertain this reasonable doubt, it is his duty to withhold his assent to the rendition of a verdict of guilty.

The evidence, in order to convict the defendant, must be such as not only to prove the guilt of the defendant, but such as to moral certainty, beyond a reasonable doubt, to exclude or disprove every hypothesis, but that of the guilt of the defendant.

In civil cases, it is repeated here, as I said before, the juries are told simply to weigh and see which has the preponderance of proof. Now, let us illustrate this. If there is a controversy between two neighbors as to the price of a load of hay, or the lines that bound their land, or the price of any merchandise, or the question of any debt, it is said by the law books and by the judges, that although the rule does work undoubtedly much actual and individual wrong—that is conceded—yet it

is better that the world move on. The wheels of commerce cannot stop. Juries cannot be brought in and set out, and the court sit and try and try, until twelve men would come to a conclusion beyond all reasonable doubt as to the price of merchandise or the quantity of land, or any of the questions that are tried in civil tribunals. They say that the necessities of the motion of the business world require that we adopt this general rule working even great wrong. But it is a sacrifice that we all have to make for the general or common good. We cannot wait. But when you come to the question of the citizen, whether he be taken from his home, whether he be stricken down in the possession of his liberty, whether he be taken from wife and children, whether infamy and disgrace shall blacken his name and darken his memory and leave it as a sad inheritance to those who are to come after him, on questions like this, no matter whether the world stops still or not, let the sails of commerce flap idly in the harbor, let the wheels cease to roll, no question of convenience shall interfere until that question be fought. No other consideration shall come between you and that man's liberty. Make the case your own. No one shall urge the mere question of convenience, "We must hurry, the docket is crowded." No, sir; the liberty of the citizen says, "Hold. stop, stay, until this question is fought."

Sun, stand thou still upon Gideon; and thou, moon, in the valley of Ajalon—until this fight be fought. Let the world stand until the battle of the freedom of man be fought out right on the battle-field, and neither sun go down nor moon sink to rest until the contest between the attacker, the Government, and the citizen be fought out and the victory won. There is the philosophy and the broad distinction—the distance that man is above property. The price of merchandise is less than the liberty of the citizen. And I want you to beware of the flippant talk that you heard. "Is not this suspicious?" said our friends on the other side. "Let them prove their innocence. Don't it look suspicious?" and all those phrases for the six days of the opening argument of my friends Ker and Bliss.

Gentlemen, in civil cases between two neighbors I meet you after you come out. "Well," say I, "Mr. Foreman, you went against us on that question, did you not think that our side had really paid that note?" "Well, it was very confusing," you will say. "We all had doubts; the judge told us though which ever side we found a preponderance of evidence upon to go that way, and we rather thought the other side had a little more evidence, and I do not think you made out your payment." Very well. I could not make any quarrel with you on that. Let us try that in this case. "Well, sir, you came in and found our defendants guilty, did you?" "Yes." "No trouble; no doubt?" "Yes. Those gloomy doubts that haunt me to my pillow. I do not know about this, but we rather thought there were some things looked suspicious, and we thought the most evidence was on the part of the Government against somebody, and we concluded we would give the verdict for the one who had the most evidence." You would, would you? Talk to me that way; in a criminal case? Then instead of being pleasant with you, as I was upon the other supposed case, I would turn upon you, and say, "You have violated these principles that I have just read. We went before you, sir, who should only have been smitten according to the law, and you have come in now and smitten us contrary to the law."

The principles are different, but all that is wanted is for you to know and appreciate it, to think a moment of this thing and see that it is not

a mere sentiment to be disposed of in a sentence, but it is a substantial, solid, existing, corporal right to protect the spirit and the liberty and the freedom of men. I might introduce many other authorities which put it in elegant shape.

It is also laid down here in the third of Greenleaf:

It is not enough that the evidence goes to show his guilt, it must be inconsistent with the reasonable supposition of his innocence.

Because he says here, and the reason I read it in Latin—it is a stumbling business, if the court please, and if there is any mispronunciation charge it to my being reared out there in the jungles of Ohio—is that it is two thousand years old. It is not the language of yesterday. He says that this principle is founded upon the doctrine of humanity and justice. He says, “Suppose the guilty so do escape by the application of the rule, *tutius semper est errare in acquietando, quam in puniendo; ex parte misericordiae, quam ex parte justitiae.*” Gentlemen, the Latin is not a bit better than plain old plodding English, but that principle has come down to us, that there must be conviction when the proof establishes beyond all reasonable doubt the guilt, and the old Roman, Cicero, in the forum nearly one hundred years before the Master trod the earth and preached the sublime theme of mercy, the sturdy, strong old warring Roman, just as the light and the dawn was breaking, had incorporated in his old Roman law, that “it is better to err ‘*in acquietando,*’”—a very little transposition makes that our capital—*quam in puniendo*—by acquittance than in punishment, to err, *ex parte misericordiae*, upon the side of mercy, *quam ex parte justitiae*, than even on the side of justice. And so my lord Hale, and all the writers that came on down, have clung to the olden maxim, and wherever it has been attempted to be infringed upon, as it was in a case or two, the old fathers of the law, headed by my lord Hale, brought them back to it. He said, “Not one jot or tittle of the old Roman maxim shall perish.” It grows better with the ages as they are old, and as Byron says of the ocean:

Time writes no wrinkle on its beauteous brow.

It is as fresh to-day to be applied to the humblest citizen of this bar as when Cicero thundered it in the forum of Rome. It is a living principle and there it is. It is better to err upon the side of mercy than upon the side of justice. Do you know—pardon me and begin to see the reason why I devote this time to this subject. It is so different from a newspaper trial, so utterly different to place twelve men there with the responsibility upon them. There is open to them a new heaven. There is open to them a God with whose throne their consciences form the golden link. Oh, it is so different from out amidst the roar of calumny to come in here before twelve upright, thoughtful men, away from clamor, and apply these olden principles, to bring them up and apply them in their beauty and ask that a citizen be tried by them. Oh, it is so pleasing. It has no terror to the true lawyer. He likes to say to his fellow citizens, “Come let us reason together; let us reason; still these roaring waves of passion.” Let us get away with the idea that somebody wants somebody convicted. Let us get away with authorized interviews in which it is said that the Attorney-General will come here to show that the Government is in earnest against these people. What business has the Government here except through its prosecuting officers. Either bad words have been said and unauthorized statements made by those in power, or true words have been spoken. In either event, the evil is one deserv-

ing of check. It has been said at this bar that the Government is in earnest and brother Ker encouraged us a little at first. He said: "Mr. McSweeny has no business before this jury." He said: "His proper place is on his way to the White House on his knees." Yes; "Asking pardon at the round table of Prince Arthur. Yes; and he says he expects also to see the gentleman who follows me—that is brother Ingersoll—also on his knees going up to the White House, aforesaid, on precisely the same ground.

Mr. KER. I did not use the word gentleman.

Mr. MCSWEENY. You did not say *gentleman*? Is that a *double entendre*?

Mr. KER. No.

Mr. MCSWEENY. Well, I say it. I always speak of gentlemen as gentlemen. Brother Ingersoll was to follow on his bended knees. Now, brother Ker has arranged that there is immortality, and he said that the corridors of time would just see these books traveling down them to the sweet music of the Philadelphia lawyer that adds its melody as it goes along. It is enough to last a little piece of eternity. Now the funniest picture that will be an annex to that book will be that picture drawn by brother Ker. Now I am a sort of a disciple of the old church, and I can kneel on proper occasions and it would not be hard, but what a sight for gods and men when Robert comes along to join this procession of genuflection up the steps of the Capitol to knock and ask for pardon for Senator Dorsey. I do not know that I would have anything to ask any pardon for. I would not care if brother Ingersoll would go up and say, "Be merciful unto me, a Republican and a sinner." I am not in that line. I need not go. But when Ingersoll and I form that procession, you get a picture that will slide down on the top rail of the baluster of the back stairs of the ages with this book. And then just as we were going to get the pardon right after his speech was delivered, there came along a notice from the Attorney-General that there should be no pardon found.

Mr. MERRICK. Is there any evidence of that, your honor?

Mr. MCSWEENY. Yes, sir.

Mr. MERRICK. Pardon me.

Mr. MCSWEENY. Well, we are just talking of pardon.

The COURT. What is that?

Mr. MERRICK. The counsel says that just after Mr. Ker's speech had come an assurance of some kind in relation to pardon from the Attorney-General, and he picks up a paper. I ask if there is any evidence in the record of anything that the Attorney-General has said in regard to pardon.

Mr. MCSWEENY. I will answer that. No, there is not.

The COURT. I understand it is a mere playful answer to something that was said by Mr. Ker on the subject of pardon.

Mr. MCSWEENY. That is all.

Mr. MERRICK. No, sir; it is not an answer to Mr. Ker, it is something from a public print in reference to something that the Attorney-General, or somebody has said, and if we are to read these interviews—

Mr. MCSWEENY. [Interposing.] Oh, no; I would not read an interview.

Mr. MERRICK. I want the jury to have nothing that is not proper matter for their consideration.

Mr. MCSWEENY. Then let me say this. There were intimations even at an early day as to the interest the Government took in this. And then how the Attorney-General would drop in here from time to time to give

us the assurance of his sympathy with the prosecution. Now, all I have to say in answer to this talk of our friends is, "Keep your hands off, you have no business here." In one of the imputed letters of Junius, not found in his regular works, I have read something concerning the interference with the prerogative of a jury trial, and it contains so much of good sense that I am trying from memory, not having access to the books, to remember it. He says something like this:

No constitution professing to be free will endure without at least a great shock of its sensibilities, even the suspicion of prerogative interference with the trial by jury. Let a wise prince beware of throwing his crown in the scales, or in the remotest manner interfering to the prejudice of the humblest citizen who may be so unfortunate as to be placed at his country's bar for trial. In this is the essence of the British constitution and there is no plant so vigorous as that which grows in the dews and rains and basks in the sunlight of a pure English judiciary. Into this sanctuary the king, if he come at all, must leave his scepter at the door.

Now, I want no threats, neither out of court nor in court, about what the Government wants, or what the Executive wants, or what he does not want. He has no right, nor have these counsel any right to attempt in the remotest degree, in the language of Junius, to even impute that they are the representatives of a power that sympathizes with them in this war against the citizen. I say to them in their White Houses, in this capital, and in the sight of the Capitol, that if they come towards this house, they must come scepterless and crownless, so far as power is concerned. I want no echoes from White Houses as to what a jury shall do; and as Richelieu threw around a little, defenseless girl, against the machinations of a powerful king, the thunder of the Church of Rome when he drew a circle and bade the king as he hurled its thunders to stay without that circle, I draw around these defendants the circle of the law; and, against emperor, king, or prince, kaiser or president, I hurl the thunderbolts of the Republic, and bid him remember that this place is holy ground. Unawed by influence, and unbribed by name, unterrified and unseduced by even the whisperings of what might be pleasing to power, I shall ask you to enter upon the investigation of this case.

Gentlemen, Senator Dorsey is charged with being a conspirator. A conspirator? Yes? Now, I want to go to the very opening of this case. I want to trace its gradations, and its charges against Senator Dorsey, and in a moment, when I get my memoranda, I will pass very readily, and very swiftly, through my references.

You were told at the opening by Mr. Bliss that Dorsey, the Senator, was the arch conspirator. You were told that John M. Peck was the brother-in-law of Mr. Dorsey. You were told by him that Peck was in bad health and afflicted with consumption, and unable practically to attend to the business. I told you so, too. Now, you were further told that Dorsey and Brady stood in these relations to each other, and I want these statements impressed upon your mind. Stephen Dorsey, he says, might scheme, yet Brady was the man fit to make the proceedings in any sense profitable or successful. Money could not be made unless Brady allowed them to make it. Money could not be made unless Brady aided them in making it. Here is what Mr. Bliss says:

Brady bore no different or more especial relation to these conspirators than he did to various other parties connected with the postal service at that time. It was, so far as Brady was concerned, a mere mercenary question of who would make it most beneficial to himself. He cared not whether it was Dorsey or a person by some other name.

Now, stick a pin there. No remarkable familiarity is claimed there. Mark it:

Brady cared not whether it was Dorsey or a person of some other name. Brady

went into office in 1876, certainly not a rich man. He came out, after being there five years, alleged to be a rich man. It has been said that he made large profits in a patent invention. The result of the evidence will show you that there was not in that invention any profit to him at all adequate to account for his changed circumstances.

I want to measure the candor of these men when they open their tirade against these defendants. Did Brady—and I mention this not that Brady is my client, but as bearing upon the pretense of conspiracy—did Brady, as he says, “Not the rich man,” come out an alleged rich man? Have you had anything about his allegation of poverty or wealth in the sustaining of that allegation before you? What was it made for? It was competent for them to prove that he had ill-gotten gains, to show that he went in poor and came out rich, to show all about a patented invention, and everything else. And yet they leave that poison in your minds if your minds are not skilled enough now against the reception of the virus, that fling made at Brady that he went in poor and came out rich. I denounce that as a base attack in an opening which they made recklessly or purposely. If recklessly, they never had the candor to apologize for it, and if they made it otherwise, it stands stamped with insincerity and with impropriety.

Now, then, I want to show you what further this gentleman says about us, for it is most in the opening that we have heard brother Bliss say anything about it. I challenge you almost to find three sentences in brother Bliss’s two days harangue at the last, in which he mentioned the name of Senator Dorsey. Senator Dorsey is not charged with making a false affidavit. Senator Dorsey is not charged, except incidentally, with getting up a false petition, and it is to that that I intend turning the attention of the jury and getting right down to my work as to the charges against Senator Dorsey. Now mark it. On page 136, then, I will call your attention to the Wilcox matter. Brother Bliss says:

We shall place before you a letter—

They look at you—

written by Senator Dorsey—

Yes, gentlemen, a letter to Wilcox—

and we shall have upon the stand, Wilcox the father and Wilcox the son.

And I said I did not care if they had the father, the son, and the holy ghost of the family.

I shall put up on the stand the father and the son; and in one of those letters, gentlemen, I regret that I dare not read it to you, but it is to Mr. Wilcox who had lived in Arkansas, and had been a little active there in politics, and he had gone over to Oregon, and Mr. Dorsey, I will show, wrote to him in his own hand—

He could venture that much:

MY DEAR FRANK.

Dear Frank! Dear Frank!

Nay; I shall show you further.

And here brother Merrick and I both laughed.

He is to do that, and to get a proper number of Democrats to write to fellow-Democrats and Senators; he is to see to getting articles in the newspapers in order to work up public opinion, and we will show you that petitions were thus got up.

Now, when I answered that I said, “You need not make such a roar and racket about that. What of it?” And when I saw afterwards

what became of the Wilcox matter, and got to reflecting back upon it, and when I saw that ominous finger of the gentleman from New York—for there is one from New York, there are two from Philadelphia, and one from Washington—I say that when brother Bliss lifted his finger and said, “I shall show you that he wrote dear Frank, and that he said get some publications in the newspapers, and get Democratic Senators, get articles written,” I thought the only case parallel to it is the case of Bardell against Pickwick, reported in the 1st of Dickens. Mrs. Bardell kept a boarding-house and put up a sign “Accommodations for a single gentleman.” Mrs. Bardell was a widow. Mr. Pickwick came and took rooms. Mrs. Bardell afterwards felt authorized to bring suit against him for a breach of promise. Mr. Buzfuz, as is proper in the English courts, made an opening statement, and thereupon I was reminded by the opening statement of brother Bliss of the opening statement of brother Buzfuz on that occasion. Says he, “There are two letters in this case. They will be given in evidence before you.” Mr. Pickwick wrote this: “Twelve o’clock; chops and tomato sauce.” “Gracious heavens, dear Mrs. Bardell, chops and tomato sauce. Yours, Pickwick.” This commences the same way, “Dear Frank.” “Dear Mrs. B., chops and tomato sauce.” And says Buzfuz, “I admit the letters are not open, they are not eloquent; but they have a covert meaning, probably well understood between the parties, and they speak fortunately with more force than if couched in the most glowing language and the most poetic imagery.” “Gentlemen,” says he, “We shall ask you to look closely to these chops and tomato sauce.” And I thought here he said he would prove that he wrote, “Dear Frank—Dear Frank.” And Frank once lived in Arkansas and he says here got up petitions: “See that there are a proper number of Democrats to write to Democratic Senators.” He has to see to getting articles in the newspapers and to doing things of that kind.

Now, I want to turn you right here to what the court says on that very subject. I will go right to the subject. I turn to page 1568. Wilcox was brought on the stand, and when I said in my opening that I would be glad to see Mr. Wilcox, brother Merrick put at me with some sharpness. “Yes, and you will see him here, you will see him here.” “Very well, bring him on, we feel confident we never understood from a letter that he had a single thing dishonorable to do, with the suggestion of Mr. Dorsey.” Very well, now on page 1568 he was brought on, and after a great deal of discussion, which I will pass, occurs the following:

By Mr. INGERSOLL:

Q. Did you get false names on the petitions?—A. I did not.

Q. Did you circulate falsehoods about the route?—A. I did not.

Q. Did you have lies published in the papers about the route?—A. I did not.

Q. Did you do anything that was not perfectly square and honor bright?—A. I don’t know of a single thing that I did that differed from straightforward work.

Q. Did you at that time consider the route from Eugene City to Bridge Creek an important one?

Mr. BLISS. I object.

The COURT. The objection there must be sustained.

Q. Were you ever asked to do anything dishonest about these routes?—A. I don’t know as I was.

Mr. BLISS. I object to that. Find out what he was asked to do, but do not let him pass judgment.

The COURT. I will sustain the objection, because that is a matter of opinion.

Mr. INGERSOLL. An average man’s opinion is pretty good on a question of that kind.

The COURT. No. There are some men that do not know what is honest and what is dishonest.

Mr. INGERSOLL. I think the course of the prosecution will show that many people do not know what is right and what is wrong.

Mr. BLISS. Then the prosecution has been successful against the defendants in this respect.

Mr. INGERSOLL. If you do not prove any more than you have proved, you might better never have commenced.

Q. What else did you do on these routes?

The WITNESS. On what route?

Mr. INGERSOLL. On any of them.

A. I wrote to Mr. Dorsey with reference to the different routes. I considered it necessary to write to him the exact conditions about it.

Now on page 1575:

Mr. BLISS. I am aware of that, sir.

The COURT. And everybody is in pursuit of money in the Treasury.

Mr. MCSWEENEY. And the sacred right of petition.

The COURT. For the purpose of procuring expedition upon a route, it is perfectly legitimate to have articles published in the papers, it seems to me, certainly if they are true in fact, and an article published in a newspaper that is true in regard to a postal route, that states the facts, is not an objectionable method of proceeding in my view.

Again, on page 1575:

The COURT. If that be true, and the court must assume it to be true, because you do not aver that it was false—

That is this publication—

I cannot see that it is competent evidence for the prosecution in this case, because in this country a man may get up petitions, if they are true.

On page 1576, says the court:

Here you propose to prove that this man was employed by Dorsey in California in getting up papers which state the truth, and advocating the expedition of a route by the publication of truth. I do not see how that expedites the trial of this case.

Mr. BLISS. Well, sir, with reference to this article, I undertake to say that there are statements in it which are not true, and the evidence in this case shows they are not.

Mr. CARPENTER. Just there there is another rule of law which shows that it is incompetent. When they put a witness upon the stand they vouch for his credibility and his integrity. They say they propose to prove that he wrote it, and now they propose by that same witness to prove it is a lie. They cannot produce that sort of testimony.

The COURT. I do not understand them to make any such offer. This witness has stated that he knew Mr. Newsome well.

Mr. CARPENTER. They say that they intend to prove that he wrote it.

The COURT. That Newsome wrote it, and it makes no odds whether he wrote it or not.

Mr. INGERSOLL. Just see this point. When the court asked the counsel about it he stated that he expected to prove that it was not true.

Mr. BLISS. I did not say that. I say now that I make no statement whether it is true or false.

The COURT. I understood the counsel for the Government to say that he would not undertake to say that it was not true.

Mr. BLISS. That was my first step. I desire to get a ruling.

The COURT. Now, you undertake to say it is not true. Now, the court calls upon you to say in what respect it is not true.

Mr. INGERSOLL. That is the point I make right there. After that was stated I object to their waiting until the court has decided the objection in the sunlight and climate of necessity, and having the leaves to grow and the buds to blossom and come out under the whip and spur of judicial opinion. They are committed to their statement. Now, let them stand by it.

The COURT. Now, there is another objection to this: You have not pointed out wherein this publication is false. And there is still another. I have not seen the authority from Dorsey to this agent of his to use falsehood. I think that where there is a general agency, I will say from Dorsey to the witness, to get up petitions and make publications for the purpose of promoting expedition upon a certain route in California, that that general authority is not an authority to him to use falsehood or to commit any crimes. Now, if you say that falsehood has been used here and crime has been perpetrated by the witness, and that the profits and fruits of this crime have been transmitted to Dorsey and he has made use of them, and that that is a ratifica-

tion, I am not prepared to say that even that would authorize the introduction of this evidence.

On page 1578:

The COURT. Well, never mind. John W. Dorsey was the contractor in this case. S. W. Dorsey was the subcontractor and his subcontract was on record. Then S. W. Dorsey with a proper regard to his own interests had a perfect right as a contractor and as a citizen to start petitions, have publications made in the newspapers, and to pay the men who did the work for him. There is no crime in that. Now, if he had hired a man to get up a fraud upon the Government, to represent as true things that are not true, to get up petitions signed by false names and have them transmitted here and used by him with the department, that, of course, would be a different case. But so far as the offer in this case is concerned now, I see an offer on the part of the Government to prove facts which do not tend at all to make out the conspiracy or any overt act under the conspiracy. They tend merely to prove that S. W. Dorsey did what every contractor had a perfect right to do, and what he ought not to be held criminally liable for trial for doing. Now, everybody knows, who is connected with public affairs, that there is not a public improvement projected that there are not parties interested in having the work done. These parties have a right to use the press in advocating the work, and they do not always confine themselves to the truth in doing so either, and they have a right to employ agents to attend to business of that sort.

Mr. INGERSOLL. Certainly the Government ought not to object to the use of the press.

The COURT. So that, inasmuch as the offer in this case is an offer to prove nothing but the truth, and to prove that Dorsey did nothing but what he had a right to do, I do not see how it would tend, in the slightest degree, to make out the charge of conspiracy if it was allowed to come in; and, as time is valuable, the court does not think it right to spend the public time and its own time and tax counsel in an investigation which can lead to no result.

Again:

The COURT. The fact that petitions were gotten up in Oregon, that newspaper articles in expedition of this route were made in Oregon, and that those were instigated by Dorsey, and that they were sent on here and used by Dorsey, does not, in my opinion, amount to any fraudulent concealment on the part of Dorsey.

Again:

The COURT. When we come to that I will decide that. But for the present I merely hold that a publication made in a newspaper in Oregon in regard to the expedition on this route which states nothing but the truth in regard to this route is no evidence of fraud even if Dorsey instigated it and paid for it. Here are petitions sent out from Washington by these defendants to that country, and they are signed by numerous parties and they are indorsed by Senators and Representatives, they come here, are laid before the department, the department does not know who started them, but they are indorsed in this way, and if fair petitions—not forged petitions, but fair petitions—stating the truth and indorsed by Senators and Representatives, are to be used as evidence of fraud on the part of the contractor, merely because he suggested them or wrote out the forms of them, I do not think that is evidence of fraud.

I thought I could not do better than just to take the opening thunder of brother Bliss as to the great charge of "Dear Frank," and Wilcox on the Eugene City and Bridge Creek route, and turn right to the enunciations of law, page by page, and at every stage for twenty-five pages where the court followed them from one proposition to the other and said, "What is it you complain of; that he got up petitions? He had a right to. He was a subcontractor. He had a right to, whether subcontractor or not." Was there truth in it? I care not in whatever place it is found, on heathen or on Roman ground. What do I care? What did the court care? The question here is fraud and corruption, and here the only things done were as Mr. Wilcox said, "Honor bright and straight. I never got a false name, I never published a falsehood, I never lied." Then says the court, "Why, what does it amount to?" Page after page, when they kept pressing it. In justice to brother Bliss I must state, and do him the justice to state, that he never said "Wilcox" or "letter" once after that opening that he

made about what he would do with "Dear Frank," and that Frank once lived up in Arkansas. And that is the great thing against Senator Dorsey; that he wrote out there and got this class of petitions. Those petitions, when you come to have them presented, were the best and most genuine of all, if, where all are genuine, there can be any comparison. It is rather an Irish statement. They are more certified in this case than in any other. It is the only route, as Wilcox showed you, where he went along and got the patrons of the offices and residents along the line, and then got the official signatures and certificates of every postmaster, certifying that he was familiar with the names and that they did business at his office. There are no other such iron-clad well-authenticated petitions genuine and certified by the Government officers in all this multitudinous testimony of over two thousand pages, and yet in the opening you were told that if he could only show you more than "Dear Frank," and could turn over a leaf, "Go and get Democratic Senators and get governors." What are men made of? Can you go and get a Democrat of high standing or a Republican either? Do you write such directions for fraud? It matters not what party they belong to. A party does not make a man:

A man's a man for a' that.

"Democrat and Republican wherever they are; get the names of leading Democrats and get the names of leading Republicans." Then come the Portland Board of Trade and representatives; and the judge says, "What is it you propose?" Here come representative men from far off lands, who certify to it and back it up, and even come here on the stand and sign or frame petitions. Now, for a moment look at the nonsense of the charge of the conspiracy. Walsh says that Brady said that the petitions were gotten up as a mere matter of form; and the allegations are that the conspiracy of these men which was formed here in Washington was to do what was done. How could you and I conspire that the mind of a governor or a Senator should run in our groove? Look at the subject of conspiracy: To conspire with regard to the condition of a given man's mind three thousand miles away. We conspired to put up General Sherman on the stand. We conspired to place those fallacies in the mind of Teller, did we? We conspired to have Valentine speak. We conspired to have Mitchell speak. We conspired to have the soldier Tecumseh, an Ohio man, a man that marched from the Atlantic to the sea, come upon that stand and speak of the Indian question as he did; this Indian question which has vexed our white settlers since 1620, when the Pilgrims unfurled their flag and knelt on Plymouth Rock. From 1620, over two hundred and fifty years the great problem of the Indian has vexed the minds of statesmen and philanthropists. It is now two hundred and fifty years after the King Philip wars, but the nature of the Indian is as savage as ever and his tomahawk still gleams and still cleaves the brain of the sleeping child. No mercy has tinged his warfare; no civilization has reached the reacher of scalps; and yet brother Sherman takes that stand without the jealousy that might attach to military men. He speaks as the foremost military man on the globe, the leader of the armies of the Republic. No empire so grand, no army so noble as the citizen and the trained soldiery of America. Yet that old soldier says, "I have no pride of profession. I say to you, gentlemen, that I have been all over that land; I have been where dangers were thick around me. Nobody got me to conspire. Nobody conspired with my thoughts. I am here to tell the jury to-day that I asked for those things. I did not wait for a little dirty caucus in Washington to give birth to my thoughts. They

were born within me. I did not wait for them to write letters. I wrote and thundered at the departments. I was pressed every day by the military men. It is equivalent to a line of defense. It is equivalent to a line of pickets. The conveying of intelligence will save the inhabitants from slaughter. The conveying of intelligence is what we want out there." Who required any conspiracy? Did you ever think of the absurdity of the subject of the alleged conspiracy, to conspire that my line of thought should run in a given direction? As if we could conspire in Dorsey's house or any other place that Sherman would ever come to the stand with these views, that Teller would take the stand and tell the tale he has told. General Sherman punctured the very idea of conspiracy. He says "I asked the department to help me. I say it is a great civilizer, it is the great protector for those who live beyond the bounds of our civilization." He gives a new reading to the lines of Richelieu:

The pen is mightier than the sword.

The man of the sword bears his eulogy to the power of the pen. How curious the subject of the conspiracy. I cannot get away from the idea. I want to impress it upon you. And, now, to show you the invention of the cunning Walsh. The court had on several occasions, it is not necessary to turn to them, said, "Gentlemen, why produce these petitions? Why produce genuine petitions one after another? What do you mean? How does this help your case?" The court in one place said, "If I had been in Brady's place, if I had been the Postmaster-General, I would have felt authorized to act on such petitions. What do you mean?" Do you know where Walsh lugged in his lie? Walsh had sat around here figuring upon how he could give Brady a shot. "How will I do it? I have heard the court say day after day, that as long as these petitions are there, Brady is going to be justified. How will I hit him? I have found the place in the joints of his armor. I will simply go in there and have him say that they were only gotten up for form, and don't amount to anything." The lie is as palpable as a mountain. The source of its invention is as plain to me as noonday, and I saw it the moment he dropped it. Up to that time, the case was out of court. Instead of a *corpus delicti* it was a *corpus* kicked out of court. Here is Walsh. Now, says he, "How will I strike General Brady's strong wall of defense? I will go in at this late day and will just puncture it with one sentence that I will put into Brady's mouth. The petitions are merely gotten up for form." General Sherman, what do you say? "It is a lie. I am no formalist. I am engaged in the protection of the helpless, and it was to me a solemn and serious matter." Teller, what do you say? I will read his testimony before I get through. "What do I say? I say that I went to Brady time and again when I was in the Senate, and says I, 'Brady, why don't you give expedition and increase?' Says Brady, 'I have been looking over the question of revenues, and there isn't much.' 'Revenue to the dogs.'"

Throw physic to the dogs.

Teller, from the first, says he told Brady as he advocated openly in the Senate, and you will find it recorded in his remarks, that the question of revenue should sink before the wants of the glorious West. "I told him that I could not go back to my people and make them believe I was a faithful representative if I went back with a feeble, poor, puny, parsimonious cry of that kind." Says Teller, "I went to Brady and I pressed him, and I would not leave until I wrote him my final letter on

retiring from the Senate as the best tribute I could give to the people I represented. The only thing I could carry back in my hands was this service, and with it I might wring from them and extort the kind words:

Well done, good and faithful servant. You have been faithful in a few things; you shall be a prince and a power and a ruler over many.

I could do nothing better in my parting than to urge upon him that this parsimonious idea of mere revenue would never permit me to go back and face my people." And Walsh said that Brady said these things were invented for his purposes of fraud! Teller stamps it with falsehood. Teller advocated it in the Senate and advocated it before Brady. This is simply an accident. If Teller had been Brady, and the forces had found it necessary for a victim, found it necessary to get some one to hitch to Dorsey, you would have had Teller here with more expedition, for he had more radical views upon the subject than Tom Brady. Now, the falsehood is stamped right upon the statement of Walsh in the nature of things. Said he, "Brady said the petitions are merely forms that I go through." What does Teller say? What does Valentine say? What does Mitchell say? What does Sherman say? That was the object of Walsh, and that was harped on by brother Bliss, and will be by all the others that come after us, that Brady said it was a mere matter of form, and that it was part of the conspiracy. Part of the conspiracy to make Mitchell, Teller, Sherman, and Valentine write and speak as they did? You cannot conspire to make men's minds as they are. Suppose there had been no petitions filed. A petition is not a requisite for expedition. That is neither here nor there. Supposing Sherman and Teller, and Valentine and Mitchell had gone up in array before him. There are oceans of letters that you have never seen, private letters that they said they would go and show. Suppose they had gone up with no petition and said, "Here, Brady, will you take our word for the condition of things out there?" "Yes, I guess, so; what is it?" "Why, Tongue River and other tongues need mail supplies. Congress has within the past year made two thousand new post routes up on our section just as an experiment, the country is growing fast. There must be service put on. We have no time to go out and get petitions." Supposing Teller and Valentine and Sherman, and all these men had gone down and had a familiar talk with Brady and he had done just the thing that he did do. You would not have had anything about false petitions but you would have had the testimony of these men upon the stand. Throw away the petitions, throw them in the stove. Scatter them to the winds. What will you do with these living witnesses? What will you do with their justification that says the West was entitled to this service? Teller said, and so did Mitchell, and so did Valentine, that out there men will go into a neighborhood and say, "This is a beautiful neighborhood and there are good mines, and all that sort of thing, but how is the postal service?" "The service is not very good; once a week or twice a week;" and other things being equal the settlers would pack up or leave their goods unpacked, and go off to other settlements where the postal arrangements were better. This was the spirit that guided them in their operations out West. What did Senator Dorsey do but receive the sanction of your honor as a lawyer and a judge in the course of your decisions when it became necessary, not extrajudicially, for your honor to put your finger on the controverted questions and decide as to the admissibility of evidence? Look at the spirit that is shown by these wit-

nesses that we happened to have here. If Congress had happened to adjourn a few days before, we would not have had Mitchell, we would not have had Valentine and some of those other men. General Sherman might have been far away. Yet we had such a column of testimony that even if there were no petitions on earth I would challenge the allegations of the indictment that Brady put on service not desired or needed by the public. Why, brother Bliss in his address to you said, and I took it down:

I admit that the western settlers were eager for this service; I admit that they honestly wanted it. They would like to have the mail come along every hour in the day, and Mr. Teller goes to an extent that I would not go.

Indeed! *indeed!* INDEED! *You would not go!* Then, in the language of brother Ker, because he would not so go, he says that Senator Dorsey will soon be seen galloping off at the rate of forty miles an hour to the Albuququerque penitentiary. That may be called high-toned treatment under a subcontract with the Department of Justice. That is expediting us at the rate of forty miles an hour, because, forsooth, we differ from brother Bliss. He says:

There is no doubt at all of the honesty of the western citizen in wanting all these expeditions, and they even wanted more.

Says he:

Teller goes to an extent that is far beyond what I would justify.

Well, on what meat hath this Cæsar fed that he hath grown so almighty great? We fellows are beneath this colossus, not the Colossus of Rhodes but the colossus of post-roads, and as we crawl beneath his mighty legs, and look up to him, he says he would not. "You would not?" "No, I would not have done as Mr. Teller did." And the consequence is, you recollect, a little matter of penitentiary and the breaking up of homes. Did you ever—did you ever since God made man, and man made star routes, hear such infernal nonsense? I say before I conclude I will read you the testimony of Mr. Teller, General Sherman, Mr. Valentine, and others, for they are pictures of gold, they are letters of gold engraven on this case. They are big men and they said that the only considerations before their people, in the presence of which party lines melted down, on which all parties met, were who brings us from the East the most star routes?

Something was said of the intelligence of the people out there. I have some statistics that I will ask you to believe are correct. They are very brief and are as to the average of letter-writing by the people of various localities. In North Carolina 5.81 letters are written by each person. The next is Indian Territory, 6.05. In South Carolina, Tennessee, and West Virginia the average of letters written by each person is slightly under 10. In Pennsylvania the average is 24.57. In Connecticut it is 38.20. In Massachusetts, 38.70, and in New York, 41.58. Montana writes an average of 41 to each person, and Wyoming, 42.35. Colorado surpasses them all, and has an average of 55.22 to each person.

The FOREMAN. [Mr. Dickson.] Is that per annum?

Mr. MCSWEENEY. Yes, sir. Colorado outranks Massachusetts, Connecticut, and Vermont. It arises from the business developments. That is the kind of country it is. The highest average, fifty-five letters and some hundredths, to glorious Colorado. I was talking with brother Creswell, a neighbor of Mr. Merrick, the old Postmaster-General, of Maryland, the other day. I suppose nobody would object to my saying that he said when he went into the Post-Office Department he had not the least conception of the wants of the West.

Mr. MERRICK. I think you had better keep to the evidence.

Mr. McSWEENEY. But I will say this: That it takes a man to go out and see that glorious West. It takes a man to get away from here and go out there. Nature got tired of repeating the East, and she went out there and got higher mountains, deeper vales, richer mines, broader rivers, clearer skies. And what a change has come. Bryant, when he was a boy, obtained his greatest fame by writing "Thanatopsis," a discourse or thoughts on death. I had occasion to hunt up the question once and emphasize it on a certain occasion, and it is quoted and in more languages than any other number of lines written in the English tongue. It commences:

To him who, in the love of nature, holds
Communion with her visible form, she speaks
A various language.

Now, in his boyhood, in order to convey an idea of the solitude where death reigns alone, he wrote these-lines:

Take the wings
Of morning, and the Barcan desert pierce,
Or lose thyself in the continuous woods
Where rolls the Oregon, and hears no sound
Save his own dashing.

The poet could picture desolation and distance only by the Barcan desert and off where the Oregon rolled and heard no sound save its own dashings; and yet transmigration of nations born in a day! Here was Senator Mitchell from that State giving his testimony to the jury of the necessities of the country, of the star routes that were needed where the Oregon now does hear the music of the pioneer, where temples are raised to the one true God, where music peals, and anthems are sung on Sunday morning, where the day is sacred. All the East has gone there. They lift up their hands and clap them with joy across the arid wastes, across the barren deserts. As I said the other day, where New England went

To plant her common schools
On the prairie's distant swells,
And wake the sabbath of those wilds
With the music of her bells.

What a transformation. The poet died and was laid to his honored rest but a short time ago. How differently he would have sung to-day about the Oregon that hears no sound save its own dashings. We have to wake up this thing. It takes no conspiracy of Montfort C. R. rdell and Gettysburg Turner, limping around because of a little old shot he got up there, to ask the West to ask the East for mail facilities, when these Senators said they hardly dared to go home and pass through their gates without having expedition in their hands. What a curious subject, I must repeat, for a conspiracy. The absurdity of the confounded thing has struck me for three months, and I wanted to get a chance to say something about it.

At this point (3 o'clock and 5 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

WEDNESDAY, AUGUST 23, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. MCSWEENY. [Resuming.] Gentlemen, I wish before proceeding further with the testimony concerning Mr. Dorsey's connection with this case, part of which I have already disposed of in the history of Wilcox, which forms so prominent a portion of the accusation rather in the opening than in the close, and they having given us five days and a half of opening, if there are any insides to the case they ought to by this time about have the viscera exhibited, and in those five days the accusations I noticed as against Senator Dorsey are exceeding slight and trivial, in justice to brother Bliss and his intellect—and I respect him and it. He passed lightly over, very lightly over this same Wilcox matter, made a little passing remark about the Anthony Joseph letter, and then hurried on to a claim in general, something like the preacher who took as his text, "The world, the flesh, and the devil." He said he touched lightly on the world, passed quickly over the flesh, and hurried on to the devil. So he got along quietly with the Wilcox matter and touched very gently upon a letter to Anthony Joseph. I will not weary you nor myself by turning to hunt it up. It was simply a letter which said, "there is danger of the service being thrown down on a route that my brother John is interested in. Although we have not personally met, I have done business for you in the Senate"—and that high-toned Spanish gentleman spoke of Senator Dorsey as being a man who had done him favors in the Senate, and that they had had communication with each other. He says, "I refer to my own responsibility; I will be perfectly responsible, do not let this service go down, my brother is absent here and I do not want him to lose." Now, for a man in conspiracy to have to stand with any seriousness and defend his home upon such trash as that is really a waste of that time which God has cut off from eternity and allotted to us here; it is a waste of it when a little portion of it is given to us for a better purpose, and any man that wants to go and stay with the Joseph letter and talk seriously about that, and will interest you in it, has powers of persuasion and powers of interest that I do not possess.

Now, what else is there about Senator Dorsey? Where is it? He made no affidavit. The Wilcox matter has been explained, and your honor has decided *en passant*, just as I read yesterday, that he had a right to do all that it was proven he did, just in the manner that he did, and when our accusers bring the man that, with some flourish of trumpets, they threatened us with at the opening, Mr. Wilcox, he says he acted honorbright; that he published along the pathways of these lines in the public papers that which he was about, right along the lines, for the purpose of working up public sentiment, concentrating it, letting these miners off in the camps know of it, though one is here and another little group there, yet that, by combination and gathering together of their forces, they could, in the language of Teller, "get, perhaps, a daily mail wherever a mining camp was established."

And is not that the most curious idea of conspiracy? We are told, gentlemen, page after page in this record, day after day in this long and tedious trial, that a conspiracy is so secret; that its very definition means and imports such secrecy; that it is so hard to find out; that people do not go abroad and let their schemes be known. True, true. And yet one of the means and instrumentalities charged here against us with great force and power, so far as language was concerned, was this:

That we had published along the line of the pathway of these routes public communications, some of which were cut out from the paper and brought here, and the court said, "Well, what do you want of that," when I made an objection. Says you, "Sir, make your objection pointed." "How, your honor?" "Inquire of your adversary whether he means to controvert it and allege and prove its falsehood." I turned to them, "Gentlemen, I take the suggestion of the court; what do you mean?" "Well, I do not know that we do that, but we expect to show that it was printed," not that it was false; "and it was then sent on and used and placed in the files of the department." The court followed them into their lair and said, "Well, what of it? I won't consider that even as one of the index or one of the indicia of fraud; so you may pass that." But it is most curious the miracles they assumed to exist in order to get up this conspiracy. They keep saying to us, "Conspiracies are secret." And yet this one is open. They say, "Conspiracies are formed between those of very close relations." For the intrusting of a man's honor, his all, his home, his fire-side, his destiny, his civic honor, and the passing plumes and the broad epaulets he wore in battle, to make a partnership of that and place it in the hands of a rogue, the man must be exceedingly close and careful in his selection. In the ordinary affairs of life, next to marrying your wife, what is regarded with more scruple and care than when gentlemen select for honest business purposes a partner? It imports the closest friendship. It imports an agency in the matter of a partnership, that the partner, though sleeping or awake, is bound for the acts of his copartner; and amongst the most serious questions of life in business is the selection by a man of his fellow-man for a partner, and we are asked here to believe that a Senator of the United States—they keep telling us that he is that, and use it in no very complimentary phrase, as to how he got here, and so forth. That I pass, but they say that a Senator of the United States would take himself down from the niche up high where his good conduct has placed him. He will come down from confederation with Senators, with Cabinets, with Presidents, and he will go helter skelter, willy nilly, into a criminal combination and conspiracy, trust his character and his all, his fame, the fame and character and standing of wife and children, and enter into a penitentiary, infamous conspiracy to rob his country's Treasury by some little, dirty, scraggy, off-cast mail route, out from Bismarck to Tongue River. Well, well. And then he will do it openly, and he will write out, "I am interested in this now. Mr. Frank Wilcox. Dear Frank: I want you to see, as I am going off"—turning this off into Bosler's hands, and I will show how little he had to do with it afterwards—"I want to see if you can honestly get up some expedition or increase here upon this matter." And this is the curious state of things. I have watched all through and never did they show the semblance of a meeting of any of these conspirators at the head center's office. No man, within three years, within the statute of limitations of this conspiracy, of these defendants has been proved to have even darkened the doors, I believe, of the Post-Office Department during that whole conspiracy. Of the checks of these thousands and hundreds of thousands, that could be traced from pillar to post, not one has had a finger laid upon it to trace it to the hand of Brady. Brother Ker made this remark when he was upon the floor. Says he, "I see that Mr. Dorsey's checks or his drafts and warrants along in 1879 clear down to this time are payable to Bosler, and are down here at the Middleton bank." Says he, "This Middleton bank appears to have been the receptacle of all these funds."

Thank you. Exactly. And in connection with it he made this unphilosophical legal remark. Says he, "It is very evident that down at the bank these checks and drafts all pass through. Now," says he, "why don't Senator Dorsey prove his innocence and bring up the checks." If the Government have found conveniently where everything was, Middleton's is only a stone's throw from here, and they could have gone down there and produced the history of every check and draft payable after July, 1879, as the papers all show, drawn to Bosler on all the routes. Bosler was here ready for an emergency if anything had been shown against Senator Dorsey that required a single man to be put upon the stand to clear his escutcheon of a stain. He was here for that. They have eulogized him. They said in one of their remarks, "Well Bosler is an honest man." Here let me remark, as the proof is not and as the fact is, that there is not a particle of proof—I will speak of it that way—that Senator Dorsey ever had one dollar of profit or compensation out of these scraggy routes. I asked you in the opening to pay attention to the proof. That is all the use you make of the opening. I called your attention to the proof and defied them to show that Senator Dorsey was even with the money that he had spent in putting service upon those routes, to the fact that in 1880, at its close, he was still out \$12,800. I threw it down by way of defiance three months ago, and dared them to the *outrance* to take up the gage and fight out that proposition, and yet it is represented in all of this country that Senator Dorsey is riding around in chariots rolling on golden hinges and wheels, and chariots and doors and horses and all are festooned with the robberies and triumphs and spoils gathered from these post-routes, and it has gone abroad to the country. I challenged them right here to produce the proof. It would have been perfectly legitimate to have made some money. The Government does not brand a man because he comes and bids upon their contracts. They encourage him. Why, they want their contracts executed and carried out. So that if he had really made some money, if he had made a hundred thousand dollars honestly I would be a spooney to stand here and attempt to apologize for it, to recognize any such necessity. I am not urging it as a plea against anything they have proved, but I am simply giving it as a fact in the case when these noisome statements are going out, of the moneys that they made. I followed them from the commencement three months ago, and when my friend Ker said "this Middleton bank down here plays an important part," says he, "I see that Bosler, and checks, and everything else figure down there," then they should have been produced. I intended one of two things. Either they sent to Middleton's, and got a black eye, or they did not go to Middleton's, and tried to eke it out by innuendo and insinuation on a criminal trial. Senator Dorsey has nothing to conceal. He had nothing to conceal, and the very statement that is made here, that he employed persons out West to write the matter up in the papers is the very antipode of conspiracy. They say that you may have a conspiracy without parties meeting. Oh, yes, so you may. I grant that. You may prove it by circumstances. Certainly you may. But the circumstances must be those things that stand around a man of his own creation. Nobody else can circumstow or circumstand them around me and then charge them as my circumstances. Certainly you can prove it by circumstances. Anything can be proved by circumstances. There is no use of quoting learned authorities upon that. Byron calls circumstances

The unspiritual god whose touch turns hope to dust, and the dust we all have trod.

Why, who doubts the power of circumstances? But the idea is, that his case is to be a mass of exception to the ordinary way conspiracies are proved. First, there is no meeting; second, the original contracts are honest and laudable. Third, there is no familiarity between the parties after the contracts are made. Again, there are quarrelings and denials and protests upon the part of brother Vaile, and other matters. Again, the alleged conspirators quarrel at the word "go" when Mr. Dorsey and Mr. Vaile come together. I ask you, if I did not paint that truly without one daub of extra color, when I gave the history of their meeting at the opening of this case, at which some of our brethren laughed; and I heard them whispering, "We will show them closer." I heard that around here. Have they done it? And, so this conspirator lacks spissitude. Sammy Weller, or Tony and Sam, after getting up a valentine, had a controversy about circumwent and circumscribe, and the old man, taking his pipe, said he thought circumwent was a tenderer word; says he, "May be it don't mean more, but it is tenderer;" and so with me, in using the word spissitude. I say the whole case lacks thickness. The contra proposition of that is put affirmatively. The boys say, "It is too thin." I utter the negative of the proposition. Conspiracy in open day! Conspiracies surrounding lawful contract! Conspiracy without the definition! A politician without a speech! A soldier without a battle; and, a conspiracy without a divide! Just think of it. And an open conspiracy—a newspaper conspiracy. Hear it, ye heavens! and just stop a minute, oh, earth, that you may consider it! A conspiracy in a newspaper. Our friend Zachary Taylor once said, "We are at peace with all the world and the rest of mankind." If you want all the world and the rest of mankind to know of any deviltry that is going on, just put it in the remotest and most obscure newspaper in this land and you will see where it will be then. Some anti-woman's rights fellow was talking about women and their carrying news. In writing a deed they generally commence, "Know all men by these presents," and that scamp had stricken out "know all men" and made it "know one woman by these presents," and when the fellow came to read it he says, "What in the mischief did you put that there for; the usual form is, 'Know all men by these presents.'" "No matter," says he, "just let one woman know it and they will all find it out." If you want anybody to know anything about a conspiracy, just let Senator Dorsey write to "Dear Frank" to move the press and turn the crank and let on the steam along the line. How different that is from Cicero's denunciation of Catiline. When we were school-boys—and off in Ireland school-boy don't mean college—I am not like Walsh who says he left college; yes, and afterwards gave a curious mispronunciation in talking about alibis (alibis), but I suppose that is the way they did it in that college. In school-boy days they used to rant and foam of Catiline and Cicero—*quousque tandem*—and I don't know but what that is where they got the idea of riding tandem.

The COURT. That is true; *at length*.

Mr. MCSWEENEY. True. As brother Bliss had horses out on the Bismarck route wheeling them up there and saying only one horse was needed instead of two. Well, Cicero turns to Catiline, if I have got it right, I believe Catiline was the conspirator and Cicero the orator—I do not want to get the thing mixed—and he asked him how long he is to insult the Senate of Rome there with his brazen face, coming in and taking his seat when he is really a conspirator to murder the consuls on the coming day when they shall take their oaths or appear at the sacrifice. How differently he described conspiracy. The same words

that we have now without the change of a letter—*conspirator*. Says Catiline—this is a free translation—“I know you my old boy,” or words to that effect, “I have got the very secrets of it, you and your *conjurationes*.” That is another name for conspirators.

The COURT. *Conjuratores*.

Mr. McSWEENY. Yes, that is the word. Now, says he, “I have penetrated your secrets; I know the secret places you meet. There is no place in Rome, down in its caves, in its most secret places, but the friends of the republic will follow you, and have reported to me your midnight cabals.

Let us try our Ciceros here. Says Bliss, “We shall show that Senator Dorsey wrote to ‘Dear Frank.’” Says he, “Go and put in all the newspapers what you are going to do, openly, publicly.” Supposing Cicero had said, “Catiline, I have got you in this; I understand it, and I have seen a letter that you were writing about all your proceedings, and what you are going to do published in the Roman papers. They will come out this evening in the *Vesper Stella*”—that is their Evening Star that they ran there—“or in the *Censor*”—that was the Evening Critic, for they couldn’t get along without a Critic—“or in the *O Tempora, O Mores*”—that will do for the New York Times. “I see, sir, that you have written a letter that will be noted in the Times this evening, and in the Star and in the Critic. You have told just how you are going to do it. The whole plot is revealed, and it is to be out in the evening papers.” Why, what a different view the old Romans had of conspiracy. That is the reason I told you at the opening it means a very secret crime. Men do not go and throw themselves open to be tracked in getting up either the original conspiracy or the overt acts that will finally tend to their conviction. And during all this, if it had not been that it is so serious, it would have been very funny; if it were not that from this curious testimony, this curious development from the charges of conspiracy that men are driven from their employments, are stranded and branded, their credit in bank broken, no man’s note asked for or regarded, he not being sought for in the business relations of life, with a great impending national charge of corrupt conspiracy hanging over him. Therefore it is that we are obliged to speak of it seriously, although it has its absolutely ludicrous features when viewed by the light of what is necessary to be proven in order to generate even the remotest idea of the existence of conspirators.

Now, if the court please, I wish to read, and reading is very dull, but I am here to get to the minds of the jury the law and testimony that I deem important in the case, and I find ample in these books from the judge on the bench announcing and enunciating practically every principle of law here involved, and therefore when it was talked about preparing long voluminous charges I appreciated the remark of your honor that substantially every phase of the question had been passed upon that could possibly come in final review before the jury.

I shall now proceed to dispose of Senator Dorsey’s little connection with this case at once, and perhaps not revert to it again. I told you in the opening that Senator Dorsey came into this matter by having aided and assisted his brother and his brother-in-law. That he indorsed for them is evidenced by the receiver of the Germania Bank. It is also evidenced in the testimony of Mr. Vaile. Very well. I told you further, that in 1878—you will remember the service was to be put on in July, 1878. [Turning to counsel for the defense.] Was it July or August?

Mr. HENKLE. July.

Mr. CARPENTER. The 1st of July.

Mr. McSWEENY. The 1st of July, 1878. Now, Senator Dorsey, before July, was called off to his New Mexican possessions, his ranch, his business other than this. As I said before, Mr. Peck had had some experience, Mr. Miner was a business man, and Mr. John Dorsey, the brother of Stephen, is of good physique, and you find him away out West traveling over mountain and moor helping to get this service on and attending to matters. I say that each and all of them had found that they had to put the service upon the routes, their checks were up and their bonds, and that they had more than they could carry. Senator Dorsey had advanced them just as much as his means with reference to his other business would permit.

Now, I will bring you to their testimony to bear out everything they have said. When they met, and when the interviews of Boone, &c., were given, when it was attempted to be asked and we did not care, what interest was there, what was said about the interest of the parties in these respective contracts—for Boone was an original bidder also, and the more the merrier, the less the idea of conspiracy, and if there was a conspiracy Boone would be the man to know it. I am glad he is one of the contractors. I am glad he is one of their witnesses. But his honor remarked, speaking to us, "Gentlemen, I want you to understand that this testimony before the conspiracy is simply competent for this purpose, to show the business relations between the parties, to show that men are members we would go back to their cradle. In that light you may look at what passed between them. But as to the particular interest that each had, you may pass that, for it is of no moment or of no importance." You remember that. But we did not stop there. When you come down to 1878, Mr. Dorsey is about going away. Congress was through its sessions, perhaps—yes, I guess it was. He was going away.

Now I come to the testimony of Mr. Boone, and it speaks better than any elaboration that I could give it. You have to go over a good many pages to get to what a witness said, for some of these gentlemen—I was not among them—had a great deal to say upon questions as they came up, and you have to travel over a great deal of argumentation to get at the thing:

The COURT. We are not at liberty to forget that the present inquiry relates to the period of time behind the 23d of May, 1879. The inquiry you were prosecuting is as to the personal relations that existed at this time between the several members of this alleged conspiracy, the defendants in this case. The inquiry is not as to their several interests in the several contracts. We are not going into that. The only relation which the history of that period has to the history of the subsequent period to which the indictment relates is in regard to the personal relations between these parties. It seems to me that we ought not to inquire as to the several interests, or parts of interest, which belong to these several parties in these numerous contracts under the Government. That is not the subject we are inquiring about. We can ascertain what their personal relations were without inquiring what were their several interests under the contract. It is to the personal relation that I wish to confine the testimony.

Again. Mr. Boone is being examined by Mr. Ingersoll:

Q. Were they the persons comprising what you call the partnership?—A. Yes, sir; there were two partners.

That "two" I think is a misprint. But no matter:

Q. But they were the persons?—A. Yes, sir.

Q. There were no other persons that you know of?—A. Not that I know of.

Q. Now, then, as far as you know, at the time of which you are speaking, while these bids were being put in, and these proposals, and while you were sending out to get information so that you could bid, knowing what you were doing at that time, S. W. Dorsey had no interest whatever in these contracts, so far as you know?

That is the question :

A. He never expressed to me that he had any interest.

Q. You never knew that he had?—A. No, sir.

Again, from page 1450 :

Q. Dorsey said to you that he was never interested in this?—A. He was interested in behalf of his brother and brother-in-law.

Again, on page 1448. You can tell when a question or an answer comes without my saying question and answer. You understand that:

Q. When did you leave the partnership or combination?—A. My recollection is that it was some time in August.

Q. Of what year?—A. Eighteen hundred and seventy-eight.

Q. How came you to leave it?—A. These contracts were to begin on the 1st of July, and the securing of the Tongue River route absorbed an immense amount of money, and we had several long routes in the West that we were not able to sublet at all, on account of the combination of the contractors, who were determined that the routes should not be started; and even where they were started the subcontractors were bought off.

By Mr. INGERSOLL :

Q. You mean by other contractors?—A. Yes, sir. General Brady sent for me and said, "These routes are down and if they are not lifted by the 15th of August I will declare you—

Without respect of person; that is my interjection—

failing contractors and award them up." John W. Dorsey was then at Bismarck, working on that route, and Miner—I don't know where he was—I think he was out West. I called on Mr. Dorsey and told him what General Brady had said.

This was before the service was put on in 1878 :

"Well," he said, frankly, "I have let John W. Dorsey have all the money I can let him have, and unless you can find somebody that can go in and lift you out I can't help you."

He further states the position that he was in with regard to his friends.

The FOREMAN. [Mr. Dickson.] Whose testimony are you reading from?

Mr. MCSWEENY. This is Boone's. He said something of some friends, about his having friends in New York who were upon his bonds. I can state it to you generally. He said that they would be declared or rather that they would be in a position to be interefered with by the department as being in default, and it would affect them and break them up probably in some contracts that they had, to have their other contracts on which they were bondsmen dishonored. He says these considerations determined him and he felt the irritation and inconvenience both to himself and with regard to the interests of his friends, and he went out. Then the other testimony follows that I read before. "In all these interviews did Senator Dorsey ever say or intimate what interest he had?" This was the Government witness. "Yes; he said that he was interested for his brother and his brother-in-law," and he said here—this was long before July. You have been told what Brady said. Now, if there was any combination, any understanding why did not Senator Dorsey give a nudge to a coconspirator? "Never mind. Never mind. It is all right. I will fix that." No; but he said frankly, "Mr. Boone, I tell you I have let them have all the money I can." Miner had gone, John W. Dorsey had gone, and Brady was sending word that the game was up. Now, what did Senator Dorsey, this chief of the conspirators, do? John W. Dorsey and Miner both gone; not one

of them here. He did not bother himself about it. He did not know when Boone went out or care anything about it; that is I suppose he would like to have seen his brother and brother-in-law provided for, and probably friend Boone, for Senator Dorsey has a heart that would throb in unison for and with the interests of a friend. Said he, "I can't help it. I have other matters to attend to. I am not going to the department." Why didn't he go up and even see Brady? There is not a particle of any such proof. He goes off about his business. Now, up to this time he had advanced his brother, Miner, and Peck, his notes, that is, he had loaned them his credit in bank. They had got the notes discounted, and Miner had drawn some drafts anticipatory of service that was to be performed. You know how it is in bank. They take the note and stick a pin through the note and the collateral and lay them away in a drawer. He thought he was safe enough. He took the best security he could get, and went off about his business. Then in August, 1878, you have the combination or the coming in of Mr. Vaile. You have heard the instrument read in which Miner, by virtue of powers of attorney from Peck and John W. Dorsey, made the contract that I will not take your time again to read, for it has been read and reread. This was August 10, 1878, or somewhere along there. The time had been extended at Mr. Vaile's request. Vaile was an old contractor, and he and Miner and these others had formed a partnership to go in and stock and run these routes. Mr. Vaile was the moneyed man. His counsel told you in the early part of the case that up to the time he had been in a few months he had pledged his credit and raised money to the extent of fifty-five or sixty or seventy thousand dollars. You know by this time it is no trifling thing to put those routes on. Now where was Mr. Dorsey? He was off in July and August. The great point is made that Mr. Vaile went to Mr. Brady. Mr. Miner had gone to him and had received a rebuff and a cold reply. Mr. Vaile told him that he thought as he had had a thousand contracts, as he told you upon the stand, and every one of the thousand honestly performed, he might know something about it. That gentleman, whose appearance is good for a thousand pounds, took the stand and told you "The man that finds a dirty dollar sticking to my fingers or a dirty deed done with the Government in all the thousand contracts cannot come forward. I throw down the gage and dare them to prove it. Never mind about this case. Never mind this indictment. Prove that I ever did a dirty or a dishonorable thing to the Government, who is paying me its money in return for the service that I have honestly performed." So that when Vaile speaks I give you notice that I believe Vaile. He does not come crusted over with indictments. He comes a free man from the free West. He is known, known at the department, and known honorably. They make a great point about him. He said: "Brother Miner, I know Brady is gruff enough." It is enough to make a man gruff with nine thousand mail routes, oceans of jackets; that, if nothing else. Each jacket they make a suit out of. They are trying to make a lawsuit out of a jacket. There was a fellow once came to an Irish lawyer and says he: "Mr. Lawyer, there was a man stole my jacket, and I want to sue him." The Irish lawyer says: "Patrick, you can never make a suit out of a jacket." Now, a jacket is enough here for suits. Here are thousands of them. Well, Mr. Brady was gruff. He did not know Miner, perhaps. Thereupon this gentleman goes in and says, "Now, Brady, if you do throw this thing down, the next highest man"—or the next lowest, whichever it is—"will take it up, and by the time that you get through with that

formality, the lettings or anything of that kind, and new contracts and all that machinery, it will take still more time. A little indulgence will really be a benefit to the Government and you will get this service on quicker." May a man do that and not go to the penitentiary? Let us stop. The circumstances must be such as are consistent with guilt and wholly inconsistent with any other hypothesis. Now, can a man safe from the penitentiary step in and say, "Mr. Brady, I tell you what it is, I am an old contractor. I know how these things are, perhaps, even better than you do. If you go to having this thing thrown up and go through your machinery and the formality of your service, you will lose time and will not get the service on as quickly as if you give a little indulgence to these men." A man may do that in this free country without being indicted as a felon! Just think of it. This, with the ominous finger of brother Bliss, was a circumstance, a circumstance inconsistent with innocence and wholly consistent with guilt. "Chops and tomato sauce, again!" Now, Mr. Dorsey, the Senator, went off to the Southwest and he comes back here at the meeting of Congress in December, 1878, for that was his last session. In the mean time, if I am correct, the subcontract arrangement, by the suggestion of Brady, had been incorporated into and formed a part of the machinery of the Government. Before that there was no protection to the subcontractor. An assignment was not regarded at all. A subcontractor, as I told you before, can place his subcontract on file; and I repeat in the closing part of my duty in this case what I said in my opening, that there was a reform that will stand as a monument in favor of Tom Brady when all his accusers shall be relegated to obscurity. A reform adopted and incorporated into the postal service that protects the driver in his far-off home; that makes the subcontractor safe against the rascality and default and insolvency of his superior contractors; makes him safe out in the mountains, in the valleys, three thousand miles away, four thousand miles away, more than across the ocean's breadth. By this device of Mr. Brady the subcontractor is in safety, and receives the guarantee of the Government to protect him. Now, by the time Senator Dorsey had come back this new thing had become in vogue, and Mr. Vaile, as a business man, seeing that he had made large advances, looked to his own interests, looked to them as he thought well, and the more he saw through them, and the more friction it produced, the more anti-conspiracy there is in this case. Conspirators must move together in infamous unity and in criminal confederation. Now, then, he comes back and goes down to the bank. He had left his ten or fifteen thousand dollars, whatever he had advanced—the amount is immaterial, for the principle is the same—and he found these anticipatory drafts of Mr. Miner no more than so much blank paper. They were no longer any security. Why? By the regulations Mr. Vaile put his subcontracts on file, and they were all bills of sale upon the main contract. They are like these little mortgages or bills of sale that you file that give you preference and a lien. Thereupon friction was produced between these parties. Now, then, for a moment let us contemplate this matter. Mr. Senator Dorsey is a chief conspirator, is he? Indeed! How does he attend to his interests? Boone sounded the alarm to him, "Brady is going to stop this thing. He says they must put on the service or he will make them throw it down and have somebody else take it up." Says the Senator, "I have done all I can. Paddle your own canoe." I might here say that it was just about as the Senator had predicted, that there was more trouble in it than profit, and only thoroughly experienced persons with immense capital can make it go. This chief

conspirator did not go to Brady. He went about his business; and Miner, not his brother, nor Peck, his brother-in-law, but Miner joins teams with Vaile, and having the powers of attorney in his pocket makes his own contract, sells out, transfers, and disposes of all that property concerning which Senator Dorsey knew no more before his return than you Mr. Foreman knew at that time. Do you believe that now? Am I right? Just let us stick a pin in there. Is that true? Is it not then a singular position for a chief conspirator? Not even his brother, John W., nor Peck, but Miner is here with the powers of attorney, and he goes around and says, "Where can I do something to get this thing started, and not have us all declared failing contractors or our boudsmen ruined?" The first that Senator Dorsey knew of it after his return from the Southwest was this. Well, in that contract it is provided that the advances already made to these men to assist them shall be sacredly paid and taken care of. It is provided that there shall be no profits divided between these parties until the advances were paid, and if the first quarter did not pay it all it was to be paid pro rata, they were to take as much as was required to pay their men and get along, and to keep pro rataing and paying off that indebtedness. That they had a right to do, and they ought to do as honest men. These matters of anticipatory drafts, &c., were common subjects of commerce. Banks would advance upon them and finally find some routes thrust upon them. Why, Mr. Walsh said that he was no more a contractor than you were in original design. He says he kept advancing men that came in there, and lo, and behold, he found himself in a position to have the whole thing turned over to him. The only thing he could do was to take the route and pay himself for the advances made. These matters were subjects of commerce and merchandise around the city. Now, Mr. Dorsey comes back and says, "Yes, I see that is in the contract and that is all very well, but I thought I was securer than that. I don't like this." He may have said, "I see a subcontract that leaves me at the mercy of Vaile and Miner. Vaile and Miner's interests are blended. I see there is going to be a moving off from John and Peck and I don't like this. Those poor fellows have used a year or so of their life out there in the West, and they have used their own little fortunes and ten or fifteen thousand dollars of mine. I know you have provided for paying me, but you have also taken into your own hands Mr. Vaile and Miner, and especially Vaile, this whole matter. It leaves me at your mercy. Is that exactly on the square? Is that the way you would treat a banker or anybody else who had gone into the service while you were reaping the benefit of it? I have come back here and don't like the way my securities are being changed. I went away thinking that at least I was secure, but things have changed in a way I don't like. John ought to have something for his year and interests. That is worth something. Here is poor Peck, the wounded soldier, the consumptive man broken down carrying the banner of his country through the red fields of war, and his wife, my wife's sister, that I know in the course of a few months or a year or two will be a widow on our hands. I do not like this." They come together then in 1879 and they say there ought to be some kind of fair work about this. John would stand anything. He is a good soul simply fit to go on under the lead of somebody and to do some work and do it faithfully and do it well. Peck should not lose. They have all got some interest in this. "It is worth something. I will advance some money and then I want enough of these contracts or something by way of security to me, I don't care much how. Fix it up." So

they went and drew lots and Vaile assumed the payment of those debts down there at the bank and Senator Dorsey pays and he advances to John something for his interest and his loss of time, thinking that he can work out for his brother and his brother-in-law and his then almost widow something for a rainy day. Thereupon this change is made and a few of these little contracts thrown out by lot as the interest of John Dorsey and Peck are turned over and Senator Dorsey assumed the responsibility and for the first time appears in them. Then he simply writes a letter to Wilcox and another little letter or so to Joseph, and after about three weeks the hand of Senator Dorsey is not in the matter at all. He only draws, I believe, the first quarter's pay, or he did not draw that. It is simply deposited down here to see that the drafts are paid and the liabilities arranged for. The sheet that I have here prepared shows that clear on down from the fourth payment of 1879 Bosler drew the pay on the routes. He sent for his friend Bosler and turned them over to him, and said, "Run them; do anything you can with them. See if you can pay your own way. Get it out of confusion. Do the best you can." Vaile was responsible for the Germania debt, the receiver of the bank came here and confirmed all that, and showed the substituted paper of Vaile, wherein he agrees to pay the Dorsey debt. The bank never let go of anything. They also had Dorsey's name at the bottom, and Dorsey said then, "Give me up my notes." "No, the bank is going to hold all, as much as they are going to hold Vaile and the original security." Then if you have looked at the paper you will remember it looks as if there was a sudden dash. "Then if I am not released, off with my name. Vaile stands for it and if you are going to hold my notes also as security off comes my name." The name is stricken off. Now, from that day on I challenge these gentlemen respectfully—I would not do it in any other way—to place their finger upon an item of testimony that shows the handling of a single dollar by Senator Dorsey, by way of profit or otherwise, from that time to this, show where we conspired or handed over any money to anybody; show where anybody ever paid us any money on their contract from that day to this. Mr. Vaile, what do you say? Says he, "From 1879 up to 1882, in June, I never saw Senator Dorsey. I never had a word of correspondence with him directly or indirectly." All the correspondence he ever had about him was in a letter written in 1880 to the Auditor of the Treasury, in which he was complaining of the Jennings route, and stating why a fine should not be put upon him for a period before he put on the service or became interested in the route. In that he complains of Senator Dorsey. Says he, "I believe Senator Dorsey to be insolvent. I am good. Any man that sues me and gets a judgment can collect it. I appeal to the justice of the department to remit or to do me justice in the matter of this fine." Says he, "Take nobody's word." This is funny conduct for a conspirator and funny talk going to the auditor, where it would immediately go around to Brady. "Take no man's word. Let me have a chance to have a hearing in court." This is the talk of a conspirator! A man says to a department, "I ask an investigation of everything connected with this matter; I can go into court and can make my defense and can make my claim. Do give me a chance to explain to the world why these remissions should be made, and why this money should not be taken from me." Was ever conspiracy like this? And this is another of those circumstances that I suppose are inconsistent with innocence and wholly reconcilable with guilt. That a man cannot ask an appeal to the courts without being guilty of conspiracy. Yet of such stuff is the dream of this prosecution made.

Baseless as the fabric of a vision it melts at the touch of the Ithureal spear of reason, and passes far from the memory of man.

This is the conduct of Vaile. This is the conspirator that never saw us from 1879 until 1882, when we met as defendants at your bar. Then, Mr. Vaile, did you ever pay us any money? "Why," with a gesture that they make some fun of—each fellow has his own peculiarities—"no, sir; not that I know of; not that I am aware of." Mr. Ker made that gesture pretty well. With a little practice I am sure he would do it still better.

Mr. KER. It does not look very graceful.

Mr. MCSWEENEY. It was not very graceful. It looked like sweeping out the confounded trash of the case though. It was a sort of rhetorical pause. Well, now, it is really hard to talk seriously about this concern. Hamlet speaks something about mirth in funerals. It is perhaps unseemly in me, as the corpse passes by, the body for funeral, that I should indulge in mirth in these obsequies; but I cannot help it. There is a spirit of mischief in me that will up, but I have been trying to anchor and to be as serious as I possibly can. But to talk about the chief conspirator going off about his business and these men disposing of the property just as they did and never touching anything concerning it since! They made no false affidavits, did nothing that was dishonorable, and nothing calling for proof at his hands. Now, then, sir, just suppose a person would bring in to me that testimony. Supposing Dorsey would say, "Now they are through. Now, Mac, what shall we do; where shall we begin?" "Begin? I do not know." "Shall we begin at those contracts?" "Why, Boone told us all about that." "Shall I show where I was?" "Well; nobody has shown that you were any place within fifty feet or a thousand miles of these transactions." "Shall I show that I did not get any corrupt money?" "Nobody says you did." "Well, shall I show that I did not pay any?" "Nobody says you did." And, I submit, Philadelphia lawyers, proverbially, are the sharpest; and it has passed into proverb, "It would bother a Philadelphia lawyer." Therefore, I say, that if I would go over to Philadelphia, and go around the officers and ask them, "Please to tell me where to begin to fight unsubstantial shadows," I do not know anybody that would make a sensible response except, "Let the shadows flit." There is nothing more intellectually straining than to strike at unsubstantial ghostlike shadows in a lawsuit. Will some gentleman please to tell me where they stepped even upon our coat-tail to make even the semblance, an Irish row. Who is it? Where is it? Who touched us? Who shall we strike? What testimony shall we meet? And the wild echoes flying only repeat the question. Can you tell, gentlemen? When you go to your jury room, is the only way you can speak. Talk of this case.

Well, now let us see about Senator Dorsey. Well, what about him? When did he conspire? Where did he conspire? Crime must have a birth. It must be cradled. There must be a place fixed in its legal history. There must be a time even when conspiracy was born, else no statute of limitations would ever date or run from it. It cannot go along floating in the clouds. Overt acts may, but overt acts are mere adjuncts, mere evidential matters so to speak almost, that reflect back, after all, upon the history of conspiracy. To be sure, we must also prove an overt act. But outside of that, illustrate it in the common law. All acts are merely evidential in their nature. I care not. The court is right. You may commence at one end or the other. I think that is right, and that is common sense. There is no technicality about it and I am not standing here to urge any technicals being pro-

claimed. Brother Bliss said that the defendants were attempting to escape on technicalities. That is not very good talk for a criminal lawyer prosecuting a defendant. The technicalities are the barricades of freedom for the citizen. It is flippant newspaper talk. It is not lawyer talk for the prosecuting officer of the Government to turn to a defendant and say, "You are urging a technicality." Why do you not let in hearsay testimony then? What is the difference whether John Jones comes here and says he heard John Brown say that John Smith said, --- "Hold on." "Oh, you are technical, are you?" Why, the pathway of a citizen's freedom is lined with that kind of technicality. They are banners that are hung out, it is the ægis that protects him. Technicality! Technicality! You may use it in whatever odious sense you please. If there is a right hidden beneath the technicality, the court itself, *suâ sponte*, would urge it in behalf of the prisoner if his counsel were ignorant, or stupid, or regardless of his client's rights and was quietly letting it pass.

Now, I say, and I repeat, will you please to tell me when Senator Dorsey conspired, where he conspired, what he conspired about? And let me here reduce it to this kind of illustration. Supposing we were to say, if your honor please—you may appropriate the proof and consider the case on the civil side of your court. Supposing you say to the judge, "Now, judge, you have heard all this. You may charge the jury that they may turn this from a criminal into a civil trial, and make Dorsey pay back to the Government every dollar that he had improperly got." Come now. I am going to change it to a civil suit where you may have just merely the preponderance of evidence. It need not be beyond all reasonable doubt at all. Now you go out. If we are a corrupt villain and have got money from the Government, you may put your finger on it, can you not? If you can civilly, *a fortiori*, how much stronger must you criminally. Now, then, if you are going to make up a civil issue—the court has told us we can't get along criminally. Just get along civilly. Let us see. Let us state an account. "Senator Dorsey in account with his country, debtor to so much corrupt fund that he took that he ought to pay back." What money? We are stating your account. What did he take that he ought to pay back, and he will pay it. Apply this testimony and show me on your oaths and your honor what dollar has he that he ought to pay back. When did he get it? Calculate the interest from it? Do you see? Even if it were a civil suit for the recovery of money.

Apply it to Vaile. The United States Government in account with Vaile. Debtor to what? To about \$15,000 of fines and penalties, as to which he waited until Brady went out, until under more favoring circumstances, and with a better tempered man, more congenial to him, he could ask their remission and save his pocket. We are making out your account. Vaile debtor to what? Miner debtor to what? Rerdell debtor to what? Come, gentlemen, and as brother Bliss has dug down into the dead soldier's grave, bring up Peck, seat him in his shroud, and even deal with the dead and send out the account to the widow and she will clear his honor and his name from a stain, and will go begging from door to door and pay back to this Government a single dollar even over his grass-grown grave that you may find against him. Send your bill out to the world. Pass the bills around, fix them up. There is money in it. There are millions in it. Get a subcontract and go it on the halves. What nonsense, what trash that they could not support a civil suit on for a single dollar, but think by jumble, by circumstance, that tender word—when they ever ran short for any proof, with the profoundness of an owl, which means wisdom, no disrespect to the owl—

they say circumstance. Hush-h-h-h. Whenever they are hard run they throw in circumstance. Then they look. Then they will say CIRCUMSTANCE. You are not going to get off Mr. Government that way. I want your circumstance.

Again. I am going to have you in that same civil suit state an account for Tom Brady. Tom Brady debtor to what and when and where? When does your interest commence? Whose money did he get of these defendants? Gentlemen, I told you when we opened, and you begin to see now why I uttered my weary words to you. You see what I meant when I said that no man should be convicted without proof of corruption, as repeated by his honor here in words that will live in this record, when your honor turned to this jury and said, "Gentlemen, there may have been mistakes, even misconduct, in not looking more carefully into things, gross mistakes even, bad judgment incident to humanity, but no man shall be convicted in my court for mistakes of judgment. There must be proof, by the law—I have told you what kind of proof—of corruption. And his honor also told me, says he, "Mr. McSweeny, I want you to understand that I have the faith that innocence is never convicted." Thank you. "No man," said his honor—if a jury would be wild enough to go astray I would understand it—"shall receive sentence at my hand unless there be proof of corruption." Come now. Proof of corruption, and its fruit.

By its fruit ye shall know it.

And I want you to turn to Thomas Brady, so reviled that all the fish market expressions in vogue in the present day have been exhausted. The Newgate calendar, with its splendid phraseology, has been hunted up and hurled at Tom Brady. In third Wharton's Criminal Law it is written that no prisoner at the bar of his country should be terrorized or driven from the presence of the court by epithet; neither should any appeal be made as to what the Government desired, or whether any witness for the defendant would thereby be deemed guilty of perjury. This and all such outside matters are deemed unworthy, and upon objection being made will be checked by the court, and in many instances form the subject of new trial.

Philpot Curran was once brought down upon special retainer to prosecute Surgeon Hay, or gentleman Hay, for the abduction of a lady. A crime, which your honor well knows in reading Irish history was quite common in that day, for I assume that your honor being fond of fun could not pass Irish history, though there is enough of tears and woe beneath the smile and joke of Ireland. He came with a retainer to prosecute. He commenced by saying, in substance—and anybody attempting to repeat the substance of Curran wishes he had not commenced it, but he said:

On the part of the defense it is lawful, it is honorable for counsel to exhaust all the efforts of genius, to paint with the painter's pencil, to picture with the poet's fancy, to draw upon every association of woe, and use all the powers of intellect that have been given him by God for the defense of his client. It has the sanction of usage and is in consonance with the spirit of humanity, but when we appear for the crown how different is our duty. We must carefully unfold the evidence. We must not paint, we must not terrorize, we must not appeal and say how justice has failed of being administered in giving the cases. No, no; this case, as though no other were tried, is all that is to be heard at the bar; and any lawyer for the defense who would stop short of the rights that I have indicated, is false to his client, and any one upon the part of the government who oversteps these moderate bounds that I have named, and in which I intend to confine myself to-day, is unworthy of having a retainer upon the part of the government against an unfortunate prisoner, and he who seeks to win a garland and triumph over a prisoner by any such extraneous means as these, will only wear blasted leaves, and will not even have come up one poor step towards

the mount on which Fame's bright temple shines afar. With these views of the duty of a prosecuting officer I approach you, gentlemen of the jury.

Is that the spirit to-day? Think you that by maligning a man, by saying that a man would be picked out as a thief from any crowd——

Mr. KER. [Interposing.] I did not say that.

Mr. MCSWEENEY. You said the equivalent.

Mr. KER. You ought not to misquote me, judge. You have it in the Critic.

Mr. MCSWEENEY. State it then. Mr. Henkle, his counsel, said, when you said "Where is Mr. Miner?" "Take me for him, here I am," vicariously of course. You did not think that was Miner. That is the mere minor proposition to the major. Says he, "Take me." "Oh, yes; I will not take you. You do not look like a man that would be picked out as a thief in a crowd."

Mr. KER. No, no.

Mr. MCSWEENEY. What then? Get up.

Mr. KER. What I did say to General Henkle was, "They would never pick you out of a crowd for a pickpocket as they would Miner," and turning to the jury I said, "I want you to see the face of the man that Vaile and Dorsey took to their hearts."

Mr. MCSWEENEY. Worse and worse; like Mrs. Sheba who went to Solomon, the half I did not tell. So "they would not take you for a thief as they would him," and that is the high tone that I have come from our western jungles to learn from my brother. Suppose his wife were sitting here right at his side; suppose his little toddling children were at his knee. Instead of confining it to the testimony, he spoke about picking out defendants as thieves and pickpockets in the crowd, and so on for quantity. And if there is more of it to come I mark it for the reprehension of twelve square, honest men. I denounce it. I would not go home and be silent when at the capital of the nation, the picked men of the cities before whose intellects I bow and the latchets of whose shoes—you haven't any shoe-strings—I am not fit to unbind, and permit them without inquiry and without challenge to maltreat, to intellectually abuse and hurt the feelings of men and women and make their unmanly war on the feelings of little crying children. I say, gentlemen, to return to my theme, that I have asked that you just sweep away denunciation, the desires of this Government, the intimations of White Houses or black houses. Put them aside. Go to the testimony that they said I dare not touch, that they intimated I would not deal with, but would be up in the clouds. I am down on earth, fruitful with rage. I am right where we live, and I am asking you in plain simple parlance; I want to make it so plain that even a Philadelphia lawyer or a wayfaring man, even were he a Philadelphia lawyer, might understand it. I want it understood, free from vilification and abuse; calling hard names break no bones, but they interfere with the rights of a defendant at the bar of his country, and become an intellectual and moral assault upon him and embarrass him in his defense.

Now, gentlemen, do you understand it? The points I make for Senator Dorsey are made by the testimony in answer to the oft-repeated inquiry which comes along, "What are these lawyers talking about if there is nothing against their clients?" Is not that deep? "What are they talking about if there is nothing against their clients?" Why, there is this to talk about: Their names are bruited abroad, held up by the press as objects for scorn's slow-moving finger to point at. Think you that they want nothing said for them? Think you that advocacy of their cause is an imputation of guilt that is to be removed? I trow

not. If there is so much against them, on the doctrine of Yankeedom, answer one question by asking another, why, in the name of eternity—not time—why, in the name of eternity, was brother Bliss three days in opening? Brother Ker ably opened in three more, and that made six, and brother Bliss used about two and a half more. But, as Mantellini, that *dilettante* fellow that was broken up, as stated in one of Dickens's novels, said, when he was sitting around and they were taking an inventory when he was going into insolvency, bankruptcy, "There, there are £113 40s. 2 pence ha' penny." "Throw away the shillings and ha'-pennys and give me the demnition total." I say I will throw away the half days and just call it about eight days. Just give the demnition total. Then, if there is nothing in the way, if it is so plain as all you interviewers have it, if it is so plain as it is written in the dailies, why do you waste eight days in thundering and roaring until the court opens and the court ceases, and they, one after the other, take their seats and fire away by the week. And then they turn to us, "Aha, if you are not guilty what have you got anything to say for?" Do you think we would let you, gentlemen, as much as we respect you, crush us down in silence? No, no. We will speak; we will speak. We will have a word to say, for you have told us that it goes far and wide. These things will be scattered like the leaves in the wind never to return again as slander does, and truth in humble garniture, slow-legged truth, will totter on and try to catch it. Truth has the eternal years of God. Error dies with the daily newspaper. Truth shall survive the triumphs of decay. When these little ephemeral attacks that make women weep have passed away, there will be brighter skies; there will be clearer stars. Sunlight will come again with this jury's verdict, and light up darkened homes. We speak; we speak. Senator Dorsey shall not go down smitten without my poor, stammering, stumbling tongue saying at least its poor say for him and the drooping flower by his side to-day. We owe no apology, my friends, for speaking. We are not afraid of the taunt "Aha; if you are not guilty why do you speak; if you are why do you speak."

Now, having disposed of Senator Dorsey, I will leave him. As they say in church—no, in political meetings, I believe—if anybody has any questions to ask, I wish he would propound them—as to Senator Dorsey. It is a pleasant theme, and I declare I would like to go into it, but as there are no questions, I have got some loose time on my hands to slash around a little. Senator Dorsey does not need me on such a matter as it stands now, and so I can guerrilla a little, up and down, here and there, and all around. *Circumstances*, you know. I hardly know which way to begin. I want to call the attention of the court to some more of their sayings during the trial. I guess that is as good a thing as I can do now. I read from page 361. Mr. Chandler was quoting an authority which I read:

Where the prosecution in a criminal case rely upon circumstantial evidence, that is, upon proof of the facts or circumstances which are to be used as a means of arriving at the principal fact in question, it is a rule that those facts or circumstances must be proved in order to lay the basis for the presumption which is sought to be established. Each circumstance essential to the conclusion must be proved to the same extent as if the whole issue rested upon the proof of that circumstance.

The COURT. No doubt that is good law.

Do you understand that, gentlemen? When you talk about circumstances, that is all there is in this case. Circumstances arising out of an honest transaction to begin with. Brother Bliss, in his opening, said:

I do not claim that this originally was a conspiracy.

I can turn you to the page. Says he :

It was a matter of gradual growth. As the evidence comes along I will have to ask you to watch its growth and its development.

Just so. Just so. It would take double optical lenses to see its growth and development. Mark you, he says there was nothing originally, but, says he, this conspiracy was one of gradual growth. Says he :

Mr. Vaile came in at a time that I cannot explain to you now, but it will be developed by the evidence.

Just so. Just so. So it was. Now, then, the circumstances relied upon must not be an indigestible mass. They must be masticated and appropriated. Let us understand it :

Each circumstance must be such and proved to the same extent as if the whole issue rested upon that circumstance.

Right in that connection I read from Willson Circumstantial Evidence, star page 157. When we are on a star-route case we always quote the star paging.

If it be objected—

Says the author—

that rigorous proof of the *corpus delicti* is sometimes unattainable, and that the effect of exacting it must be that crime will occasionally pass unpunished, it must be admitted that such possibly may be the result; but it is answered that where there is no proof, or which is the same thing, no sufficient legal proof of crime there can be no legal criminality.

In penal jurisprudence there can be no middle term; the party must be absolutely and unconditionally guilty or not guilty. Nor under any circumstances can conditions of supposed expediency ever supersede the immutable obligations of justice; and occasional impunity of crime is an evil of far less magnitude than the punishment of the innocent.

* * * Lord Chancellor Nottingham, on the trial of Lord Cornwallis, said: "The fouler the crime is the clearer and plainer ought the proof to be."

Now on the same page:

Where there is nothing but the evidence of circumstances, those circumstances ought to be closely and necessarily connected, and to be made out as clear as if they were absolute and positive proof.

You see there is often a mistake in the idea that when you are talking about circumstances, you get some and then you drop the thing. I have just read in the presence of the court and in your hearing that each circumstance must be proved—when the evidence is circumstantial—to the amount of full, positive proof. And circumstance that does not marshal itself and is not proved beyond all reasonable doubt, as if it stood alone on which the fate of the prisoner was determined will not answer. That is the first step. The second is that it must be taken from its isolation and brought legitimately, not forcibly, over into the family of some other circumstance with which kindred relations and ties of legal consanguinity by way of criminality have been established. Then, too, that circumstance must be a circumstance arising from and attributable to the prisoner's own conduct. Nobody else has a right to invent circumstances and charge them up to him. It is qualified by this rule; let us be fair; if there be the doctrine of agency established which lies at the root of conspiracy then the rule thus enunciated by myself has this all-controlling modification, of course: If there be partnership first in legal business. Men get together as bankers. There is no necessity for the seven bankers or the ten to step in and all sign a draft, or borrow, or discount. If there be ten merchants they need not all go to the importers and stand around the counter and buy

goods. They need not all march up in procession and sign a note, because in the law this is not required, and it is permitted that each may act for the other whether absent or present, sleeping or waking. The quiet, silent law of agency is operative. Everything done in the line of the agency binds the partnership; but anything outside of it does not. In a partnership of lawyers there must be no making of contracts to build houses unless there is some special provision for it. A merchant must not engage in other matters, for the moment he does, the implied agency ceases. If he goes then and signs the partnership name, the world must look out. *Caveat!* Let him beware. *Cave!* Look out. If you have not held yourself out in partnership to the world as engaged in that kind of business, then the agency ceases even *quoad* strangers. But, gentlemen, in order to make legal partnership a conspiracy, the court has told you a dozen times that there must come into it an element of criminality. I cannot use a better illustration in enforcing this to the jury than your honor did. Your honor said, "These men or any men may legitimately and legally go into an honorable business and a respectable calling and join their resources together." That is a partnership. I need not turn to it in the book, but I will adopt your honor's language as near as I can: "It may ripen and grow up into or down into a criminal combination." That is true. Men may engage in honorable merchandise for years, and the temptation may overcome them, and some day they may say "The duties are too high. Partners, from this out let us go up to the custom-house and make an arrangement, and after this get in goods free of customs and undersell our neighbors." There would be an illustration of that matter arising from the hint I got from your honor, that a legal partnership might with its upas bud poisonously arrive and ripen and rotten into a combination to break the country's laws. Who doubts that? I mean it fair and square. Then that brings in this: In every criminal conspiracy—perhaps that is tautology; we use the word criminal to distinguish it from innocent. I believe in our common nomenclature conspiracy implies criminal partnership. Now, there must be in conspiracy a partnership. I will put it in this way: Before the jury find that anybody in a case is guilty of a conspiracy they must establish the partnership so that in a civil suit an action could be maintained against them on civil liabilities. Of course they must. Recollect that, gentlemen. You will have to find, if you would find against these parties—I say this respectfully, submitting to the court to pass upon all these propositions—I have said to the court, and I repeat to the jury, that in order to find any one guilty of conspiracy you must find a partnership just as regularly as if you were sitting down to try them on a case like that. Let me give you an illustration. There is nothing like bringing the matter home. It is the only way I ever get anything into my head. We are in partnership, are we? We must be if we are conspirators. Vaile, I believe you were up there a couple of thousand miles from here making some contracts? Yes. Senator Dorsey would open his eyes if there would come down a contract for ten thousand bushels of corn or a hundred head of horses bought by his partner Vaile, now, wouldn't he? Why how is this? You are in partnership up there? Don't you know? Don't you know? Really I do not. Supposing *per contra* Dorsey or Bosler made a contract about two thousand miles off, under which they had put out a subcontract and become responsible, and burst up, and there was a little matter of seventeen or eighteen thousand dollars for oats and corn and contracts and horses and everything else, and that was sent in here to Vaile. Mr.

Vaile, your partner, John W. Dorsey, has been getting some oats and corn on your account. Now, from the testimony before you you would actually laugh at that, wouldn't you? And yet that is only trying a civil case. If you could not charge one of these parties for corn bought for the other, how, in God Almighty's name, are you going to do it for a criminal conspiracy and put them in the penitentiary on account of a criminal partnership? If there is not civil partnership enough to cover the price of a bushel of corn, how can you have a criminal conspiracy that would carry away liberty? That brings me to this proposition: In every conspiracy there must be partnership; but every partnership is not conspiracy. Every partnership need not be conspiracy. The outset of every conspiracy must be partnership. You may have partnership, I repeat, without conspiracy, but you cannot have conspiracy without partnership. Now, remember this when you retire to your room. I want to impress it upon you that if it is good criminal combination and partnership we are to be sent galloping at the rate of forty miles an hour to the Albany penitentiary right past the White House, and right past Gettysburg, and right past the hill up here, where, if it had not been for Dorsey and his guns, you, brother Ker, would not have been here to-day prosecuting us. I believe the train goes right past there.

Mr. KER. There is no evidence of that.

Mr. McSWEENEY. I did not ask any evidence from you, brother Ker, when you pointed to a gentleman on the jury and said that the times had changed; that you recognized a gentleman who was on one side of the contest while you were on the other. I liked the reference. Do not misunderstand me. I like these pleasant pictures of our glorious country at peace. You could not charm me more. The eye fills with gratitude, the heart swells with admiration when we think of what we have gone through, brother Ker. I make no complaint. I like to see the blue and the gray together. I like to know that it matters not whether a man's skin be dark or what bronze may be on his cheeks, that all are men before the law. I know, brother Ker, that times have changed. The roar of battle has ceased. The smoke has cleared away, and on that new mount of transfiguration, bondage put off its chains, rent by the thunderbolt of war, and liberty came forth in her beautiful garments without spot or wrinkle. Hosannas to the god of battles, that we live in a land like this. No, no, Brother Ker; I was pleased with the melody of the references. They came

Like music down the aisle,
Like sweet peans above the roar of battle.

And I rejoice that under the fig tree of our own planting we are upon a land of which my eloquent friend Ingersoll says:

Its dome is spread over a people in which there is not a slave.

No, no; I was not complaining of that.

But I must get back to my theme again, and it is this: That in every conspiracy there must be partnership. You see I care but little how much I repeat these things. It is not with me a matter of how my sentences shall appear in these records. It is a matter to me of no account. I do not care whether a stray nominative case runs over ten pages hunting up some stray verb to hook on to. It makes no difference to me. I am saying this, that when you retire to your jury-room you should ask if there is a partnership proved here. Take for instance a note by Vaile. "For value received I promise to pay John Jones, of Nevada, or somebody out there, \$13,000, the price of a subcontract and

for some horses." I wish I could get that pronunciation right. I have been in the habit of saying horses, but I see brother Bliss—and in New York they ought to know—says "hosses," and it would be inhospitable not to follow him. Now, supposing a bill came in debtor \$1,500 for hosses and Government mules, and some stray jackasses thrown in—I don't care, and that suit is brought against Dorsey, Brady, Miner, Peck, Vaile, and Rerdell.

Mr. WILSON. And Turner.

Mr. MCSWEENY. Turner and the executor of Peck. Debtor for corn. How much would you give for a note under those circumstances? Speak quick.

Mr. KER. One dollar.

Mr. MCSWEENY. Wouldn't you be in a beautiful position from the testimony you have heard to give a verdict for corn, oats, contracts, horse-shoeing, and horse doctoring, to get those horses along that were perishing on the alkaline waters that quenched no thirst? Send in a bill to us and sue the whole gang, debtor to corn. Nobody would acknowledge any such corn. [Laughter.] And yet, my fellow-citizens, you are driven to just that position of absurdity. In order to work the conviction of these defendants you would have to find a partnership that would carry a civil liability for goods purchased. Don't that startle you when you put it in that light? Who denies it? If anybody, speak, for him have I offended. If you could not recover for corn you cannot ship a fellow to the penitentiary, because there must be a partnership. Even brother Ker sees that. [Laughter.] Why should he not? You see when this is analyzed and taken to pieces and thrown apart of what stuff it is made. Where is the proof of partnership? Where is the expressed or implied agency arising from one partner to the other to act for him? Tell me. Nay, circumstances are powerful. What circumstances? I plunge at once in *medias res* without preliminary argument. I read from 3 Dillon, pages 615 and 616:

The dispatches between other persons than the defendants are no evidence to show his connection with the conspiracy unless they are brought home to him. They were admitted to show the nature and purpose, the plan and operations of the conspiracy.

The same line that your honor has held for two months:

Guilt—

Guilt—

cannot be fastened upon any person by the declarations or statements, oral or written, of others. Guilt must originate within a man's own heart and it must be established by his own acts, conduct, or admission.

The circumstances relied upon must be brought home whether those circumstances are to affect him individually or to establish the condition of partnership so that the doctrine of agency may bind him. Any circumstances relied upon to have effect must be what? It must be a circumstance or fact or conduct or declaration, oral or written, by himself.

Guilt must originate within a man's own heart and it must be established by his own acts, conduct, or admissions.

It must be clearly proved beyond all reasonable doubt and capable of no interpretation except consistent with guilt and must be wholly inconsistent with innocence.

Come now, let us reason together.

What act of any one man is there? I speak in the gross and scope of all this alleged conspiracy. What act, declaration, or admission, oral or otherwise, has been done by us to authorize any of the others to go outside of the emotions of the absent one's own heart, and do some

act that will bind him, though he be sleeping or a thousand miles away? You see this is no trifle when you get down to it. There is a remark of the court on a page that I will turn to. It is on page 739 of the record. First, there is a remark by Mr. Ingersoll:

Mr. INGERSOLL. So that the only question is, after they have set out the fraudulent things done on a route, after they have set out all that was illegally done on a route, specifically calling attention to that route, then they have the right to go into anything else that is said to have happened upon that route, without giving us any notice. Now, that is the whole question.

The COURT. I believe the court has several times given expression to its views on this very question, or questions that are so near to it as to be hardly distinguishable. The last occasion was no longer ago than yesterday.

Now, the Government in this case has undertaken a mighty task.

I should think they had. Let me read that again:

Now, the Government in this case has undertaken a mighty task. It has combined some seven or eight defendants in one conspiracy—

Partnership, I interpolate—

and it has charged that the subjects of the conspiracy were nineteen different contracts and subcontracts, and it has undertaken to make out its case against all these defendants under this combination of contracts and subcontracts, and under charges specially setting forth the overt acts done by the conspirators and through the medium of the Post-Office Department and the Treasury Department, and it is a scheme of the most comprehensive character, and one which it is called to establish. That is all. But the court in looking at the offer of evidence in any particular case must regard the evidence in relation to the comprehensiveness of this indictment and of the scheme of the prosecution. It is necessary that there should be a conspiracy. If the conspiracy be established as charged in this indictment, then it comprehends all these nineteen or twenty different contracts and the service under those contracts. From the relation of the conspiracy those contracts become blended.

I have told you they had a large contract. No wonder they let it out. No wonder. And at this late day to simply whine about it and say, "Conspiracies are hard to prove. Won't you please help us out" will not do. They have charged a comprehensive conspiracy between eight men, sundered miles apart, separate in interest and antagonistic in feeling; no division of spoils, no unity of purpose that would make them liable for a single dollar purchased by one at the store of a Washington City merchant. And yet, as I repeat—

Until the echoes tire—

you cannot make one step towards an overt act or a circumstance until you have established the conspiracy, the partnership, unless that circumstance under the qualifications I have given you, springing from the party, from his own heart and motive power, is intended to and is legitimately conducive to the proof of partnership and agency one to the other. Is it not taxing the credulity of man? Are there not limits to human relief? Is it not taxation without representation or without the basis of intellectual food on which to build, to ask the jury on such a poverty-spread feast as this to feed and find the pabulum that will nourish the mind up to a conclusion that these men conspired either in holy or unholy purpose and made a partnership for aught on earth between each other?

At this point (12 o'clock and 20 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. MCSWEENEY. [Resuming.] If the court please, and gentlemen, I am reminded by my friend, Judge Carpenter, of a point that he so well

presented that I simply wish to refer the jury to his remarks upon it. The idea is this: They have themselves proved a couple of interior partnerships. The Vaile and Miner combination went off by itself and pursued its path from 1879 down. The distribution of that money is traced; that is, the drawing of the warrants and everything connected with its obtention so as to show that it was appropriated by Mr. Vaile to the payment of old indebtedness, contracts, subcontracts, and the honorable obligations that he had incurred, and that partnership went on its separate pathway in good faith, just as it purported to be a partnership when it was formed. The Senator Dorsey and Bosler matter took its course and its proceeds are traceable directly in open banking form; no meeting of Walsh to pass money on the streets, and nothing else like that, no covering up, but plain banking transactions. Now no principle of law would permit the idea that even for the sake of the argument, Vaile *et al.* had gone and formed some kind of combination, and Bosler *et al.* had gone on their hook and formed another kind of combination, improper in its character. These *inter se*, these split up transactions would not be the thing described in the indictment. And that, I believe, Judge Carpenter, was the idea that you wished me again to remind the jury of, and I do it with pleasure, but refer with confidence to your own elaboration of that subject. This money was traced yearly down in all its legitimate paths and pathways, as suggested by the judge, and itself is proved by the prosecution. That is *hari-kari*. They have killed it themselves, and they have shown the impossibility of the existence of any such thing as is alleged by way of conspiracy in this indictment, without any further elaboration of that idea, without wearying myself with reading.

Now I refer you to the celebrated case decided by the House of Lords of the Government of England in putting Dan O'Connell in jail, for talking liberty on the Dublin streets. There is the principle that we contend for exactly, that interior subdivisions, one power at one end and another at another, though both be wrong, do not constitute the conspiracy, the unit charged in the indictment.

The COURT. There was a double conspiracy proved in that case, and some were found guilty under one conspiracy and others under another conspiracy.

Mr. MCSWEENEY. The court is familiar with it. Your honor would get no light from my reading it. I know your honor is familiar with the O'Connell case, and every Irishman has an idea of it.

Now I want to show further what the court said, gentlemen, at a certain stage of this case on page 741. After we had traveled 741 pages, had got away down nearly into July. The court remarked:

You cannot divide it as you can an apple amongst several owners, but each one partakes of the character of the whole of all of the other ingredients of the combination. It is one whole made up of different parts, and all the parties according to the scheme of this indictment, in my view, have a legal interest in the whole and in every part.

Mr. INGERSOLL. That is, provided the conspiracy is established.

The COURT. Provided the conspiracy is established. Now, in regard to that question: In my view, the conspiracy has not yet been made out.

I read that from page 741. At that state of the proceeding, page 741, the court openly and boldly stated:

Provided the conspiracy is established. And now, in regard to that question; in my view, the conspiracy has not yet been made out.

And I ask you from nearly those first days of July when that utterance was made, on down, will you please to put your finger upon an item of testimony against my client or any of these persons that

changed or would change, in your view, the opinion that the court then had. Let me here remark, for fear I forget it, because this question has gone over to you, you must not get the idea that the court has any opinion on that subject. The court will tell you, and no one more candidly than he, that you are the supreme arbiters of the fact. Lawyers know on these questions what courts will say. It is not assumption in me to speak thus confidently as to what the court will say. The court will tell you that you are the arbiter of the facts. It is all for you, the credit you will give to witnesses, the force you will give to circumstances. All that is yours, and nobody will more firmly and emphatically say to you that nobody shall invade that province than his honor when he comes to talk to you finally. You will remember then that if at any stage of this case, at the close of the testimony, or at any time—it will come to you when you retire to your room. It would be convenient to you, and I merely suggest it, to first say, turning to each other, “Is there any conspiracy established at all by that quality of proof of which we have heard so much, by that class of circumstances emanating from himself, with authority given to others to bind him by other circumstances when he was not present, and by that class of circumstances that are proven each as fully as if the whole case depended upon it alone.” Circumstantial evidence, it has been well said, is to be measured in this way, and its strength tested. The figure is used of a chain—a chain of circumstantial evidence. We have to use figures of material things to convey to our inner temple and express to others the thoughts and the intellectual ideas that we may have of things. So poor and weak is language after all that we must use symbols. Therefore, it is said that circumstantial evidence may be regarded as a chain, and it is said that no chain is stronger than its weakest link, and the idea is finely expressed in the books. Why? Why you are going to apply it to a draft. Follow out the idea of a chain. You have your chain and your links. You are hitching it on to a load. There is a weak link down there. What boots it that ninety-nine of those links are made of welded masses of steel or iron. How does that help your load? The pressure comes and your chain is no stronger than its weakest link. Do you see? And so in the philosophy of circumstantial evidence all your chain is measured and its tension tested by the tenacity of its weakest link. And so when these circumstances here come to be brought before you, this one and that one, well enough. Suppose you find there is one which is weak. Hook it there and it will be helped by those strong ones. That is unphilosophic and untrue. Each and every circumstance must point to a grand center, must be proved beyond reasonable doubt, must speak potently. Its own language must emanate from the heart and conduct of the parties sought to be charged, and when all is linked together, it must be a strong chain, for if there be one single link missing it is gone. That sort of helps to illustrate the *corpus delicti*, the body of the offense, this *corpus* that you have heard so much of, and the books illustrate the danger of supplying any fancy for the convenience of this missing or weak link. If the circumstances are consistent with innocence, however much they might be consistent with guilt, that is only half the proposition. If they are consistent with innocence then the defendant or defendants whoever may have suspicion cast upon him, is entitled to acquittal. Now, if the jury fail to find beyond all reasonable doubt that there has been a conspiracy according to the indictment the inquiry goes no further. In the language of Burrill, without turning to the page, it is useless and unphilosophic

to commence inquiry about the committer of a crime until you first establish the existence of a crime committed. Melancholy instances have happened in the history of judicial proceedings illustrating the dangers of a departure from this rule.

A case is given in the books some place, like this: An uncle was made the guardian of his niece by his dying brother. The property was so arranged that this living brother should be her guardian, and on failure of issue upon her part he was to become her heir. On one occasion, in a wood close to the place of their residence, contention was heard between the uncle and the niece. She was heard by the passers-by to say, 'Oh, God, uncle, don't kill me.' The next morning the girl was missing. Suspicion was aroused. It was an English case. The officers of justice came around. The defendant trembled. He got to making curious excuses and statements about where he had last seen his niece. She remains absent; he is tried. These circumstances of her absence are shown. That is consistent with guilt. If she were murdered and made away with that is just what they would prove was consistent with guilt. The jury, to make it short, found a verdict of guilty of murder. They found the motive in the fact that he would be her next heir and her next of descent. It was fixed perhaps by the will, and perhaps by descent. I know not, and I care not. It is immaterial. That man was executed. The young lady arriving at age returned to claim her fortune over the grave of her executed uncle. She clearly makes out her identity and receives it. Now, the story was just this: He had detected the little girl in something that aroused his anger, and was punishing her in the woods by slapping her or inflicting some slight corporal punishment. The passer-by heard the little girl say, "Oh, uncle, don't kill me." And that night she packed up her little bundle, went out of the house, and crossed the British channel. Communication of news was not then as it is now. She never heard of the trial of her unfortunate uncle, and came back when she had arrived at the age of majority and claimed her fortune. And yet English judges sat and were not careful enough about exacting the proof of the *corpus delicti* beyond all reasonable doubt, and enforcing that other rule, that the circumstances must not only be consistent with guilt—that part was consistent, but that is only half of the proposition.

The COURT. Is that the case of Lord Cowper's brother, told by Macaulay?

Mr. MCSWEENY. Indeed I have not seen it for years, and I was trying to look it up in Burrell on Circumstantial Evidence.

Mr. HOUNSHELL. It is in Starkey's Evidence, your honor. Spencer Cowper's trial your honor is speaking of?

The COURT. Yes; I am talking about Spencer Cowper's trial. In that case the accused was convicted by the jury, but he was pardoned.

Mr. MCSWEENY. Is this that case?

Mr. HOUNSHELL. No, sir; that is by Sir Matthew Hale.

Mr. MCSWEENY. I have used it on occasions as illustrating this point, and it makes it more tragical, because the man was taken to his death under circumstantial evidence.

The COURT. The case I am speaking of is the case of Spencer Cowper, the brother of Lord Cowper. It took place long since Lord Hale's time.

Mr. HOUNSHELL. The date of that case was 1799.

The COURT. Yes. The girl was a Quakeress, and the Quakers arose in arms, although they were peaceable people and opposed to taking life. But, under the circumstances, they all made a clamor, and there

was turbulent excitement against Spencer Cowper, and under the excitement he was convicted. But you may be referring to some other case.

Mr. MCSWEENY. The books are full of circumstances that make truth appear stranger than fiction. The books that carefully look into that are full of startling importance, and make the study of the criminal law fascinating. They deal with life and liberty. No mock heroics on the mimic stage. They are full of reality. They make us stop and pause. They make a jury carefully and conscientiously stop and apply these great principles, and make them living things as you pass along.

You will be called upon when you retire to the jury-room to say, "Is there proven a conspiracy?" You will remember that the court has never taken that from you. If you say "No," that ends your investigation; if "Yea," who, when, how, where, what? I will not repeat. I simply wish to bring to your attention that all this time, because the case has gone to you *non constat*, that it goes to you under judicial sanction or opinion or expression of view in any shape that anything has been proved. See if I am not sustained by his honor on that. You are unhampered, unembarrassed to enter upon that subject like free men with free, unharnessed thought. Just think of it, and think of the propositions that I lay down if they are worthy of your consideration. I have thrown out hints to help you to investigate. If you are trying it upon a mere question of partners, as I repeat it, which is the best of all conspiracy, will you please to commence and tell me where the liability of one or other of these parties would be for a civil debt for an act done by the other? If the court please, something has been said about confessions. Let us make that brief. You have said on these pages that a confessional statement can only be received as against the party making it. I wish to call your attention to and puncture some bad law of my brother Bliss upon this subject, and it is as good a way to commence the discussion of the proposition as any. On page 117 Mr. Bliss, in opening to you, said:

Now, that is the confession of one of these conspirators. As to that, I think the court will instruct you that a man's confession that he has been guilty of a crime is evidence against him, though that crime is conspiracy, just as much as his confession of any other crime; that moreover in conspiracy when you become once satisfied that certain persons are engaged, then the act or declaration of any one of them made while engaged in that conspiracy is also evidence against all the others. Therefore, if you become satisfied from other evidence or from all the evidence that at the time of Rerdell's confession the conspiracy was then still in progress, then the statements of Mr. Rerdell will bind them all.

I guess not. Mark the fallacy.

The COURT. Well, he has assumed that the conspiracy was in existence, and that these confessions were made in the course of it. I suppose that is what he meant.

Mr. MCSWEENY. Then it is bad law. Your honor has said the confessions of a party before conspiracy—I will commence there—could never help to establish it. Secondly, after it is over, likewise the same doctrine. Now, that is the position at that end, and that is the position at the other.

The COURT. No; I think I have expressed the opinion that after the conspiracy is over his confession will be accepted as against himself.

Mr. MCSWEENY. Oh, certainly.

The COURT. But against himself only.

Mr. MCSWEENY. Now, then, the fallacy of brother Bliss is having disposed of it at that end. But mark the fallacy:

But if at the time the confession was made the conspiracy was still in progress, then the statements of Rerdell would bind them all.

How so. The doctrine of conspiracy——

The COURT. [Interposing.] He has not submitted that proposition to the court yet.

Mr. MCSWEENY. No, no, and he has argued no law. He never said law once in two days of opening. Brother Ker did not either, except that he said that a conspiracy properly defined was an illegal combination. In their six day's work I have not had the benefit of the views of those gentlemen as to what they claim upon that subject. They have been six days here working out chaos, and made chaos more chaotic, and confusion worse confounded, and a confounded sight worse.

But I want to puncture that bad law for all time, even as part of my argument, with your honor's permission. Why should there be any distinction made by brother Bliss that if it were before, it could not be received against anybody but himself, if after, against nobody but himself, but if the conspiracy was still in operation and then a man made a confession it would bind the others? The doctrine that we have had so often repeated is, that the agency extends to carrying out the object of the confederation, the partnership in business authorizes one of the partners to do the work of the partnership. The criminal combination has also business on its hands, the same as the civil partnership, only it is going to descend to legal means. Now, then, the confession or statement of an act done by the confederation must be something in effectuating its object. But whilst it is in existence one man goes and gives it away. Is that effectuating its object? Whoever in forming the conspiracy or confederation by express or implied power, told the other to go and uneffectuate the object when the power to bind is only something to effectuate it? There is the fallacy that brother Bliss fell into. Let me illustrate this. Where is somebody who will do to serve in the administration of a conspiracy. I will take brother Totten. Brother Totten and I sit down——

The COURT. [Interposing.] I do not think that it is worth while for you to exhaust your strength any more than is necessary about this matter. I have not been asked for an instruction yet upon the subject by either side; but in the course of this trial, the court had occasion on two or three different days to give expression to its views in regard to this very matter, and they amount to the proposition that you have laid down; that is, that a member of a conspiracy has no authority to bind the others by confession, unless what he has said, has been in the execution of the purposes of the conspiracy whilst he is engaged in that work. That, I think, is the law.

Mr. MCSWEENY. Undoubtedly. It was because I found it there without any qualification that I intended to show that if two parties—I will just go on briefly with the illustration—were to sit down and say “We will go to-night and break in and rob Mr. Dickson's house, or we are going to pick some suitable dark night, we have not just fixed that time, we will do it.” I repent. I sneak right off from the confederacy, I leave brother Totten, if that is the man who is with me. Says I, “Look here, wake up, I want to reveal a thing to you.” The conspiracy is in existence of course. “Brother Dickson, we have laid a plan to get into your house. See well to your locks the first dark night. I have just left the conspiracy, but I have repented and I want to tell you. My fellow conspirator don't know I have done it. Suppose my friend Totten and I met down here at the Riggs House to-night to rob you, and the conspiracy so far as he thinks is in full blast; and not to effectuate the object but to uneffectuate it, I went to you and gave you warning. Who would call that an overt act? Supposing the officer of the Government should find that we two have plotted. The Government

officer would say "Hold on. I must look out for an overt act. Wait until I get an overt act. We have to allege the overt act." Would it do to allege for the overt act that I went up and told brother Dickson? Certainly not. It is not an act in furtherance of the conspiracy and therefore I drop it without further illustration. A confession, as the court said, in order to bind anybody else must be in furtherance of the act and not in its unfurtherance. It breaks the implied law of agency. It is not honor among rogues. I never authorized you to go and tell. The very object of the conspiracy and secrecy is not to tell. Who ever made you an agent to go and tell? That may be important at a stage further on, but I intend to be brief and will not weary you unnecessarily.

It is said that Mr. Walsh gave testimony in this case that is worthy of consideration. Mr. Walsh says that in December 1880, two years of the conspiracy having run as alleged, that he went around to see Brady. He sent him a note, and had an appointment in an open office owned by General Sheridan in the city of Washington on one of your leading streets. He tells you a story that I wish to call your attention to and that is all. I will not say that he is a liar. It is always better to prove a fellow a liar and let the nomenclature come from the audience that hear it. Prove all things, even that a fellow is a liar, and then hold fast to him when you have got him. Walsh tells this remarkable story: In 1880, in the month of December, he says he went down to Sheridan's office, and that thereupon Mr. Brady came in. Said Walsh to Brady, "My financial circumstances are not such as they have previously been and recently existed." That is a thundering curious kind of prologue for a fellow to commence with, between men seeing each other about fifty times a day. "My financial circumstances are in a more dilapidated condition than they have previously been up to the present and subsequent period," or words to that effect. "I would like a settlement." Thereupon, says Mr. Brady, "Have you the data?" Who, in the name of Heaven, ever heard such talk? It is too high up for me. It is too stilted. "Have you the *data*?" A fellow out West coming into our office and talking about *data* would be thought to be dealing in dates, and he would ask him how much they were a keg. "Have you the DATA?" "Thereupon," he said, "I produced the data." That is a new name for notes—two datas. First, it was one data, or datum. He first swears distinctly to one in the proposition that was handed in by brother Bliss here:

I shall offer to prove that he went in and laid down a note, and that Brady took up the note.

Just mark which way the wind blows by the straws. You do not go out to see whether the barn is turned around. You go out to the straw pile to see which way the wind blows. That is the way you get it. Just mark this. Mr. Bliss says what he expects to prove—I am going to turn to it if it takes all summer; for it is by these little things that you get the run of a made-up story. I read from page 1669:

I propose to prove by this witness that about the time the routes mentioned in the indictment were increased and expedited, Brady, one of the defendants, ordered the expedition and increase of other routes, including the one in which the witness, Walsh, was interested.

Now let us stick a pin there. So Brady did order an expedition for Walsh without conspiracy, did he? Do you see that?

I expect to prove by Walsh that at the time some of the expeditions in this case were made he also made one for Walsh in which he was interested.

When it was afterwards attempted to levy 20 per cent. it was shown

that the route was increased from \$74,000 up to about \$125,000. He did not do that on a conspiracy, did he? Do you see that? About the same time that he had done these things he had also expedited a route that Walsh was interested in. Why hadn't he fixed it before and there would have been no occasion for this after fuss? That would be way back in 1878 or 1879, or somewhere along there. Now, what? He stated to the witness at that interview, that when contractors obtained such expedition of their routes they always paid him, Brady, for making the expedition; that he was always to receive 20 per cent. of the amount to be paid to the contractor; that such was his—what? Contract? No; that such was his invariable practice in every case, and that the witness, and everybody engaged on mail routes knew, and understood that this was his practice; and that, having ordered expedition upon a route upon which Walsh was the contractor, with an allowance of pay, therefore he, Brady, claimed in settlement with witness an indebtedness due by Brady to the witness, for money loaned by the witness to Brady; that he, Brady, was entitled to a credit upon such debt to the amount of 20 per cent. on the amount ordered to be paid for the expedition; that if he, the witness, did not understand it, he must be a fool; that he, Brady, did not make these expeditions for fun; that the witness must conform—to what? To his bargain? No; must conform to the practice of his, Brady's office. To his practice of extortion. Why I see oceans of proof here, even in this story of Walsh, to knock the idea of a conspiracy higher than a kite:

That he, Brady, thereupon made a calculation of the amount due by the witness for the expedition amounting to over \$30,000, and thereupon took from the table the promissory note—

That is just what Mr. Bliss said—

given by him to witness for part of the loan so made and put it in his pocket, claiming that the same was paid in the manner before stated, and that the promissory note had only been given as a matter of form.

Then, further along, Mr. Bliss got up and says he, "Oh, if counsel will permit me to interrupt them I want to offer further proof," and then he also said that the petitions were mere matters of form. Now, I want to show you how this was emphasized by the reading of brother Wilson:

Mr. WILSON. I have it here.

Mr. HENKLE. [To Mr. Wilson.] Read it.

Mr. WILSON. [Reading.] And that he took from the table the promissory note; and further along Mr. Bliss added this: And that Brady further stated that petitions filed asking for increase were only matters of form to make on the record an excuse for his, Brady's, orders.

The COURT. Mr. Bliss amended his offer, and I suppose Judge Wilson makes reference to that amendment.

Mr. MCSWEENEY. Yes. I could not just get my eye upon the manner in which Mr. Bliss made it. On a page or two afterward he said "If Mr. Ingersoll will permit me, I wish to state further," and put in that addendum.

Now, then, I want to go to the testimony itself. Mr. Walsh says that he went in there and then Brady asked him if he had brought the data with him. I read from page 1700:

I told him that I had. I gave him the amounts and laid the notes—

The first time plurality ever occurred—

of General Brady on the table, and said that the matter was all settled so far as I understood as to dates, &c., but that the matter of interest was still open, and that I wished to discuss it with him. I told him that if he would recollect, there was no agreement as to interest, &c., and that I would leave that to him, he being a person

engaged in commercial operations of a large character, and that he could, I think, determine it, and that certainly we could between us, so that there would be no room for argument. The general looked at the memoranda that I furnished and seemed silent, and he remarked he thought I was in error, that he did not really think that I thought I owed him.

Q. That you owed him?—A. [Correcting himself.] That he owed me; really did not think that; that he had benefited me very largely; that he had given me a very remunerative contract—

Without any agreement, mind you—

and that generally he thought there was no obligation so far as he was concerned. I asked him to explain. He said he thought that I did not need any explanation; that he was of opinion that there had been enough seen by me to indicate what the usual arrangements were. I asked him to explain. He went on to explain without any hesitation. He recited the fact that my route had been expedited, or the service had been increased, whatever the terms are, and that I must not suppose for a moment that it afforded him any special amusement to indulge in those things. I did not know whether it did or not, I responded; that I thought the law in the matter had governed him, the fact being that petitions had come in for an increase on that service, and that generally I did not think he was right in the position assumed.

There they had discussed petitions. I want you to watch this:

He said there was no use in arguing that matter, and that if I affected ignorance that it was sheer affectation on my part. I asked him to please indicate in figures what the terms were. He told me that as a rule it was 20 per cent. per annum on the amount of expedition. That is, the sum increased in money was what he conceived to be his pro rata of the enterprise. I asked him to please figure and see what that amount would be. He called my attention to the fact that the increase in round numbers had been in my case from \$74,000 to practically \$135,975. * * * He then reminded me of the fact that I had been requested to pay \$8,000 to what was known as the Congressional corruption fund.

I turn now to page 1702:

I refused, and General Brady told me that I might do as I pleased about that, but that he was of the opinion that the best thing I could do would be to sell out. I replied that I had been willing to sell out, and if I could find a purchaser even at a sacrifice I would sell out. Before that he had taken up the memorandum and the note and put them—

The memorandum and the note—

in his pocket. I asked him what he meant by doing that. He said he meant to settle the matter; that was his notion of a settlement. I told him my remedy lay in the courts; I would have recourse to them; that his conduct was outrageous; that viewed from any stand-point, waiving the morality altogether, it was an outrageous demand for any such sum of money.

And after that he put the notes in his pocket, and says he, "Walsh you had better sell out," and Walsh replied, "Well, if I can find a purchaser even at a sacrifice I will set out," and he got up and left. That ended substantially the interview, although something may have happened that escaped my attention. You see brother Bliss had to put in as an addendum after he had read the original offer—the matter about the petitions. When Walsh was asked about the petitions, says he, "Why, Mr. Brady, I thought petitions came in all along here to justify this increase." He don't say there they are matter of form. Says he, "There is no use of arguing this matter. If you have not noticed things you are a fool." They have not got that thing fixed right. They passed that. He ends by saying that this was substantially the conversation. There was a screw loose somewhere.

By Mr. BLISS:

Q. Oh, was anything more in detail said as to the practice of other contractors?—A. He referred me to the fact that I had seen enough if I chose to observe. I asked him what he referred to. He said he referred to the Peterson matter, and to the Congressional appropriation for Corpus Christi and Price, &c.

He has not got it out yet.

Q. What did he say, if anything, about petitions and their effect?

Lord! He couldn't bring the fellow up to it even after having it read in court, and Mr. Wilson rereading it. I read from page 1700:

I told him that I supposed petitions that had come in asking for that increase were the occasion of it. His answer to that was that he would not argue this question.

That was his answer to petitions. How simple the truth is, and how tortuous and winding is the path of falsehood. It is like the toper who drank off the water and left the gin and sugar. "What about petitions?" I told you yesterday that Walsh had sat here for a month, and had heard his honor say time and again "These petitions appear to be genuine, signed by Representatives and Congressmen, and asked for by the people, and whether right or not it was the voice of the people out there asking for this thing," and your honor said, "If I were Brady under the same circumstances, I don't see why I should not have granted these petitions." Brady must be stabbed, and the cunning Walsh, after making out his programme to brother Bliss beforehand, then put in the addendum, as much as to say, "I will puncture that. I have watched the court on that. That is helping Brady. He is going to fall back on these petitions. I urged it myself that here were petitions that were put in on these matters. Why, says I, 'There were petitions for increase and expedition. What do you mean?' Instead of saying the petitions were a mere matter of form, says he, 'I won't argue the matter with you. If you have not noticed the matter enough you are a fool.' This ended the conversation and is substantially all that happened."

Now, way down on page 1702:

Q. What did he say, if anything, about petitions and their effect?

The court knows the dodge—if there is any at law, which I deny—but there is sometimes something that looks a little like circumvention to get into a witness by a leading question, and they think they get rid of it by putting in the magical words "if any." I have seen more mischief done by that fool thing than would take the balance of the day to relate. You must not ask a leading question, but say, "State how this fellow told you out at the corner that he raised his gun and pulled the trigger and shot down John Smith just as he was coming across the street, IF ANY." You have cured it like the mischief by sticking on "if any." Now, see this little dodge:

What did he say about petitions and their effect, *if anything*?

Lord! IF ANYTHING! "What did he say about petitions not amounting to anything? You have forgotten, Walsh, and I want to get it out of you. We have been going all around it, but we have not come to it. What did he say about petitions and their not amounting to a confounded thing, if anything?" Pshaw! Pshaw! It was a trick unworthy of being perpetrated at the trial of a spavined horse before a justice of the peace. "What did he say about petitions, if anything, and their effect?" "Oh, yes; I had nearly forgotten my part. What did he say? Why, I told him that I thought he was acting under the law and in accordance with the law." He told us that before. That is not on a new subject. He said in answer to it, "There is no use of arguing it, and I will not argue it with you if you have not seen enough." He commenced back there. "I told him about the petitions, and acting in accordance with the law and the petitions. I cannot put it exactly in his phraseology; but that the petitions were simply intended to enable him to act under the law

and in accordance therewith." That is an almighty distance from the offer after all, is it not? Brother Bliss said, "I expect to prove that he said that the petitions were got up as mere matters of form;" and even with all this thumb-screw process the offer is larger than Walsh had the memory to swear to. He had the conscience, but his memory failed. I am not saying to him—

Let not conscience make you linger—

He has not got any. It is memory that failed.

I do not think that he exactly put it in this phraseology.

Oh, the trembling falsehood—

I do not think that he put it exactly in this phraseology; but the petitions were to enable him to act in accordance with law.

Well, that is a horse of another color. A pretty good answer. To act in accordance with the law. How far that falls short of the proposition made by brother Bliss. He says, "I expect to prove by the witness that the petitions were gotten up merely as a matter of form," and it finally comes, with all his hesitations, to simply this:

The petitions were to enable him to act under the law and in accordance therewith.

This is pretty good. To act in accordance with the law is not so bad. "In accordance," is good. Did you notice these curiosities as this matter proceeded?

Does anything else occur to you now—

says Bliss. "No, not now." He had not even another leading question to stick in, with his "if anything." I tell you the magicians exposed their box there. You could see under the table. I could. The proceeding was perfectly plain. Now mark it:

Listen, oh, heavens! and be still, oh, earth.

Just listen to the tale. Walsh is a man of broken fortunes and he had one note that got to be two. If the case had lasted a month more, and he had been recalled, there would have been a dozen—data. "Have you got the *data*?" I think Brady is an Indiana man, and I don't think data has traveled out west of the Ohio. He is an Indiana man. Judge Wilson, when he lived out there, told me in a private conversation that they used to call them notes; and I believe if Brady had been really asking about \$25,000 worth of notes he would have said, "Have you got *them* notes with you?" He would have said "them." He would not have stuck in "those." "Have you got *them* notes with you?" "Yes, I have got them here." It is the funniest excuse for this fellow to pull out his notes. He has to get them out in some way. "Have you the *data*?" He didn't say he was going to settle it, but he said, "Have you the *data*?" "Yes, there is the data." Well, they are lying there; those two notes. Brady says, "I aint going to pay you; I don't owe you anything; I expedited your route, and I am going to make a calculation, and I am going to pay it that way. I don't owe you a cent. Well, Walsh says—

Mr. KER. [Interposing.] He says that he twisted the notes up.

Mr. MCSWEENY. Brother Ker says that Brady sat there twisting them. Let us take it that way. I go to you, brother Ker, with my \$25,000 worth of "data," and you just sit there and twist them. Will you?

Mr. KER. You are doing so well I don't like to interfere.

Mr. MCSWEENY. I just want you to sit there and twist them, and keep saying, "Most outrageous transaction. I don't owe you any money on these datas." If that had been my paper, how long would he have twisted it? But he has to get out his data. There must be a *corpus*

delicti, you know. There must be the notes, *relict*i. They must be left there so that they could be conveniently taken. He might have said in the language of a famous case that I will not give now:

I know you are strong enough to take them.

There they are. Very well. "I don't intend to pay them." "What are you going to do?" says Walsh. "Well, it is the way I settle." "It is? Why," says I, to Mr. Brady, "laying aside the question of the *morale*, is not this rather a preposterous transaction?" Says Brady, "Sell out;" and the last statement to him was, "Well, if I can find a purchaser even at a sacrifice, I will," and that substantially ended the interview. Now, was there nobody engaged on this contract to believe that? Have you got anybody that has agreed to believe it. I will take it on halves and believe one end if you can get another fellow to finish out the contract. You ought to try to get it done on a job, because no one man could swallow it all. Twenty-five thousand dollars; all that Mr. Walsh had; loaned under circumstances like these. He met him in the street and handed him the money. There must be no check. Do you see what that was for? Walsh was a banker. He of all men knew the importance of an obligation importing the indebtedness of one man to another. It dispenses with proof. Now, he knew that those notes constituted all the evidence he had on earth, and he knew if the man would steal the evidence of his property that that would be the end of the transaction. It was peculiarly a case where he would fight for his life and up to his life's peril before he would be thus deprived of all the evidence he had on earth, for he had to dispense with the proof by check. There was no other paper passing between them. There was no memorandum on his books. In order to clear out the kitchen and clear the decks he says: "I took my books as a banker and gave them to a restaurant-keeper, and that closes the concern—to a man by the name of Felker. I took my bank-books, I, the scholastic graduate of college, the man of business; I thought I would close the thing up by carrying over my books and giving them to a restaurant-keeper"—to stew oysters with. He is bound not to have any papers around; not a paper. He didn't sue Brady until way in the next year, July or June, 1881.

Mr. Totten has talked to you about the inconsistencies of the various amounts. I will not go over that. I wonder if it was not noticed in the world that here was a curious suit for a large amount of money and no evidence of indebtedness. I wonder if he did not think this was a good place to put in some data, even though he would destroy them with the breath that created them. Hadn't he better bring some notes forward? I think, considering the nakedness of the case, that he wanted to clothe it with the fig-leaf of some notes. Right there: Was ever a scene like that and a man? He is given the cool advice to sell out. He gets up, \$25,000 gone:

Not the least obeisance made he,
Not a moment stopped or staid he,
Not even a parting damn to Brady,
As he stalked out of his door.
This it was, and nothing more;

and scarcely this. Did you ever see such a scene? A man going away out into the cold, cold world, with his \$25,000 gone, in the hands of a thief and a robber. As I said when he was on the stand, why not rush at him and from the robber rend his prey, because it was yours? Again, Brady was in office. It was in December, 1880. A new dynasty

was coming in. They have told us a dozen times that he was preparing to get his house in order either to leave or to be his own successor on good conduct. There had been an examination in 1880 by the Congressional committee before the passage of the deficiency bill. In January, 1880, this took place, and the interview in December, 1880. He knew all about this and about the new administration coming in and yet he robbed a man of \$25,000, and then said he, "Here; don't go yet. Don't go. We are going to part as enemies. I have robbed you; but I want to tell you what kind of a villain I am. I am an officer of the Government and I want to tell you that there is not a man who comes in here for expedition or increase of service, but what I levy blackmail upon him. Now, go. Go, Walsh:

Here, Walsh, I give myself away; 'tis the worst that I can do."

Was ever scene like that? An officer high up, within a step or so of a place at the Cabinet table, to tell his enemy as he goes into the world, "Go out and blast me. I have given you plenty of data. I tell you that everywhere, wherever there is a contractor on all these nine thousand routes, when expedition or increase is wanted, there shall I be found a robber and an extortioner. Now go. Sell out. Go, go, go!

Stand not on the order of your going, but go at once.

Pshaw! And you are asked to believe that. Walsh don't believe it. He has too much mind. He is too smart a fellow to believe it. Would Brady place himself in the hands of that man? I wanted to cross-examine him, but the judge sort of intimated that it was not our show. "But," says brother Merrick, "I will ask brother Mack's question. He is anxious to know," says Mr. Merrick to him, "why you didn't do something?" "Well, I am a man of peace. I respect the law." Let us stop there a moment. "You respect the law." What law would you invade or break by grasping by the throat the man who is robbing you of your property? Tell me by what refinement it is that you stand while I take your watch or your note? If it is your horse you would have some chance of going and identifying him. You can't swallow a horse. You can go and find him. But these impalpable evidences of debt, these notes that perish in the flame, who would stand that? Why not rush out, saying nothing about personal conflict now, and cry, police! Come in here! My notes have been taken! Search him! If he is swallowing them choke him! Help! Wife and children depend upon this. It is all I have got." It is said that faith as large as a grain of mustard seed will enable a man to say to a mountain, "Be thou removed," and it is done; but you may indulge in a peck of that article, you may take a barrel of mustard seed and the mind cannot be mustered into the belief of such a monstrous story as that. Nobody believes it. It was thought because these men were under this cloud that your credulity could be trifled with and presumed upon. Brady has been hounded and the press set at him to head every column with the word thief, thief; but who thought that public opinion reaching even a juror's intellect would be so debauched that this falsehood would be believed? He never swore to it before did he? That was in 1880. He brought suit simply upon memoranda. He never said "note" in 1881. He brought another suit in New York and never said "note." He talked to his attorneys and he never said "note." He says the reason for that is he did not want scandal. On whom would the scandal be? On the scamp who took his notes. Did you ever say anything to Brady about those notes? You pass each other every day. "I guess so." Did you ever tackle him and say, "Brady, Brady, was it not a sort of joke? What did you mean?"

Not a word, but when the exigencies of this case required it, having never spoken to anybody else about it, he went to Woodward, he says, and made him his confessor, and mentioned these notes. Eighteen hundred and eighty, 1881, and 1882. Was ever another spectacle of Christian forgiveness like that? I can begin to understand now some of those passages of Scripture that I used to be troubled about, something about if a fellow takes your coat give him your cloak. I think now that, according to the testimony of Walsh, that if a man would come in and clean the rack of coats, Walsh would say, as he was going out, "Hold on, my friend; I will send some of the servants upstairs. I have a real good cloak. I will get it for you." Then there is a passage to the effect that if a man asks you to go with him a mile you should go with him twain. I think if the thermometer was 125° in the shade, and somebody dragged Walsh a mile, he would say, "Well, I have gone with you a mile, and I will go with you another mile, if it takes all day, and if I melt." If a fellow would hit him on one cheek I think he would turn the other—only I don't, until he had hit him a lick back.

Brother Wilson has called my attention to page 1718, on the subject of Mr. Walsh:

Q. At the time you took this contract, what arrangement was made with the Second Assistant Postmaster-General for the expedition of the service?—A. None whatever.

Q. What was said about it, if anything?—A. I went to the Second Assistant Postmaster-General when I offered the service at \$18,500, and asked him whether, if I took it at that rate, I could reasonably look for any expedition, and Mr. Brady was not in a very communicative mood, and just told me I could do as I pleased about it; that I could take the contract or not just as I felt disposed; that he had no suggestions to offer; that he had nothing at all to say on that subject.

Do as you please.

Mr. DICKSON. [The foreman.] Whose testimony is that?

Mr. MCSWEENEY. That is the testimony of Mr. Walsh. It is at page 1718. You know I said a while ago, and that is what suggested it to Judge Wilson, that it proves positively to us that expedition, &c., was not the result of an arrangement with him, and he refers me to page 1718 as to what I have just read. This was brought out by Judge Wilson by referring to his oath before the Congressional committee.

Did you testify to that?—A. Yes, sir.

Q. That was true, was it?—A. That is true, sir.

Now, then, supposing the story of Walsh to be true. Had he consented that day to be bled? I want to call your attention to page 1702. That I did not read:

Price being financially embarrassed had given those drafts, all of which I took rather as argument that I should not refuse to accept the rulings of the department.

He looked upon it as nothing else, according to his own story. Now, then, supposing Walsh had been placed together with these defendants as a conspirator, and supposing his contract had been brought in here raised from \$74,000 to \$135,000. Would they not have had an elegant apparent case according to their stand-point and their theory against him; and yet, according to him, he had an increase from \$74,000 to \$135,000 without any arrangement or intimation that there would be an increase of service. So that you see you could take and make a case like this and bunch and bundle anybody of the seven thousand contractors, throw them in hurly burly and say that because there are similar contracts and similar kind of conduct and similar increases and similar additions of horses that similarity makes unity. Similarity of conduct in different directions no more makes unity than to prove that

in this town there are a dozen men engaged in house building and contracting in the same line.

Now, gentlemen, supposing that stood alone in a civil suit. I like to try a thing that way. Supposing upon that kind of an oath it had been said he wanted to recover something in a civil suit. Supposing now there were no other testimony than just that. How long would you hesitate in discharging Brady from a claim for \$25,000 on two lost notes. Take that with you to your jury-room. Mr. Walsh had been before the grand jury. He says that. He either told this story or he did not, I do not care which.

Mr. WILSON. He says he never told it until he went before the grand jury.

Mr. MCSWEENEY. Then he did tell it there and under the management, I do not mean improper management, but under the supervision of brother Bliss to see that the points would be brought properly out without any cross-examination.

The COURT. I think, Mr. McSweeney, you cannot go into that subject.

Mr. MCSWEENEY. I did not propose only to say that he had been before the grand jury. Now as brother Bliss has talked about ringing up curtains and managing the stage, I advise him when next his performer appears to change the scenery and no longer make the play a melodrama; and if it appears next fall let us have it announced as a roaring farce and change all the scenery and everything else to make it acceptable. But they offer it seriously against a man's liberty with all the surrounding inconsistencies and most palpable motives against its truth—long concealment of a wrong like that and upon the ground that he did not want any scandal. And yet he comes in here full mouthed and he scatters scandal widespread. He talks about a corruption fund to apply to a committee that was sitting in Congress to investigate this, throws his slime worse than the venom of the Nile over everything. What becomes of his detestation of scandal? There is no man too high, no man so low but is bedraggled with his slime and innuendo on that stand. He talked to you about a corruption fund that was necessary up there at Congress. Oh, gentlemen, he dreaded scandal, didn't he?

Brother Bliss was very short in his remarks on Mr. Walsh. A short horse is soon curried. He says, "You heard the statements of Mr. Walsh. They must be believed if nobody was called to contradict him." No, they must not. Now let me read for my argument from page 52 of 2d Ohio State Reports, a decision by Chief-Justice Thurman. Judge Thurman is known in this city. A brighter, purer, better man never adorned the bench and gave glory to it, than he on the Ohio bench. No man at the bar came up to his shoulders. No man in the Senate was more than his peer. You have known Judge Thurman among you, and what he has to say comes directly in point. In the case of French against Millard, the court were asked to instruct the jury:

That it is their duty to give credit to the statements of each witness unless contradicted by other evidence; that in order to discredit the testimony of a witness on account of his general bad character, the witness who is called upon to discredit the witness on account of general character, must prove that he is acquainted with the witness's general character for truth and veracity.

That point is disposed of. I pass it.

The first clause affirms that it is the duty of a jury to give credit to the statements of each witness, unless contradicted by other evidence. How is this to be done where, as is sometimes the case, a witness's statements are directly at variance with each other? And is the jury to be told that no matter what is the manner of a witness; no matter how many and gross are his contradictions; no matter how apparent may be his ignorance or incapacity; no matter how manifest it may be that he has manufact-

ured or is manufacturing his story; no matter how clearly his willingness to swear falsely may be seen; no matter how incredible may be his narrative, he must yet be credited "unless contradicted by other evidence."

Surely, surely this would be placing witnesses on a curious level. It would be strange law to say that each and every witness is to be considered entitled to the same credit as other witnesses unless contradicted. There is no such rule of the human mind. These great rules of judgment are written in the intellect. They would exist if a universal conflagration would clear the shelves of every law book. Man, constituted as he is with not a book in existence, furnishes his own rule for the judgment of the improbability of stories, and hence, when they lay down that rule I lay down Judge Thurman, who says it would be monstrous to make any such procrustean bed to measure each and every witness alike if he is not contradicted. It would be flattery to contradict such a man. It would be yielding too much to put any witness in antagonism with a story so foul. A man smarting under such wrong concealed for two whole years with the expedition of the Government in his pocket, and then the expedition of his oath as quick as the winged lightening and swift as traveling thought keeps pace with the expedition in his pocket. A man is to be believed unless he be contradicted.

Suppose brother Ker would come in this morning, as much as I esteem him and his veracity, and say to the court, "I am a little late this morning, I did not get in until a little after ten; I had to come a couple of hundred miles since breakfast, and the horses were not there and the railroad had left me"—yes, the railroad. You might as well fix it up right—"the railroad had gone, but I had just to start out and walk this couple of hundred miles, and it took me three hours, walking pretty smart, to get here." Supposing something depended upon the truth of that story. As much as I respect my friend, I would simply commence saying, "The man is beside himself; hath much Government prosecution made him mad?"

Mr. KER. I would not tell such a story.

Mr. MCSWEENEY. Certainly not. Now I read Bliss, "Now, the said Ker shall not be discredited unless some witness shall contradict him." Now, the probability or improbability of a story can be judged in the ordinary affairs of life by the jury. I would not have to call in some witnesses. How far can a man tramp, even a Philadelphia lawyer. What is his gait? I wouldn't have to prove that.

Gang the gait ye came again.

You could not prove that. And so when this man tells this monstrous story, when he thinks the storm has broken on Brady's head, when he thinks that anybody can be believed against Tom Brady, thinks he, "now is my time, I will try it on here, I have got a civil suit, I will go around and try how the medicine works, and if it is successful with this jury I will try it in my civil suit, and bring out the data and put in two notes, but I want to see what this jury think, may be I had better stick to that memorandum, and not use the notes; just wait and see what this jury think of it."

Now, if the court please, these same remarks relate to the non-applicability of a confession unless there is a proof of a *corpus delicti*. We will apply it to Rerdell or any other pretended confessional statement in the case. The principle one laid down to a sensible jury, mere elaboration by enumeration of more instances does not add to the intellectual processes of thought, or strengthen or increase the basis on which my argument is built.

Now, I am going to cease wearying you and them. I have, in my feeble, stuttering, stammering, poor way told my tale before you. I ask you if I have distorted testimony. I ask you if I have not kept down to the plain base of common sense where common men may understand me. I ask you if you now see the propriety for any warning of my friend that I would get away from the facts and attempt to steal your judgments from sitting in solemn consideration upon the facts. Have I? I have read you line upon line, page upon page. I have not stopped to consider. I cannot now read the testimony of Sherman, of Teller, and of all these men. I have not asked you, "Is it lawful to carry a mail, sworn to by those men." I am asking the question beyond Brady. They are asking if it was lawful to put this service upon the route. Was it lawful to carry it? What is the matter with anybody carrying the mail. Some mails a man finds do not pay, in the sense of payment. Perchance, in the changes of business, the mail does not pay. Then a man, if it do not pay one month would be innocent, would he; and if it would fall below payment the next time, then he would not be innocent, would he?

And so about this talk of horses; that I must mention. In these matters of opinion, Mr. Taylor and Mr. Perkins give me all that I want upon that subject. Mr. Taylor and Mr. Perkins were partners. I will read the testimony of Taylor and Perkins. It is so full of argument, and speaks so fully for itself, that I would like to read that evidence. Here is Mr. Perkins, at page 1129; let me first tell what I want this to illustrate.

This matter as to how many horses it will take, how many men out in that new country, is a subject out of the way. The witness may put his language in, and in the very nature of it, it is but the subject of conjecture. Does the court understand me? There are some things that, however, you may phrase them in their very nature, are estimational or conjectural, independent of phraseology. Thus: How many horses will it take for four years or one year upon a new and untried route out in the wilds? What do you say? I say it will take so many. I may say it positively, and yet if the court please, is it not the subject mentally of estimation. That is my point. You say that it depends upon the driver. It depends upon the quality of your stock. It depends upon the percentage that may be allowed for unexpected weather. You may make some contingent leeway for Indian depredations, and therefore I make this application generally to whom it may concern. Wherever an affidavit comes up swearing to these matters, I do not care how it is phrased. I trust the court will permit the jury, in estimating whether it is intentionally false, to consider the nature of the subject-matter. Now let me read you page 1129. I break right into it:

Q. Then eleven men and thirty-two animals is rather too low, isn't it?—A. Eleven men is plenty.

Q. But thirty-two animals is not enough?—A. You can estimate it all the way from twenty-five to thirty-five animals, taking the winter and summer. You have got to have some extras.

Q. Then when a man makes an affidavit that on a schedule of forty-five hours, three times a week, it would require eleven men and thirty-two animals he is not very far from being right, is he?—A. On a forty-five hours schedule he is not very far from being right.

Q. Exactly. Now, this matter of getting at the number of men and animals necessary to carry the mail, running through a period of four years is a matter with reference to which men would differ if they were going to make estimates?—A. I don't think there are any two men who would run a mail line alike.

Q. And there are hardly any two men who would calculate a mail line alike?—A. Yes, sir; and there aint two men that run it alike. Some of them run it in the ground.

Some of them get some poor rosinante of a horse and with the brutality that characterizes some men toward the noble animal, run him to death and then come here three thousand miles and tell how one horse less than the horses put on under his cruel management could get along. And then again the Government get very tender about horses some time and say "You haven't got enough." And the fraud is, you have too few, and the next minute, "You have got too many." Now, I turn over on the next page :

Q. I wish to know whether this matter of making an estimate of the number of men and animals necessary to carry the mail on a route is one with reference to which different persons would have different opinions, and as to which they would make their calculations from different considerations?—A. I think the right way to make the calculation is for them to go and find out how many men and horses it will take, and then calculate on that.

Q. How are they to tell that?—A. By going and putting them on and trying it. A man must do it, and the contractor ought to go and see.

Q. Suppose he cannot go and see?—A. Then send his agent.

Q. If you were to send out two different men, would not those men give different opinions?—A. They could tell after they run it awhile.

Q. You can answer my question, can you not?—A. Yes, sir.

Q. Will you please to do it?—A. Yes, sir.

Q. Is not that a matter with reference to which persons in that business differ very greatly?—A. I suppose so; yes, sir.

Q. And if two men were looking at the same route one man would conclude that he could run it with a certain number of horses and men, and the other man would differ as to the number, would he not?—A. I have no doubt that he would.

Q. Is not that a very common thing?—A. As I have told you before, there was several men on our route there, and they did not use the same amount of stock and men. Some of them thought they could get along with less men and horses, and others more. Some of them ran it into the ground. When I ran the mail, the mail went through, and I told you exactly the number of men and horses it took to run that mail.

It depends on the treatment of horses; it depends on the accidents you have with them, whether in drinking alkali waters disease bursts out upon them and you have to lay them up and get recruits. Nothing is more a subject on which men differ than the number of men and horses to go four years on a route two hundred and fifty miles long.

I turn over now to Mr. Taylor, on page 1136. Now, you know what that other man said about the number of men and horses.

Q. To carry it three trips a week on a schedule of forty-five hours?—A. I should judge about thirty animals.

Q. And how many drivers?—A. I should have altogether about nine men employed.

Q. How many of those would be drivers?—A. I should have eight drivers to be their own stock-tenders. Excuse me a moment. I wish to correct that. You ask me on the expedited route.

Mr. BLISS. Yes. Forty-five hours three times a week.

The WITNESS. It would take eleven men and about sixty animals to make a sure thing of it on a forty-five hour schedule three times a week.

Perkins and Teller were partners, and Perkins put it from thirty to thirty-five, and Teller says, to be safe, I think any man ought to have sixty. Now, suppose an affidavit does come in. I refer to Gray's Reports, volume 5, page 79:

A party is not to be convicted of perjury, because, in the opinion of the jury, he had no reasonable cause for the opinion he expressed. If, in his own mode of reasoning upon the facts occurring before him, he thought the person who left the ship was William P. Hood, though he might reason very poorly, and upon data which the jury might think very unsatisfactory, yet his testimony would not be willfully false.

And so, gentlemen, when we have proved a horse more or a horse less will you just consider the nature and subject matter of the estimates. When Mr. Brady came into that office after the election of Mr. Hayes in 1876-77, there was no way of getting at this, except

getting the contractors to come up or send their estimates and do the best he could. Now, Mr. Brady reasoned thus, "I cannot sit down and have confabs with all these men." The department had been accustomed to taking their unsworn statements. He suggested getting up this rule. "I want something on the conscience of these men that will simply make them more careful. Before it was a matter of estimate and judgment." He cannot change the laws of the human mind nor the subject-matter of the estimate. But now here is a rule of the department, made in 1877, which never existed before, and that they say was a badge of fraud. I say it is a badge of protection and honesty. Says he, "Give me your oaths, although there is no law for it." It is not a judicial oath. It is a rule, a regulation of the department. "Still, give me your oath; that will bind the conscience the more. And thereupon, when Congress came together, the Postmaster-General had observed its operations from '76 and '77, and '78 and '79, and he reported brother Brady's improvement as worthy of going in and being consolidated in the statutes of Congress. And what was originally a simple direction of his received the sanction and approval of the members of Congress and the recommendation of his superior, and it is now incorporated into a law of the land, so that if it was a badge of fraud on the part of Brady it is a badge of fraud on the part of Congress that made it a law. And yet that was roared out by the hour as an evidence of fraud upon the part of Brady that he laid more of a stress upon a man's conscience and put him to the test of an oath, and it is now a part of the law of the land. It received, from the Postmaster-General's report, his approval and sanction, and now, as I understand it, having received that full sanction, under proper circumstances it could be deemed a judicial oath. It was a reform of brother Brady, done for the purpose of getting at the truth in a way that was left loose and helter-skelter for seventy-five years of the Government before. Let us wake up and do a man justice. Let us not listen to this roar of calumny. Why, in the matter of estimate, good heavens, you go around. You want to commence a building which is to cost a hundred thousand dollars. You go to a decent mechanic, who honestly and conscientiously wants to do the best and get the job, "How many thousands will you do it for?"

Now, I will give you another test. You twelve men have heard this testimony. You may take the books of it, for all I care. I wish you would. I shall ask the court as a privilege upon the part of the defendants to let you have them to look over the testimony and think over it. You go out now and take the route of Taylor and Perkins. You look over all the evidence, and you say, "Now, brethren, let us, just for fun, see how these estimates are. We have heard all the evidence. I will mark about how many men and horses I think ought to be on that route. Don't show your paper." You, you, you [indicating jurors], and you would have, I venture to say, as many different estimates as there are jurymen. Why, take the ordinary case. Have any of you got a farm, are any of you farmers, did any of you ever say, "I am going to stock my farm and let a man run it, I am going to furnish everything and let him run it." You go to a man and say, "How much will it cost to run this farm?" On these routes it depends on drivers, it depends on the care you take of the horses. It depends on the winter; it depends on the summer, but here in civilization we don't have to take these chances. You say to the man, "How many horses will it take to run my farm of three hundred acres?" The man will say, "I think I can run it with two horses, one mowing, machine, &c., &c." You come along the next year and find your horses spavined and used up and have to buy five more and you go on until you

buy twenty and thirty. You get another man and you find yourself getting along snugly and nicely and doing well on five. It is the difference between man and man. One man has no judgment in treating horses. Another man knows how long a horse will last. Men differ in their organization and men must form and give different estimates. I have had some experience of that myself. Just you try it. And they make great pretensions that the Government is going to the bow-wows because an extra horse was hitched on. I think I see brother Ker and Mr. Bliss mourning the departure of this Republic, sitting down some moonlight night with their legs dangling over the upper rail of the Long Bridge, weeping until the Potomac rises with their tears, "The country has gone to the devil and the jury has let those fellows off, and it all comes," says Bliss, "from that extra horse."

You recollect Macaulay, in speaking of the history of the popes and the endurance of the Catholic Church, says it has endured and survived the rise and fall of empires, and he hints that it may still be in existence when some lone traveler from New Zealand will be found on the ruins of London Bridge sketching Saint Paul's from a broken arch. Why, that is nothing to what may happen here. Here will be some lone traveler coming here from New York or Philadelphia, instead of New Zealand, sitting on the Long Bridge taking a picture of the Capitol, all in ruins, saying, "We survived that little matter with George III, in 1776, and the spite of the confounded old fellow in his dotage in 1814 coming to burn our Capitol. We got over these and the late little trouble that we had, and we were going along smoothly, but there came a time when on the Bismarck and Tongue River route they carried a mail with three horses when one would have sufficed. Alas, my country." Talk about New Zealand and the broken arch, and the fellow in London. That is nothing to the picture of that extra horse. Let us weep. As Tom Moore says, "There is bliss in tears." That is this Bliss over the destruction of the country by that extra horse.

I am nearly done. I have tried to treat this case seriously. The New York Times so regards it. I leave this case with you for your serious consideration. I part with you with regret. My comings in and goings out for these three months before you have been very pleasant. I have had pleasant converse with our friends upon the other side. Our little pleasantries have left no sting. I have received nothing but kindness and courtesy on every hand. To the counsel who shall follow me upon the part of the Government, I shall listen with profound pleasure. They are gentlemen whose scholastic lore and polished phrases will leave nothing unsaid and beautifully said, so that after they have done it may be remarked of each of their performances "They have not touched what they have not left adorned," and amongst the pleasures of my journey I shall sit and drink in their phrases. But I shall never forget that your duty is to watch that no detriment comes to the defendants against the law.

To your honor, I am under every obligation for a kindness unsurpassed and patience that knew no bounds to its endurance. With a kindness and gentleness through all the case, that tends, as Sidney Smith says, to unfreeze the coldness of dignity, you have listened to us, you have borne with us. You have proceeded with the dignity of the judge, the learning of the lawyer, and last, but not least, the courtesy of the polished gentleman.

And you, gentlemen, I leave with thoughts that will recur to these

scenes in the days that are to come. Memory will often revisit here. It will bring back the features that this scene has worn:

You may break, you may ruin the vase if you will,
But the scent of the roses will hang around it still.

And the perfumed roses of memory will bring this up before me in the days to come, and I shall have nothing but pleasant thoughts of this sojourn among you.

And now I launch the little bark of my client, the man with the noble soul, the tongue of truth, and the hand of charity, he who passed from boyhood at nineteen, when he stepped forth into the ranks of his country, ragged and almost barefooted near where I live; at twenty and twenty-one brevetted colonel for bravery on the field in General Barnett's Ohio battery. Scarce twenty-one and brevetted colonel for valor. Spottsylvania saw him wounded and in his tent, in the Wilderness, in Cold Harbor, in Petersburg, at Chickamauga covered with wounds from head to foot in his country's service, and at the final scene at Appomattox. Think you he is a thief who robbed the Treasury of that country whose foundations he helped to cement with his blood? Few boys turn out at nineteen and raise themselves up—oh! the glory of these institutions of ours—to the Senate; up until he provoked enmity, up until envy and jealousy made its stab at him. The first murder that stained the soil of earth was the result of a question between two brethren as to whose offering was most acceptable. Dorsey has found the lines of the poet to be true that—

He who ascends to mountain tops,
Shall find the loftiest summit crowned with ice and snow;
He who surpasses or subdues mankind,
Must look down on the hate of those below.

He has been stabbed in the house of his friends. Here is a little book [exhibiting a small volume] that you may look upon, inscribed George Bliss. It is not in evidence. Scarce had the shoes grown old that stamped their loud approval of Senator Dorsey—two months—nay, not two months—until the roar of accusations burst out against him.

I place him the peer in honesty and honor and integrity of any Senator with whom he associated in the halls of his country.

I place him as the peerless man whose fault is generosity, and I will ask you to say whether there is that class of proof of which I have spoken, without a dollar to taint his clean hands, which shall cause you to bring in a verdict of guilty against him. I cast his little bark, freighted with all he loves, upon the waves of testimony. Wife and child are aboard. Guided by the juror's oath, I know it will reach the shore and be forever anchored from the storm. I know that, inspired by your verdict, he will look upon this persecution as a black portion of the past and try to forget it. I believe that the drooping flower that is hanging by his side will, when your inspiring verdict of not guilty comes, lift her fair face toward heaven again, and that she, too, poor, frail flower, will thank the cloud when it has passed away.

And now my voice dies into an echo. The shades of evening gather around me. I have said my say. I have spoken my farewell word. With thanks, oh, so many thanks to you for your kind attention, I have done; completely done. [Applause, promptly checked by the officers of the court.]

At this point (3 o'clock and 22 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

THURSDAY, AUGUST 24, 1882.

The court met at 10 o'clock and 5 minutes a. m.

Present, counsel for the Government and for the defendants.

Mr. MERRICK. May it please your honor and gentlemen of the jury:

Before this jury was sworn, in May last, when we were discussing before the court the technical questions raised by the defendants upon the indictment, and interposed in the hope that their conduct might never be subjected to an inquiry by a jury of the country, I stated that, in my view, the duty of a prosecuting officer of the Government, as defined by the oath which he had taken, was never to ask for a verdict of guilty except where he believed that guilt had been clearly and satisfactorily established, and never to fail to urge a verdict of conviction wherever he believed that guilt was shown by the evidence. I further stated that when the evidence had been submitted to a jury, if we ever succeeded in getting to a trial, that I would remember my responsibility, discharge my obligation to its fullest extent by declaring the fact as to any one of these defendants in reference to whom I believed the proof did not show guilt beyond a reasonable doubt; and that in reference to any of the others, as to whom the proof should establish guilt, I would demand a verdict of conviction. In the execution of this purpose, thus declared, and in the performance of that duty, as I understand it, and in the name of the Government of the United States I demand from this jury a verdict of guilty against John W. Dorsey, John R. Miner, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, and Thomas J. Brady.

In reference to Turner the evidence does not leave my mind free from doubt; and whilst I do not believe him unstained by criminal conduct in receiving money, as Rerdell stated in his confession as the consideration for irregularities in official conduct, I do not believe that these men introduced him into their confidence and made him familiar with the secrets of this conspiracy as a member of the conspiracy. For him, therefore, repentance and reflection. And since he has heard the grating of the penitentiary doors so close to him, let that sound go with him through life and serve to quicken the better sentiments of his nature, elevate and improve his character, and make him hereafter a better and more useful man.

The question for you to try under this indictment is not a question of simply the criminality of the defendants in its broadest acceptation, but a question of conspiracy to defraud the Government as charged in the indictment.

Now, gentlemen, I beg to say to you that in the remarks I shall submit in the performance of my duty, I shall shirk no question of law and no question of fact; I shall color no testimony, understate no declaration of any witness, and ask from his honor or from you the declaration or application of no legal principle which I do not believe to be laid up in the great store-house of legal wisdom. I implore you, in response to

this declaration of my purpose, to scatter and dispel whatever clouds may have arisen from your emotional nature under the magic wand of the eloquence of my brother upon the other side, and which only tend to weaken the vigor and obscure the light of judgment, and having thus dispelled them come up coolly and thoughtfully and solemnly to the discharge of your high duty of judging your brother man according to the laws of the land and the evidence of the case. And though tears may flow like rain it is better that the husband be torn from the arms of his wife and children than that the canker of official corruption should be allowed to feed on the heart of the republic, under the guarantee and protection of a false verdict and perverted law. We have naught to do with tears; we have naught to do with sorrow. Man when he undertakes to judge his brother man undertakes to perform the highest duty given to humanity. Inclosed within the jury-box, or on the bench, he is separated from the great mass of mankind, and sentiments of brotherhood die away. Standing above humanity and nearest God, he looks down upon his fellows and judges them without the influence of a thought as to the sorrow his judgment may bring.

In the commencement of this case we heard the bold audacity of repeated assertions of clear innocence, and invectives against the Government for having hunted, with vindictive malice, those who were not guilty. For three months we have listened to the testimony, and now that it is all given this proud and arrogant tone has been changed to one of a plea for mercy to the jury upon the basis of a possible doubt. No longer do we hear resounding those demands and that insulting diction which characterized the earlier stages of the case. Ah, no; far from it. One of the country's ablest lawyers spends two hours and a half in arguing to the jury the obligation of acquitting if there is a reasonable doubt. He clings to the last plank that floats on the sea in the midst of the tempest this evidence has raised around him. He pours into that sea to open your hearts the tears of wife and children pleading to you for mercy, instead of opening your minds to a just judgment by the light of truth. I have no such plea to make for mercy; but to those who are citizens of my country, and in behalf of her institutions, I plead for her, for the stability of those institutions, the supremacy of the law, and the vindication of the truth. Nothing more.

Along with this plea for sympathy comes the end of the train of those technicalities which commenced in procession when this indictment was found. The counsel upon the other side say to the jury, with a disregard of what they must themselves have observed that almost shocks common sense, as it certainly does truth, that we have wandered away from the indictment and talked about everything except what is charged. Now, in reply, it becomes my duty to call your attention in a few sentences to the scheme and character of this indictment. It is a long paper, and I say in the honor of my friend Mr. Ker that it is one of the best specimens of pleading I have ever seen in any book or read any court. Although long and apparently complicated, when you read it from its commencement to its end, and remember in the beginning that you have to reach the end, and then when you reach the end look back from the beginning, you will find it a clear, consecutive statement, with many repetitions required by the formality of the law, but embracing the plain and simple charge that the individuals named in that paper conspired to defraud the United States by the means of certain mail route contracts, and by certain means connected with those contracts, to wit, false oaths, forged petitions, and fraudulent papers. That is the charge, and it is set forth with technical particularity; and all attempts to disturb it as a valid legal document have been but futile dalliance

with its strength. The defendants are charged with having conspired to defraud the United States. The means by which this defrauding was to be accomplished are certain contracts for carrying the mail over certain designated routes, and obtaining upon those contracts certain fraudulent orders from the Second Assistant Postmaster-General which he was to render, knowing at the time he rendered them that he was betraying the trust of his office in his own interest and in the interest of his associates.

Now, I shall have a word to say presently to his honor in reference to the relation which the means used to accomplish the conspiracy has to the subject-matter of the charge. My proposition will be one which your honor will no doubt readily understand: That where a conspiracy to do a criminal act is charged, and there are various means alleged by which the conspirators propose to accomplish the contemplated end, if any of the means are proved to have been used, it is sufficient to establish the general charge; and more: If any of the means are proved to have been used by any one of the parties, it is immaterial whether the result was achieved or not achieved. The charge being a conspiracy to do the act is not a charge of having done the act. It is a charge of having agreed to do it; and when the means are set forth, if *any* of the means enumerated and designated, however insignificant, have been used by any one of the parties charged in the effort to achieve the result, it establishes the allegation. But before I come to discuss that proposition of law there are one or two technical questions started in the course of the argument to which I deem it expedient to call the attention of the court. And first, lest I should forget it, as my notes are quite imperfect, I desire to call the attention of his honor and the jury, more especially the jury, to a proposition stated by Mr. Chandler in the course of his very excellent argument, and one which soiled its beauty as it also sapped its soundness, that in every case under the established principles of law a man has a right to make the best bargain that he can, and save himself from criticism behind the doctrine of *caveat emptor*. I do not question the broad application of that doctrine.

The COURT. I understood it to be *caveat* contractor.

Mr. MERRICK. *Caveat emptor* he said, and he applied it to contractor. I suppose it ought to be *caveat* contractor.

The COURT. In this case, of course, the principle is the same.

Mr. MERRICK. It is the same principle. Well, I concede the doctrine to apply to all transactions between man and man, limited, however, by a certain degree of personal honor, which prevents not only the word of deceit from going forth, but the intimation of deceit or the shadow of fraud. So let the doctrine be *caveat emptor*, *caveat* contractor. But did not brother Chandler know that beyond the common law, beyond its iron-bound limits, lay another and a broader domain of equity jurisprudence? Did he not know that to relieve us of the principles of the common law, when they clash with honor, with fairness, and with justice, equity law came in to impose a legal obligation coincident in moral force with the rule of law upon the action of the citizen? Did he not know further than that, and beyond it, that the doctrine of *caveat emptor* and *caveat* contractor neither in law nor in equity can apply to a man when he is dealing with the trustee of another man? Am I right, your honor?

The COURT. Yes.

Mr. MERRICK. And what was Mr. Brady in this case? He was your trustee and my trustee and the trustee of the whole people of the United States, appointed by the Government of the United States to guard your property and mine and theirs. No man has a right to contract

with him, in respect of matters pertaining to his official duty, without guiding his behavior and his conduct by those rules which equity and law lay down as the obligatory rules regulating the conduct of an individual dealing with the trustee of another man. In dealing with his trust, before violating his obligation, soiling his honor, and disgracing his office, he should have remembered that he was a trustee. If tears have ever flowed in this or any other country from just cause—if hearts have ever been broken—such tears have fallen over the fragments of fortunes ruined, and such hearts have bled over hearthstones torn up by the recklessness and the fraud of trustees.

If there is any relation established by law which the courts should regard as sacred, and juries should protect with a flaming sword, it is the relation of trustee or *cestuy que trust*. Confidence must be reposed somewhere in the business relations of life. Confidence must be reposed somewhere in the conduct of public affairs. The widow and the orphan have to repose this confidence in a trustee, and the public have likewise to repose it in a trustee. If these trustees are to act upon the doctrine of *caveat emptor*, and people dealing with them are to deal with them upon the doctrine of *caveat* contractor, break down your laws, and leave to the wolf the helpless lamb. The trustee is the shepherd, and when he opens the door to let in the thief to steal the sheep that he is put there to guard, he deserves, in my judgment, not the penitentiary, but the gallows.

May it please your honor, Mr. Totten read a passage from the contract made between the department and these defendants, in which there seemed to be a stipulation that in case of increase the contracting party should be paid *pro rata*. Now, what does that mean? Your honor stated that you had not previously seen it, and it apparently attracted your attention. I presume, however, that since that time you have thought it over, and that the difficulties Mr. Totten raised in regard to it have all disappeared; but I must make a few remarks in regard to it and a few suggestions upon the subject. What does the contract mean by *pro rata* in case of expedition? What are you to *prorate* with? *Pro rata* has a signification. It is similar to proportion, but not exactly the same. What are you to *prorate* with? You must have some given quantity. You must have three given quantities in every sum of proportion. What given quantities have you for expedition ordered on the route in regard to which you undertake to *prorate*? Suppose the route was one hundred miles long, the time one hundred hours, and the pay \$100, and you order it to be run in fifty hours. What are you going to *prorate* with?

The COURT. Just double the pay.

Mr. MERRICK. Just double the pay. That is an answer to Mr. Totten.

Mr. TOTTEN. It is not a correct one.

Mr. MERRICK. It comes from the court.

The COURT. How do you understand it?

Mr. TOTTEN. This is expedition.

The COURT. I am talking about expedition.

Mr. MERRICK. And I am talking about expedition.

Mr. TOTTEN. It will not be to double the pay.

The COURT. If a man gets a thousand dollars for making a trip in one hundred hours and he doubles the expedition, that is, the time is reduced to fifty hours, he would get \$2,000.

Mr. TOTTEN. The statute says it shall be in proportion to the increased number of horses and men. That is expedition. The other is increase, which was in your honor's mind, I think. If the number of trips was one a week and that number was doubled, it would double the pay.

The COURT. It is not to exceed that.

Mr. MERRICK. One moment. I put it in that shape for the purpose of showing the only construction to be put on that contract.

The COURT. Wait a moment. In regard to expedition, nothing is to be allowed at all unless the number of horses and carriers is increased.

Mr. TOTTEN. That is right.

Mr. HENKLE. And the allowance is then in proportion to the increase of the men and horses.

The COURT. Yes; perhaps that is the proper construction.

Mr. TOTTEN. The trips are increased; the pay is increased in the same proportion.

The COURT. That is the rule in regard to trips. In regard to expedition, probably the other is the rule.

Mr. MERRICK. No, sir; I will ask the jury to see how weak and unavailing a straw they cling to. Gentlemen (turning to counsel for the defendants), do not exhibit the weakness of your case so plainly.

The COURT. Let us look at the rule.

Mr. MERRICK. Allow me to make my explanation, your honor.

The COURT. I want to see the exact language of that rule as to increased compensation for increased celerity.

No extra allowance shall be made on any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution.

Mr. WILSON. There is your *pro rata*.

The COURT. Yes, there is the *pro rata*. It comes in in regard to carriers and stock.

Mr. MERRICK. Now we have it *ex cathedra*. *Pro rata* on that contract. Tell me where are your given figures? This contract does not say anything about horses and carriers. It says *pro rata*. Now, if this contract is to rule independent of the statute on the principle that you make the best bargain with the trustee that you can, even if it is against the law, then you must prorate according to the increase of time and time furnishes the given figure. You pay a hundred dollars for a hundred miles to be carried in one hundred hours, and then you diminish it to fifty. As one hundred is to one hundred so is fifty to the unknown quantity. It just amounts to precisely double, may it please your honor, in that case. But you have to get your given figures, and you get your figures from the contract.

The COURT. Suppose this to be the case, and it is pretty nearly the case with some of these contracts. The original contract required an expedition of a mile and a fraction an hour.

Mr. MERRICK. Yes, sir.

The COURT. Well, suppose the expedition reduced in time; that is, that they be required to carry the mail two miles an hour. The contractor could carry the mail two miles an hour without any more horses or carriers than he could if he were required to carry it one mile an hour. In that case I suppose the execution of this law would forbid the allowance of any extra compensation.

Mr. MERRICK. Unquestionably.

The COURT. Well, suppose it were three miles an hour—that is not very fast traveling—and no more men or horses would be required. Still if that was the case there would be no allowance for expedition.

Mr. MERRICK. Certainly not.

The COURT. And so there would be no allowance for expedition until you reached the point when more men and more horses were required,

and then the expedition would be regulated according to the increased number of carriers and horses.

Mr. MERRICK. Yes, sir.

The COURT. That is what the law means.

Mr. MERRICK. That is what the law means.

The COURT. And that is what I understand the other side to claim.

Mr. HENKLE. Undoubtedly.

Mr. WILSON. That is exactly what we claim. Mr. Merrick says it is time, it is not horses.

Mr. MERRICK. I am not reasoning upon what the law is, but I am reasoning upon what Mr. Totten says.

Mr. TOTTEN. And I reasoned as the judge said.

Mr. MERRICK. Then the *pro rata* in that statement has nothing to do with it.

The COURT. The rule is different when it is a mere increase of service.

Mr. MERRICK. Certainly. I had supposed I could not understand this extreme position now taken. This is worse than the other one.

Mr. TOTTEN. This contract expressly speaks of increased speed.

Mr. MERRICK. I know it does, and I am talking about it. It is said that, on the contract, they were obliged to allow *pro rata*. Now, the contract does not say what the given figures are.

The COURT. Let us hear that provision of the contract read. It was just submitted to me the other day and I glanced at it.

Mr. MERRICK. There is nothing in it. It is just a waste of time to read it.

Mr. WILSON. There is a great deal in it.

Mr. MERRICK. A great deal in it? I am amazed to hear you say that.

The COURT. This is a provision which all the contracts contained, I understand.

Mr. MERRICK. Not the old contracts. The old contracts were not to exceed *pro rata*. I have examined into the matter, sir.

The COURT. We must be governed by the evidence. These contracts are in evidence. We have none of the old forms before us in evidence.

Mr. MERRICK. That remark I made in reply to what had been said:

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing a *pro rata* increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock and carriers is rendered necessary.

That is not the contract that was read the other day. Now, then, I pass from the question which I supposed was the one made by Mr. Totten as to the *pro rata* matter and come to the one made by Mr. Wilson, and I understand him to state that the contractor is entitled to *pro rata* wherever the additional stock and carriers are required, and that the sum upon which the *pro rata* is to be ascertained is a sum in which the given quantity is made up by the oath of the contractor. [To Mr. Wilson.] Am I right?

Mr. WILSON. Did I say that?

Mr. MERRICK. I ask if that is the proposition.

Mr. WILSON. I have not laid down such a proposition.

Mr. MERRICK. He is silent when the core is touched, but talks freely enough around the bark. You must have the given quantities to pro-rate by. What are they? The original price, one; the stock and carriers necessary on the original price, and at the original price, two. Where is your third? The false oath of your contractor. The base,

perjured statement on which Brady made his proportion, knowing it to be false, with the proof before him that it was false. [To Mr. Wilson.]

Why are you silent now?

Mr. WILSON. I won't be silent in the end.

The COURT. He is not obliged to speak.

Mr. WILSON. If your honor please, I won't be silent when my time comes to speak.

Mr. MERRICK. But he spoke out of his time.

Mr. WILSON. I did not speak out of my time, with all due deference to my friend.

Mr. MERRICK. Now, gentlemen, you have the sum, and let me hear what my learned brother when he comes to speak has to say of it; for whatever there is of fault his full capacity will find out. Whatever there is of seductive influence to carry his argument to your hearts his genius and long experience will aid him in bringing to bear. But he is wisely silent when the nerve is touched. When most men scream he sits solemnly holding fast all nervous impulses, and is silent.

What do we complain of here, gentlemen? That they allowed *pro rata*? Yes. Is that all? Our complaint is that the given quantity in the sum was ascertained by the contractor's oath and by that alone. We go to the very root. We neither trifle around the bark nor dally with the leaves. We go to the root and to the heart and say there is the rottenness. How often throughout this case has it been shown that the speed was increased to a mile from a mile and a quarter and the additional stock required by the affidavit asserted to be ten times the amount of the original stock, and an amount allowed on that oath of thousands of dollars over and above the contract price. Throughout the case we have heard it cried aloud, "What was Brady's motive? Bring it home to him?" One such transaction carries it home to him—one such transaction that shocks the common sense of honest men who know how fast a horse can go and what a horse may do. But I only touch this subject to irritate a raw surface. I now pass it.

I shall not discuss, as I said, in detail these fraudulent transactions which show that this corrupt trustee violated the obligations of his oath of office. My learned brothers Ker and Bliss have spread the facts before you with great accuracy and distinguished ability. The history of all these transactions has been detailed to you by the witnesses on the stand, gathered up by my learned associates and placed before you in proper and legal arrangement. I will not read the testimony. The arguments of my associates stand untouched by anything that has come from my learned brothers of the other side. They have assailed them. My distinguished friend, Mr. Totten, with all his learning and ability, assailed them. Mr. Chandler assailed them. All of the counsel have assailed them. They have assailed both arguments, but they stand as firm and as unshaken and unimpaired to-day as they did upon the day upon which they were made, and they will so stand to the end. Why? Because they are an accurate statement and detail of the evidence, the appropriate and proper collocation of that evidence, and deductions from that evidence drawn by the inexorable rules of logic. They stand like a rock on the shore of the sea against which the angry ocean beats, but can neither penetrate nor overleap, and from which the waves, after their efforts to destroy, recede in frothy insignificance into the sea, leaving naught to be heard along the shore save the low murmurings of a vain and futile effort. I shall take the conclusions that these arguments establish as final; and from this finality I shall reason and present my views to you. They dealt with facts. Now, it becomes my office to apply the law to the facts with which they dealt, and then

I shall present to your consideration certain other facts that were left for me to deal with.

Another technical point presented by the learned counsel for the defendants was that the orders in question derived no vitality or force from the signature of Brady. That all their vitality and effective energy was derived from the signature of the Postmaster-General to the journal. Now, if your honor please, I beg to call your attention to page 39 of the Regulations of the Post-Office Department, and to the Revised Statutes, sec. 161. The Revised Statutes provide as follows:

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of his officers and clerks, the distribution and performance of his business, and the custody, use, and preservation of his records, papers, and property appertaining to it.

On page 40 of the Regulations your honor will find the regulation in reference to the office of the Second Assistant Postmaster-General, which is as follows:

To this office is assigned the business of arranging the mail service of the United States, and placing the same under contract, embracing all correspondence and proceedings respecting the frequency of trips, mode of conveyance, and times of departures and arrivals on all the routes.

Then there are various other duties assigned, and then it says:

It reports—

That is, this office—

weekly to the Auditor all contracts executed and all orders affecting the accounts for mail transportation.

By that regulation the Second Assistant Postmaster-General is charged with making contracts for all matters affecting the increase of service and expedition, and he is required to report weekly to the Auditor of the Treasury for the Post-Office Department. This regulation, therefore, under the law, takes up and defines the distributive share of the business of the department belonging to the Second Assistant Postmaster-General. These departments are too large for the personal supervision of any one individual, and therefore the law allowed the business to be distributed. So the executive business of the United States is too large for one individual, and the President acts not by himself personally but through his Cabinet officers. All orders have their final resting place of authority and responsibility on the Executive, but their efficacy is derived from the Cabinet minister who issues them under the authority of the Executive, although the Executive may never see or hear of them. So here Mr. Brady, a Second Assistant Postmaster-General, had transferred to him the obligation and the duty of making contracts for carrying the mail, putting service upon the routes, and expediting or increasing that service as the case might show to be necessary, and he was required to report to the Auditor once a week, that the Auditor might make up his accounts. The journal was brought before your honor by my learned brother, a journal kept in the Post-Office Department in which all these orders are entered, and it was shown that this journal was signed by the Postmaster-General. But how signed? Sometimes once in a week, sometimes once in two weeks, and seldom or never read by the Postmaster-General, even at the time he affixed his signature to it.

Mr. TOTTEN. Brother Merrick, excuse me, but the records show that they were signed every day. The records show that as a matter of fact.

Mr. MERRICK. The records do not show any such thing.

The COURT. The witness said that was the rule, but it often happened—

Mr. TOTTEN. [Interposing.] Your honor, that is the truth, but the records do show that they were signed every day.

Mr. MERRICK. Is it thus the counsel for the defendants trifles with the proof? Does he not know that the journal record is made up each day and for each day, and that when the entries represent the transactions of some ten, fourteen, or twenty days, the journal is then taken to the Postmaster-General, who signs for each one of those days? I do not mean that the record is made up of a mass of entries for a whole month without designation of day. No. Each day's record is its own, except the signature, and when they get from fourteen to twenty days the Postmaster General on one day signs for each and every day. I refer to pages 330 and 333 of the record, to the testimony of Mr. Amos M. Wilson, who says that he was in charge of the journal from July 9, 1869, until July 7, 1880:

Q. How often did you take it to his room?

That is, to the room of the Postmaster-General.

A. I think on an average, about once in two weeks.

Q. When you took the journal to him to sign, did he read it over?—A. Generally not.

And then came Mr. Charles W. Morgan:

Q. During the time that you had charge of the journal, how often did you take it to the Postmaster-General for signature?—A. Sometimes once a week and sometimes twice a week.

A misprint, or a misreport by the stenographer.

Mr. WILSON. It was neither; but the witness came back and corrected it afterward.

Mr. MERRICK. No, sir; it was not so. That was not as it was originally stated, and he came back and on page 363 he says:

I intended to say once a week, and sometimes once in two weeks.

Mr. MERRICK. And, then, further on:

Q. Are these certificates—

The certificates he produced here were those which the regulations require to be sent once a week to the Auditor, you recollect.

Q. Are these certificates sent from the Second Assistant Postmaster-General to the Auditor before the Postmaster-General himself signs the record?—A. Often they are.

Of course they are. Why? For the simple reason that the regulation requires them to be sent from the Second Assistant's office to the Auditor's office once in every week. There is no regulation which requires the journal to be signed within any specified time, and as that journal is signed only once in two weeks, obedience to the regulation in reference to the transmission of the certificates of the orders from the Second Assistant's to the Auditor's office makes it absolutely necessary that they should be certified before being signed by the Postmaster-General.

But you have in this case, gentlemen, a notable illustration of the power of a Second Assistant Postmaster-General when wielded by the autocratic disregard of trust manifested during Mr. Brady's time. On route No. 38113, from Rawlins to White River, you recollect that Rerdell wrote out requesting petitions to be got up with great expedition, and saying in his letter to his confidential friend and assistant, "If they can be here before the 4th of March I can get seven trips

a week." I will not stop to comment upon what Rerdell knew he could do before the 4th of March, nor how he came to know it. But calling your attention to the fact that on the 4th of March, 1881, a new condition was to arise in this country by the change of administration in which millions of all parties would with rejoicing hearts help the departure of one outgoing President, and hail with delight the incoming of another, duly elected and without stain on his garment. I want you to reason to conclusions for yourselves. The petitions did not get here until the 5th of March. The echoes of the inauguration guns had hardly died away, and time had not been allowed for the incoming administration to sweep the Augean stables. Much of the dirt still remained. The petitions coming on the 5th of March, the alert Rerdell obtained his order from Brady on the 7th for seven trips a week. We were going down the quarter-stretch, we conspirators, and we had to whip up. The petitions were filed one day, and before the expiration of a week they were responded to by the seven trips prophesied by Rerdell when he asked that the petitions be sent in before the 4th of March. The order was made by Brady, and was communicated and went into practical operation, and after a little while the journal was taken into Postmaster-General James, and James seeing that order on the journal taking out of the Federal Treasury \$18,275, immediately directed it to be revoked. He orders that order to be revoked after it had gone into operation. Brady having James's order communicated to him, went to James's office and said, "Did you direct that thing to be done?" "Yes," said James; "do it." "I want to know," says Brady, "if economy is to be the policy of your administration?" The Postmaster-General replied that it was, and Brady turned around and walked out and went back to his office, and, if I mistake not, remained in office for one or two months after that time.

Mr. KER. Until April.

Mr. MERRICK. Until April; remained in his office until April, and never executed the mandate of the Postmaster-General by a revocation of this fraudulent order. Where did it get its vitality? Vital life was breathed into it by Brady when he passed it, writing on the back of it, "Do this—Brady," and then writing under it the full detail of the order and signing his name, "Brady," to the detail of the order. On that very day or the following day he communicated it to the parties interested, the trips were put on and multiplied, and the work was done, or being done, and then at that time the journal is taken to Postmaster-General James, and when he first sees this order he says, "Strike that order out." Brady defied his superior officer. Under the regulations he was master of the contract system. The order was not revoked during his period of office. Page after page of the book was turned over, and there it remained until in the progress of this investigation it was discovered lying back among the treasures the ex-Second Assistant Postmaster-General had left when he left the department. But the service had been done and the damage had been done. He had robbed the government for the benefit of these parties in the first instance by passing the order, and he had darkened and deepened the criminality in the theft by refusing in the second instance to revoke the order when he was directed to revoke it by his official master and superior. This exhibits to you three interesting things, gentlemen of the jury. First, it exhibits to you the power of the Second Assistant Postmaster-General in these matters. Second, it throws a light in upon the conduct of Brady in connection with these conspirators, by bringing them into close communication and into close connection. Now let me ask you why was it, according to the ordinary conduct of men and the

operations of their thoughts and sentiments, that Brady did not revoke that order when he was told to revoke it? Why did he not do it? He was quick enough to pass it. The petitions had hardly rested in the department before it was passed. Why did he not revoke it?

Mr. WILSON. Is there any evidence?

Mr. MERRICK. You may interrogate me as much as you like if you will answer all the questions I put.

Mr. WILSON. I thought you asked me the question. I have got the record to show.

Mr. MERRICK. And so have I. Why did he not do it? He was ordered to do it. If you want to tell me why, I will listen to you.

Mr. WILSON. Because he was not ordered to do it.

The COURT. We cannot have any colloquy.

Mr. MERRICK. James said on the stand that he ordered Brady to do it. French was first told, and French told Brady, and Brady came in and asked James if that was his order, and James said it was, and says Brady, "Is economy to be the rule of your administration?"

Mr. WILSON. All right. I may be mistaken.

Mr. MERRICK. Yes; you are mistaken. He sent word to Brady and Brady was ordered to do it. Do you believe, gentlemen, that after James told French to revoke that order, which I do not suppose my learned brother has any question about, he did not tell Brady what James had said? Do you believe that after James told French to have that order revoked that he did not tell Brady about it? But I was going on to say that he did not revoke it. Why did he not? Gentlemen, according to the ordinary rules that govern human conduct, why did he not? What motive had he for not doing it? Was it not the most natural thing in the world that he should do it, knowing that his superior had ordered it revoked? Having been informed that his superior had ordered it done, was it not the most natural thing on earth for him to obey the order of his superior and revoke the obnoxious direction? Would you not have done it, Mr. Foreman? Would you not have done it? Would you not have done it if you had not been paid not to do it? Is there any way of accounting for such a violation of duty, such a manifest disregard of obligation; such a manifest repudiation of the mandates of superior authority in so easy a task, being simply to scratch out a few lines or to write a few words, "This order is revoked"? Is there anything that can account for a failure to do it except that he was paid not to do it or had been paid to grant the order, and if he had revoked it would have forfeited the consideration he had received and was to continue to receive as long as the order stood? Human nature has its ways. Human nature has its laws superior to the laws of man. We all are subject to an unseen and unwritten law, which we cannot define, but which we daily and hourly obey, and in our obedience offer homage to the Almighty God that made it. Congresses and convocations and executive officers and all the powers of earth cannot stay the operations of the laws of nature. We obey them day by day, hour by hour, and minute by minute, and he who obeys them most faithfully, most truly, most earnestly, and most deeply prays from the bottom of his heart to the Almighty Father. When you find a man departing from obedience to the law that governs the ordinary conduct of man your first inquiry always is, "Why does he do it?" You are not satisfied. Rebellious human intellect will not remain content, if interested in the subject, until it finds some motive operating upon the mind strong enough to compel a man to do under the circumstances that which ninety-nine hundredths of mankind would not have done.

One other remark in reference to brother Totten, and I leave him for

the present, to pay my respects to him hereafter. In the course of his argument to the jury he made certain statements in regard to these routes and the increases and expeditions upon them, and I did not wish to interrupt him, although I saw he was making mistakes at every step; but he made one mistake in regard to which the foreman asked him a question which brought him back to the record. Finally he answered the foreman satisfactorily, and then said, "Oh, I am not dealing with those orders. They are outside of the statute of limitation. I am dealing with the orders in the indictment." Then I saw the clew to the great mistakes he had been making. He presented to the jury on the first day of his argument a tabulated statement of the expeditions granted on the various routes. That tabulated statement is on page 2693, and is headed "Cost of original service and additions made by Brady from May 17, 1879, to April 1, 1881." I do not know why he should have selected that period of time particularly, and I do not know where he got the statement from. He very certainly did not get it from the evidence. Somebody, I think, has been playing a huge joke upon him. He makes out as the amount allowed for expedition from May 17, 1879, to April 1, 1881, \$55,828. Why, gentlemen, on two routes expedited within that time there was very nearly as much as that. This does not cover one-third of it. On his table he states himself that there was an expedition of \$8,600 on a route not embraced in his statement, and then another on August 2 on route 35055, and in a note at the end, or at the side, that there was an expedition of \$27,950 on that route, but does not put it in the calculation. So on down. It is a delusive statement which my brother had better correct.

Mr. TOTTEN. No, sir.

Mr. MERRICK. It is not consistent with the testimony. He says that as to the expeditions made on routes three years before the finding of this indictment, they are not to be considered in this case at all, that he is dealing with the expeditions specified in the indictment.

The COURT. Mr. Merrick, it was on the 7th of April, 1880, I think, that Congress passed an act in which some provision was made on account of these—

Mr. MERRICK. [Interposing.] I am coming to that, your honor. Now, gentlemen, in connection with this table of Mr. Totton's, allow me to say to you that the expedition upon the routes in this indictment subsequent to May 20, 1879, amounted to \$203,449.

Mr. TOTTEN. By Brady?

Mr. MERRICK. Well, I suppose there may have been an order or two made by French.

Mr. TOTTEN. Yes, and there were five or six made by the Postmaster-General.

Mr. MERRICK. There may have been an order or two by French. I am sorry we have not got him here to talk about. There are some orders that you claim to have been made by French and not by Brady, where French made them in obedience to Brady's mandate in blue pencil on the back of the jacket.

Mr. TOTTEN. I think there are two cases of that kind.

Mr. MERRICK. Yes, sir; if there is even a straw three times broken in its back they would catch at it and hope to swim by it. He says that he deals only with the orders in the indictment. Now, I say to you, gentlemen, as a proposition of law, that you and the court will deal with orders and acts that were made and transpired at a period anterior to the period within which limitations would bar; that most of the evidence, or a great deal of the evidence in this case, relates to acts and circumstances transpiring at a period anterior to that when, as original offenses,

those acts would be barred by the statute of limitations. Why? Because the question is conspiracy *vel non*, and although the conspiracy is laid in the indictment at the date of the 23d of May, 1879, that becomes only a technical averment, and I can prove that the conspiracy so charged as on the 23d of May, 1879, was made at any anterior period, and the only question for you is, *was it in existence on the 23d of May, 1879?* The acts of the conspirators done before the 23d of May, 1879, may all be evidence, if they tend to show a criminal conspiracy between them, though they are not evidence as overt acts under section 5440 of the Revised Statutes. What said the court upon that subject? We need not ask your honor to speak again. I read from page 1440:

It is true that the indictment charges that the parties entered into a conspiracy on that date—

That is the 23d of May, 1879—

and that the overt acts, as there called, have been committed since that date. Of course every act done in pursuance of the conspiracy must be subsequent in date to the conspiracy. The position though taken by the counsel for the defense that no evidence can be received of the existence of the conspiracy anterior to the time fixed in the indictment, I think, is an erroneous position. It is none the less a conspiracy, since the date fixed in the indictment, because it was a conspiracy before.

If, then, I prove it to have been a conspiracy before the date mentioned without some explanation on the other side as to when it ceased to be a conspiracy, whatever may be the rule of law in reference to the burden of proof, your minds cannot be satisfied that it has not continued to be a conspiracy down to the 23d day of May, 1879. If I show the combination of these defendants to have been a conspiracy in 1877, if I show it to have been a conspiracy in 1878, then the presumption naturally arises that it was still a conspiracy in 1879, and especially is that presumption made conclusive if I prove that, subsequent to the 23d of May, 1879, the conspirators were doing acts of mutual and reciprocal aid, combining in the prosecution of the different co-ordinate parts of those acts to produce one common result for the common benefit. The theory of the other side, that they would limit you to the consideration only of acts committed since the 23d of May, 1879, is preposterous. We go back behind 1879. I shall go back behind 1879, and will seat them at the council board together. I understand that my eloquent friend, whom I had not the pleasure of hearing yesterday, because of my indisposition, compared this by way of ridicule to Catiline's conspiracy and Cicero's knowledge of it. True, Cicero knew all that there was going on inside of Catiline's conspiracy, all that transpired between his friends and associates, where they met and what they meant, and what they debated. He says we know nothing of this conspiracy. He is in error. We know where you met and when you met and what you meant, and what you proposed to do and how you did it. Your purpose was self, and your means were forged petitions, false oaths, and all kinds of frauds, and you stole half a million of dollars a year. You were like a canker at the heart of your country, and we have come to pluck you out that the tree may flourish and have health and power to resist the storm. Yes, prior to 1879 we knew where you were. We will bring you together in 1877. S. W. Dorsey, of whom my learned brother was so fond of speaking as Senator Dorsey, was there at the council board, the presiding genius of the robber band, using these lower and lesser men for his own ends, as he was obliged to use somebody, because he wore the robe of office which he could not soil without danger in the open field. He had to use other means. His pockets were open, but other hands were to be thrust into the public purse. I will not call him Senator Dorsey. He is not a Senator. He

is an ex-Senator. I do not choose to use that dignified term of designation applicable to one of the highest offices in my government in speaking of a man standing in the criminal dock of a criminal court. And if Mr. Bliss did not speak of S. W. Dorsey I will, and I will track him and follow him, and I will show who his companions were and who his company was, and where they met and what they did. But before I come to that I must get rid of one or two other matters.

Mr. Totten has said that the Government of the United States gave full protection to its Treasury against invasion by a law which forbade any public officer to make a contract for the fiscal year beyond the appropriations for that year. There is such a law. It is section 3679 of the Revised Statutes:

No department of the government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations.

Now, you remember that brother Totten said there was no danger to the government whilst that law stood upon its statute book; that the Government was amply guarded and amply protected by that law. Is it so? Then I presume the client of my brother, in his faithful observance of that law, and in the course of his official conduct under the recognition of the supreme authority of that law, has taught my brother to feel that that law is ample protection. I cannot account for the learned gentleman's supposing the law to be ample in any other way. Is he right? Is this law sufficient? Why, gentlemen of the jury, I will show you from the evidence, when I come to look at it directly, that Brady disregarded and trampled that law under foot, and that these contracts are filled not only with the virus of crime committed subsequent to the date of their creation, but that the contracts themselves were steeped in iniquity in the womb of their official mother. He disregarded that law from the very first beginning of the fiscal year during which these contracts were made down to the time he was removed from office.

What is the evidence; and this becomes very important, for the other side would have you believe that here is a much-injured and persecuted officer of the Federal Government, who loves his country with all his heart and reverences the law with patriotic devotion. I think I will show you before I get through that he loves his country only as the object of pelf, and reverences neither the law of God nor man.

Mr. Blackburn testified on the stand that for the fiscal year ending June 30, 1880, Congress had appropriated for the star service \$5,900,000, which, says Blackburn, was all that was ever asked. For the fiscal year ending July 1, 1879, we did not look to see what were the appropriations; but for the fiscal year ending July 1 or June 30, 1880, beginning with July, 1879, Congress appropriated the amount of \$5,900,000, which was every farthing that the Second Assistant Postmaster-General demanded. He then says that Brady reported to him that there would be a deficiency of \$1,700,000 on the contracts he had made. This report was made to Mr. Blackburn the last of December, 1879, or the first of January, 1880. Although he had obtained every cent he wanted for the star service on the 1st of July, 1879, yet, by December of that year, only five short months after the money had been placed at his command he goes to Blackburn and says: "There will be a deficiency on the contracts I have made of \$1,700,000 since July 1, 1879, Mr. Blackburn, although I got every cent I asked for the star service up to the 1st of July, 1880. Since the 1st day of July, 1879—only five short months—oh, how painful to think of it with all my love of law, and sanctified regard for its provisions, I have burst clean through them all and am \$1,700,000

in debt over and beyond the appropriation." Down goes the flimsy barrier that Mr. Totten says would guard the Treasury. Down goes that security for the people's money which he says is ample as a limitation upon the department' to keep it within the appropriation. Wide flies open the doors of the Treasury at the magic touch of the Second Assistant Postmaster-General, and not only what is in there for the star service is robbed out, but robbery is committed in anticipation of what may be put there under subsequent legislation. Seventeen hundred thousand dollars in excess of the appropriation, and yet we are told that this law is ample protection to the public Treasury.

This demand was made in December, 1879, or January, 1880, to meet the coming deficiency in June, at the close of the fiscal year, and then Blackburn was asked whether or not it was not usual to have deficiencies. He said it had been a very common thing, here of late; that prior to the war there had not been so many deficiencies, if any. It struck me as singular. Said I, "Did you ever know of a case of deficiency where a public officer had got all that he had asked for in the original appropriation?" "*Never in my life,*" was the prompt reply. Deficiencies arise because Congress being careful of the Treasury, and some members looking to popularity in their districts upon the ground of practical economy manifested in their legislative course, do not grant what is asked, and when all that is asked is granted there is never a deficiency. Mr. Blackburn never knew such a thing.

Now, to meet this condition of things, what did Congress do? Startled and amazed at what had been done, on the 8th day of January, 1880, Mr. Blackburn offered in the House a resolution of inquiry into this extraordinary condition of affairs. A committee of investigation was appointed from the members of the Committee on Appropriations. On the 12th day of January, 1880, this committee of investigation met and called Mr. Brady before it. A protracted inquiry ensued, and when you leave the jury box—for whilst you are there you cannot be allowed to do it—you will read with great interest a report of Mr. Brady's testimony before that committee, and knowing what you do you will read it with much more interest than the members of Congress did. It was discovered that this deficiency had not been made known to Congress in the original report of the Post-Office Department when it first met, although the officials knew perfectly well that the deficiency existed, but they waited a week till they got under way, and then they sent in a report of this deficiency, and then Mr. Brady followed it up by seeing Mr. Blackburn, and then came along this investigation in which our friend Mr. Buell figured so largely and about whom I shall possibly have something to say by and by; for I feel it my duty in the exercise of the sentiment of ordinary humanity to gather up the mortal and the material fragments of the man that have been left lying around this room since he testified.

Mr. WILSON. Mr. Merrick, you refer to the jury reading the testimony of General Brady after they get through. You may read it to them now.

Mr. MERRICK. I do not wish to read it. I would like to have Mr. Brady on the stand and examine him about it.

Mr. WILSON. You have suggested to the jury to read his testimony. I offer to you now the opportunity to read it to them.

Mr. MERRICK. Yes, when I cannot cross-examine him.

Mr. WILSON. Then you ought not to mention it.

Mr. MERRICK. Put him on the stand; I will stop to-day and let you do it. Put him up and let me have him for a while under my hand.

Mr. WILSON. If your honor please, I want to interpose my objection

again to what Mr. Merrick is now saying in the presence of the jury, and I want to have it noted on the record that we take an exception to this transgression of the law by the Government prosecution.

Mr. MERRICK. I shall not transgress any law.

Mr. WILSON. Well, your honor, he has done it a good many times.

The COURT. I do not see what the court can do but strike out that part of the speech. If it were evidence the court would have power to do that.

Mr. MERRICK. If Mr. Wilson brings these things on his own head, he must take the consequences.

Mr. WILSON. I have not said one word on that subject. If your honor will allow me, I know your honor intends to administer the law in this case, and you will do me the credit to believe that I believe you intend to do that.

The COURT. You need not make any suggestion of that sort to the court, the court will take care of its own duties.

Mr. WILSON. I know that, but I only make that remark as preliminary to what I wish to observe, and that is that it seems to me that when the counsel is transgressing the plain and positive law laid down by Congress as written in the statute books, he ought to be called to account and stopped in that way, and that we ought not to be required to stand up in regard to a matter of that kind.

The COURT. The act of Congress declares that it shall be the privilege—I ought not even to allude to the act of Congress upon the subject. We will say nothing about it, because it might have——

Mr. TOTTEN. [Interposing.] Is there no way that these repetitions of this offense can be stopped?

The COURT. I see no way for the court to do except to admonish counsel to avoid making any such remark.

Mr. WILSON. That is all I am asking.

Mr. MERRICK. I consider myself admonished.

The COURT. I hope you will observe it.

Mr. MERRICK. I will, of course. If brother Wilson draws fire on his head he must burn.

Mr. WILSON. I drew no such fire as that, Mr. Merrick.

Mr. MERRICK. Well, gentlemen, as I was saying when this little interruption took place, this investigation was protracted and they finally, on the 7th day of April, 1880, passed an act which I will read to you. By section 1, of that act, gentlemen of the jury, an appropriation of \$1,100,000 is made to meet the expenses of the star-route service during the rest of the fiscal year. By the second section, \$100,000 is appropriated to enable the Postmaster-General to place new service on routes already provided for. There were a large number of routes that had been provided for in 1879, that have been spoken of here. There were three or four hundred upon which no service had been put at all, and the money that had been used for expediting would have put service on the whole of them. And then follows this *proviso* :

Provided, That the Postmaster-General shall not hereafter have the power to expedite the service under any contract either now existing or hereafter given, to a rate of pay exceeding 50 per centum upon the contract as originally let.

Section 3d refers to a different subject. Section 4th provides that:

Nothing in this act contained shall be deemed or construed to affect the validity or legality of the acts or omission of any officer of the United States, or to affect any proceeding therefor.

An important feature in this act, upon which I shall presently comment, is a provision that where expedition is granted the pay allowed

shall not exceed 50 per cent. of the original cost. I understood brother Wilson to state in his opening that Mr. Brady had suggested such a provision. If I am not right I want to be corrected.

THE COURT. That provision, I understand, relates merely to the power to make expedition.

MR. MERRICK. That is all, sir.

THE COURT. It does not interfere with his power to increase the service?

MR. MERRICK. Not at all.

MR. WILSON. Brady recommended it.

MR. MERRICK. Brady recommended it. Then, gentlemen, we have another immense proof in the case, and out of his own mouth he stands convicted of having injured the United States by at least unnecessarily withdrawing from the Treasury thousands and hundreds of thousands of dollars; for, as I shall show you, and as you already know, his expeditions were not only 50 per cent., not only 100 per cent., not only 500 per cent., but they were more than a thousand per cent. He expedited from \$1,000 right straight on, to God knows where, in the fifteens and the twenty thousands, and although he gave this immense sum for expedition, yet my learned brother, probably without seeing the bearing of the statement he was making, now says that he recommended the law providing that "No sum for expedition shall ever be granted greater than 50 per cent. of the original cost." Of course no man would recommend a law which would pay a contractor less than he was entitled to. Then, if Brady knew that expedition could be obtained, and the contractor respectably and properly paid at 50 per cent. upon the original cost, why in the name of God did he give him thousands of per cent. upon the original cost? It was all within his discretion. The law gave him the discretionary power. I was amazed when I heard my brother make the statement in his opening, knowing, as I did, the facts that would be developed in the progress of the case.

Now let us analyze this law. Some stress is laid upon it. When we were discussing technical questions it was claimed that this law partly exempted these parties from the consequences of their criminality, and that Congress had passed its judgment of acquittal upon their conduct, and brother Totten in his argument said "All these things were laid before Congress and Congress is the power in the Government to find fault with the malversation of a civil officer." Let us see what Congress did:

SEC. 1. That the sum of \$1,100,000, or so much thereof as may be necessary, be and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, to meet the expenses of inland mail transportation on star routes for the remainder of the current fiscal year. During the remainder of the current fiscal year no further expediting of service on any postal route shall be made.

Did Congress approve what had been done? "During the remainder of this fiscal year no further expediting, Mr. Brady, if you please. We have had enough of your expediting. Whether it be necessary or unnecessary, you shall not judge. During this year we will at least stop the highest flings in your wild dance. Our experience with you is sufficient. The laws making appropriations for the departments do not bind you, personal integrity does not bind you, the obligations of official trust do not bind you. Now we will make a law and say that you shall not do these things. Break that if you dare." Was that approval, gentlemen of the jury?

SEC. 11. That the further sum of \$100,000 be, and the same is hereby, appropriated as aforesaid, to enable the Postmaster-General to place new service as authorized by law.

New service where ? New service on neglected routes left unserved that Peck and his coconspirators might absorb the appropriation by duplication of trips and expedition of time. My brother McSweeney says, "You carry the Stars and Stripes to the West, and you carry civilization, and your mail-carriers and station keepers and postmasters and picket Sherman's lines." But Brady's service only carries the banner, and it only pickets Sherman's line where these conspirators are benefited. Other routes prescribed by Congress are not served, although they pass by the homes of the pioneer and his valuable settlements. "If they are served says Brady, S. W. Dorsey and I will not have money enough to pay us for expedition on the Oregon route, therefore we will leave them unserved." Now, says Congress, "Look up, delinquent officer. No more of your expeditions, your partialities, and your spoliations in putting service on these other routes. Here is a hundred thousand dollars to do it with." And then it goes on :

Provided, That the Postmaster-General shall not hereafter have the power to expedite the service under any contract either now existing or hereafter given to a rate of pay exceeding 50 per centum upon the contract as originally let.

Fifty per cent. was then, in the judgment of Congress, as much as ought to be allowed for expedition. If the route originally cost \$1,000, then to expedite it the Second Assistant Postmaster-General might pay \$500 in addition, and no more. Not only did Congress think so, but Brady thought so, says his counsel, and Brady, therefore in imagination, standing on this witness stand, testifies to this jury, "In my judgment, from my experience in reference to the expedition of routes, 50 per cent. upon the original cost is as much as ought to be allowed to anybody or under any circumstances." What did Brady, sitting in the Second Assistant's office, obeying the mandates of the conspirators, do ? Canyon City to Fort McDermitt, route 41160, expedited December 23, 1878, from two miles an hour to two and a half miles an hour, cost \$18,612. The original cost of the route was \$2,800. Fifty per cent. would have been \$1,400, but instead of \$1,400 there was made \$18,612. There were two trips per week added to it. Now, gentlemen, you have a case. Out of his own mouth does he stand convicted.

But let me look casually over the record and see for a single moment how much further we go. Now, here is quite an interesting route. One of John W. Dorsey's routes, Mineral Park to Pioche, miles per hour, two and seventy-six one-hundredths. It was originally two and seventy-six one-hundredths, and then it was reduced to three and eighty-six one-hundredths miles per hour. That is a reduction of just one mile. Suppose it to have been three miles in the first instance and then to have been reduced or expedited to four miles an hour, a difference of one mile, and what do you think it cost with two trips added ? *Nineteen thousand three hundred and eighty dollars.* The original cost was \$3,000.

Now, suppose we find there is one where there is no additional trip added in at all, and the cost is simply for increased expedition. I will take Tres Alamos to Clifton. It was originally two and thirty-four one-hundredths miles an hour, and was reduced to four and ninety-two one-hundredths miles per hour. The original cost was \$1,568, which was increased to \$9,408. Now, according to what Brady testified to Congress as to the proper cost of such expedition it would have amounted to \$784. What he did pay was \$9,408.

The COURT. But, Mr. Merrick, was there not an increase of service ?

Mr. MERRICK. No, sir; not on this route. I called attention to the cases where there were trips added.

Mr. WILSON. Oh, he is all wrong.

Mr. MERRICK. What did you say ?

Mr. WILSON. Go ahead; I will answer you when my time comes.

Mr. MERRICK. Just tell me what you said.

Mr. WILSON. No; I would rather you would go on.

Mr. MERRICK. Was there any increase of service on this route? No, sir. On the other two routes mentioned there was an increase of trips, and I so stated. On this route, No. 46113, from Tres Alamos to Clifton, there were two trips added at a cost of \$3,136, June 16, 1879. On the same day, June 16, 1879, it was reduced from two and thirty-four one-hundredths miles per hour to four and ninety-two one-hundredths miles per hour, and the pay was \$9,408 *for the expedition* and not for the trips.

The COURT. I see, according to my table here, there was one trip a week.

Mr. MERRICK. Ah, but, your honor, that was paid for otherwise. Two trips were added at a cost of \$3,136. Have you that?

The COURT. Yes; and subsequently —

Mr. MERRICK. [Interposing]. Expedition was allowed.

The COURT. The trips per week were increased to four.

Mr. MERRICK. They carried it along jumpingly. I will now take the route from Eugene City to Bridge Creek, 44140. Has your honor that route on your table?

The COURT. Yes.

Mr. MERRICK. You will see in the first place there were two trips added at a cost of \$4,649. Do you see it?

The COURT. Yes.

Mr. MERRICK. Now, the time was reduced to three and ninety-one one-hundredths miles per hour from one and fifty-nine one-hundredths miles per hour, and there was paid for that \$14,486. Do you observe? There are no trips in that.

Mr. TOTTEN. What is that you are reading from?

Mr. MERRICK. I am reading from a table.

Mr. TOTTEN. That is news to me. Is that all right?

Mr. MERRICK. Yes, it is all right. All that I do is right. It is not in evidence. It is my private table, sir, copied from the books here. Look at the records. There they are.

Mr. WILSON. I am not disputing it.

Mr. MERRICK. Well, you are talking to yourself and giving out signs that you know something as if you would if you could or you could if you would. Do what you can.

Mr. WILSON. I will after a while.

Mr. MERRICK. I want the court to follow me as I call attention to this table.

Here is a route where the time is reduced from two and twenty-two one-hundredths miles per hour to four and sixty-one one-hundredths miles per hour, and this is the route from Julian to Colton. There were no trips added, and the pay was increased by \$5,346, the original pay being \$1,188. In many of these cases Brady has confused the trips with expedition in making up the aggregate of the increased pay, but I have been picking out the cases in which he has not confused the trips with expedition. Now, I will take the route from Bismarck to Tongue River, about which we have had so much talk, and which furnished a subject for the display of Brother McSweeny's wit.

Now, the original cost was \$2,350. The original schedule time was three miles an hour, and it was reduced to three and eighty-four one-hundredths—not a mile, only three-quarters of a mile—and for that immense increase of speed there was paid \$27,950.

The COURT. Oh, no. From Bismarck to Tongue River it was three and eighty-four one-hundredths.

Mr. MERRICK. Well, sir.

The COURT. The miles per hour were three and eighty-four one-hundredths.

Mr. MERRICK. Well, look at the original time on the Bismarck and Tongue River route. You will see that it says, "Miles per hour, three."

The COURT. You are right.

Mr. MERRICK. For which expedition they paid \$29,950.

The COURT. If this table is right.

Mr. MERRICK. Yes, sir; that is right. It is made from the orders. I have the orders here, if they want to test it. If it was not right brother Wilson would be on his feet.

At this point (12 o'clock and 25 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. MERRICK. With submission to the court, gentlemen of the jury: On some of the routes to which I have referred in connection with this statute, suggested, as his counsel says, by Mr. Brady, the amount allowed, in addition to the original consideration of the contract, was made up not only of expedition, but of additional trips. In others it was made up of expedition alone, as in the case of the Bismarck and Tongue River route, where \$27,950 was added to the original contract price of \$2,350, which was for expedition alone to an amount of three and eighty-four one-hundredths miles per hour as a substitute for three miles per hour in the face of Mr. Brady's declaration to Congress that in no case of expedition should the amount allowed exceed 50 per cent. of the original contract.

Passing from this for the present, I now ask your further attention to the act of Congress, the fourth section of which provides—

That nothing in this act contained shall be deemed or construed to affect the validity or legality of the acts or omissions of any officer of the United States, or to affect any proceedings therefor.

Now, Congress, when it passed that act, was looking to the transactions that are now before you for your consideration, and having investigated those transactions for many weeks, reached a definite conclusion in regard to them. What did Congress do? *First*, it prohibited these whom it found to be delinquent officers from making any further orders for expedition upon the routes for any cause whatever during that fiscal year. *Second*, it provided that the department should never thereafter allow for any expedition more than 50 per cent. of the original cost stipulated in the contract. *Third*, and most important, it declared that nothing in this act contained shall affect the validity or legality of any of these contracts or the omissions of any officer of the United States, nor shall it affect any proceeding on account of the acts or omissions of the officers of the United States in respect of these contracts.

Congress was looking to the future, looking to the possibility and the probability of civil proceedings to recover for the government that which had been unlawfully taken from the government, and therefore declared that the act should not, in such a case, have any operation or effect; and further looking to criminal proceedings, the justice, the propriety, and the necessity of which Congress foresaw, it enacted in this very law that the law should not in any way bar or impair those criminal proceedings. You then have instead of an approval by Congress, of the acts of Brady, as Mr. Totten stated, a declaration which conveys distinctly the Congressional disapproval of all that had transpired and the Congressional

declaration of prospective civil litigation and criminal litigation arising out of the acts which it had investigated.

Now, may it please your honor, in reference to the subjects that the Second Assistant Postmaster-General is required to consider in making up his judgment as to what shall be the amount allowed for expedition, I beg to call your honor's attention to the laws of the United States and the regulations of the department. It is provided by section 3945 of the Revised Statutes, copied on page 129 of the Regulations, that—

The Postmaster-General shall provide for carrying the mail on all post-roads established by law as often as he, having due regard to *productiveness* and other circumstances, may think proper.

My learned brothers on the other side have sneered at the requirement of *productiveness* as an element for consideration in determining what increase of trips or expedition should be allowed. They have declared that such a requirement was one of the relics of barbarism, and that the Postmaster-General in expediting and increasing routes was in duty bound to regard only the necessities of the people as he might think them to be, and their wishes as expressed through petitions and their Representatives in Congress. They have said that this was an old law long since supplanted. They have brought the Secretary of the Interior upon the stand to prove that according to his theory the true policy of the country was to increase the service and speed on routes in the Western country, whether there was one letter or a thousand letters passing over the route, and that *productiveness* was the least consideration that ought to influence him in making any order of the department in respect to the frequency or the rapidity of the mails. They brought General Sherman here, the amount of whose proof is, gentlemen of the jury, that the Post-Office Department should be a subordinate auxiliary department to the War Department, and that out of the appropriations for the Post Office Department, stations and post-offices should be provided in the Western country as a substitute for the pickets of the Army. I have no doubt or question but that General Sherman so regards that department, and thinks that that department should be an auxiliary to the Army that he commands. But it is not as an auxiliary to the Army that the Post-Office Department was organized, and it is not from Mr. Teller or from General Sherman or members of Congress that this jury or this people must determine the policy of the law as laid down in the original statute passed at the time the Post-Office Department was organized. The Postmaster-General is required by law to regard *productiveness* as the first and most important consideration in determining the increase and expedition of the service, and that rule and policy prevailed in 1876, the very year that Mr. Brady went into office, for the Congress of the United States in that year passed a law providing that the Postmaster-General should inquire into the condition of the mail service and *the expense of carrying the mail*, in order, says the act, *to reduce those expenses within the limits of the revenues of the office*. Your honor is familiar with the act, I have no doubt. That act looked to *productiveness*, and required the Post-Office Department to ascertain how it was possible by limiting the expenses to bring them within the bounds of the revenues of the department. I therefore submit to your honor that *productiveness* still remains the paramount consideration with the Postmaster-General and the Second Assistant Postmaster-General when he is called upon to determine what shall be the rate of the speed or the amount of the service on any particular route.

Now, may it please your honor, regarding this proposition as established,

and I will hereafter apply to it the facts in proof, and will now ask your honor's consideration in the hearing of the jury of certain propositions of law. I have reduced them to the form of prayers or requests, and I beg to be allowed to read them to the court and will then submit to your honor the authorities by which they are sustained.

In the progress of this case both sides have thus far been discussing the facts. Only one of the counsel upon the other side devoted part of the time occupied by him in his argument to the law. At the time the argument was about to commence I submitted to the court that it would be wiser for both sides to bring forward their propositions formulated that we might know what questions of law were to be debated. I offered to the other side my propositions. Mr. Wilson replied that Mr. Chandler would present theirs. Whether Mr. Chandler has presented them as promised by Mr. Wilson I cannot say, though I presume from the general tenor of his argument that he has not. I now ask my brother whether I have before me in the arguments that have preceded me all the propositions of law contemplated to be advanced by the counsel for the defense?

Mr. CHANDLER. No, sir; I have not given them all.

Mr. MERRICK. May I have them, gentlemen?

Mr. TOTTEN. We have not got them quite ready.

Mr. MERRICK. They have not got them quite ready. Three months have elapsed since the case begun, two weeks since I called for them, and they are not yet ready. I have no right to constrain them. I have no right to ask your honor to require them to give them, I presume.

The COURT. I have no power to require it.

Mr. MERRICK. You have no power, but I beg your honor to bear in mind that they are withheld. My brother Wilson said he had them at the time I asked for them, but that they were at his office. I suppose they have been pickled. Certainly they have been preserved from my observation. I will read my own, your honor. They shall have the full benefit of mine, and if they are not law, let theirs prevail. Gentlemen of the jury, we are fighting very much in the dark, as to any defenses claimed for the accused. From the beginning of this case to the present time the prosecution has never yet tried to open the door to let in the light that the defense have not slammed it to, and except where the court has restrained their effort in that direction it has remained shut. They have sought to wrap themselves in their cloak of concealment and silence from the beginning down to the present time. We have asked to introduce no evidence to which they have not objected. We have sought to develop no truth which they have not endeavored to suppress. Nothing that we have asked for enlightening the jury has been granted. The court has been invoked to stop us whenever we sought to throw in the glare of discovery upon their secret machinations, and even to-day, although the prayers were written two weeks ago, they exercise their discretionary power of withholding them that I may not discuss them and possibly in the vain hope of springing a surprise upon the learned gentleman who is to close the case. Let them profit if they can by these *tricks* of the profession. I am entirely convinced that the truth will prevail. Law and justice will achieve their end, and when the record is made, gentlemen of the jury, you and I will congratulate ourselves upon having fully performed our duty whilst they may have the questionable pleasure of knowing that shrewdly devised tricks adopted to achieve an improper end have proved futile and unavailing.

I submit that as but little has been said about a conspiracy and what constitutes it and how it is to be proved, it becomes my duty to ask the

court its consideration of certain propositions of law which I have carefully formulated :

1st. To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, in word or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, passively or tacitly, come to a mutual understanding to accomplish the combination and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by a common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, such persons become conspirators, although the part which any one of them is to take in the conspiracy is a subordinate one, or is to be executed at a remote distance from the other conspirators.

You may conspire across a continent. This conspiracy, if it exists, says Mr. McSweeney, is a conspiracy at long range. Yes, it ranged from the District of Columbia to the shores of the Pacific, and in law it is immaterial whether the man on the shores of the Pacific ever saw, communicated with, or knew the man in the District of Columbia. If each performed co-ordinate parts of an act, each of which co-ordinate parts were essential to produce the common result that both desired, it is a conspiracy, and a Washington jury of sensible men, who deal with practical ideas in close, clear logic are not to be deceived by talking of conspiracy across a continent. You may conspire across a continent or around the world. Conspiracy consists in mutual co-operation, however remote the co-operating parties may be, and the production of the result may be the proof of the conspiracy. My brother smiles. He is somewhat familiar with the doctrine of conspiracy, and knows the proposition I lay down to be true. I mean brother Chandler. He has had to defend conspirators in another conspiracy case than this. Conspiracy has become the common crime of the country. Conspirators live and flourished in Missouri and in California. Here in the shadow of the Capitol is the theater for the practical realization of their profits, and one of the great difficulties that we have to contend with in this prosecution, gentlemen, is that the cohesive power of bad men is stronger than the cohesive power of good men. This conspiracy is a compact body of strong and leading men, represented by strong and leading counsel, against the Government, and not only does the compact body work for the acquittal of these defendants, but all the other conspiracies, the whiskey conspiracy that Mr. Chandler knows of, the land conspiracies in the Interior Department, the leasing conspiracies, and the innumerable conspiracies that are formed here at the Capitol feel the throb of sympathetic love and fear with this conspiracy now in peril and appreciating the fact that above them all hangs the fearful avalanche of legal vengeance, the links of whose sustaining chain will be melted by the breath of justice. They all rush together to help these Treasury robbers and receive the assurance of immunity from the crime of future speculation in a verdict that shall give free range to these conspiracies all over the country.

2d. A conspiracy can seldom be proved by direct testimony. Persons combining for the execution of an unlawful scheme do not ordinarily expose themselves to public observation ; and the fact of the combination can, therefore, as a general rule, be established only by proof of the acts of the several parties in such combination, and the relation of those acts to each other, and their tendency by their united effect to produce a common result. In other words, where the jury find that the acts of several parties charged

with a conspiracy are the co-ordinates of each other, and needed for the consummation of the criminal purpose charged in the indictment as the object of the conspiracy they are at liberty to find that the various parties performing those several and respective acts were engaged in a conspiracy to produce the unlawful result, although there may be no direct evidence whatever before them to show that such parties ever entered into any agreement to accomplish such unlawful purpose.

Now, your honor will perceive that this matter of conspiracy relates to a combination of men that is very different in its character from a partnership, and I will not insult the intelligence of the court or the common understanding of the jury by undertaking to discriminate between the two. I think if I were to undertake to show you that a partnership was, in all its elements and features, different from a conspiracy, your honor, in the exercise of a judicial discretion that requires the economy of time in public duty, would stop me.

3d. *Every combination of men is not necessarily a conspiracy. A conspiracy, punishable by law, is a combination of persons to effect a lawful purpose by unlawful means. And when parties are charged with conspiracy, a combination must first be shown, and then its unlawful character either by reason of the means to be used or by reason of the result sought to be attained. A combination or confederation of men, perfectly innocent in its inception, may subsequently become criminal, either by a change of the means which they propose to use, or by a change of the end which they propose to accomplish. There is no criminality in a confederation of individuals to bid for and procure contracts in the mail service of the United States. But where it is shown that the means proposed to be used by such confederation for the purpose of gaining profit out of such contracts, are such as are declared by the law to be criminal, such as the presentation to the Post-Office Department of false and forged petitions for the increase or expedition of the service, or the making or presentation to the department of false affidavits, then such combination or confederation becomes illegal in its character, and the persons composing it become liable to criminal prosecution as conspirators. If it further appears that such persons do any overt act in execution of such illegal combination, such as the presentation of a claim for the payment of money to them founded upon any order or orders, obtained upon such false affidavits or petitions, such persons are guilty of conspiracy under the act of Congress, enacted to punish conspiracy to defraud the United States. Moreover, any one thereafter entering into such illegal combination becomes a member thereof, and liable to the penalties denounced by law against it, equally as if he had been originally connected with the scheme.*

4th. *In determining the question of the existence of a conspiracy, the jury will take into consideration, as a very material fact, the relation of the parties to one another, their personal and business association with each other, and all the facts in evidence that tend to show what transpired between them at or before the time of the alleged combination, as well as the acts performed by each party severally subsequently to such alleged combination in respect of the subject-matter of the alleged conspiracy; and from these, together with all the other facts before them, the jury will determine whether a combination in fact existed, and whether such combination was illegal in its inception, or became illegal at any subsequent time.*

I am reading all these propositions now, gentlemen of the jury, to you and to the court with a view of applying the facts to them hereafter, provided they are correct law, and if they are not, I am sure his honor will tell me before I undertake to apply the facts.

5th. *If the jury believes, from the evidence, that the defendant, Thomas*

J. Brady, as charged in the indictment, was Second Assistant Postmaster-General of the United States, and that his codefendants, or any of them, were engaged in a combination to obtain increase or expedition of the mail service upon the routes on which they had contracts for such service, and which are set out in such indictment, and that they paid to said Brady money or other valuable thing for the grant to them or any of them of such increase or expedition of the mail service for the common benefit, and that any of said parties obtained payment from the United States for such increase or expedition of service, knowing the same to have been founded upon any fraud, the jury is justified in finding guilty of conspiracy all who participated in such transaction. The law does not require direct testimony of the payment of money or other valuable consideration to the defendant Brady by his codefendants; neither does it require direct testimony, either verbal or written, of guilty knowledge of a conspiracy or participation therein by any one or more of the defendants. The jury is authorized to infer these things from the circumstances of the case, if, in the exercise of a sound discretion, they find the facts to be such as show their existence.

You do not, gentlemen of the jury, require direct testimony, but if from indirect testimony the jury find that there was this conspiracy, and that Brady received part of the proceeds of the fraud on the United States, or was paid in anticipation of that fraud upon the consideration that he would help its perpetration, and thus became a member of the conspiracy, you do not need any direct proof at all to establish it, but it is established by circumstances leading your minds, as rational men, familiar with the motives that impel men's conduct, up to that conclusion.

Before proceeding to read the next prayer to the jury, I deem it necessary to make an observation or two upon one of the points of the defense, which is this: That on the 1st day of April, 1879, these parties all met here in the city of Washington. These parties, they say, engaged in an honest transaction; these parties whom I say were engaged in conspiracy. They all met at S. W. Dorsey's house, and sat down and drew lots for the plunder. They began plundering when the contracts began. That was the 1st of July, 1878. They were engaged in the practical organization and conduct of this great fraud from the 1st of July, 1878. Say the other side, they met together in combination to reap the profits of a legitimate enterprise, and on the 1st day of April, 1879, they met at S. W. Dorsey's house to divide up the assets, each distributee thereafter to take care of himself. Concede it. My reply is that from the 1st of July, 1878, you have been robbing on your contracts obtained on bids put in by your combination formed in 1877, and you have been robbing from the 1st of July, 1878, down, with great success, and that in April, 1879, less than one short month after Stephen Dorsey shook off the toga of the Senate, he came out a full-fledged robber of the Treasury, and sat with you at the board to divide up the plunder of his coconspirators, and I will prove it by the evidence; and, as my brother Henkle has said, no man who is not paid to believe the contrary can fail to believe what I say. With that explanation I will read the prayer:

6th. *If a conspiracy is found to exist, any division of the property which formed the subject-matter of the conspiracy cannot relieve the parties from the joint liability to the criminal law as conspirators; and if a combination is found to have existed for an unlawful purpose, and there has been a subsequent division of the property of the combination between the several participants in severalty; and it is further found that thereafter there was an interchange of efforts by the several parties, through unlawful and illegal*

processes, to enhance the value of the property set off to the several parties respectively, such illegal acts done to enhance the several interests are evidence of a conspiracy.

The important fact in this prayer may be elaborated as follows: There was an interchange of efforts by the several parties, through unlawful and illegal processes, to enhance the value of the property set off to the several parties respectively. Such illegal efforts done to enhance the several interests are evidence of conspiracy. Those illegal efforts, subsequently done by the parties to enhance the property, ought to be specified as efforts in pursuance of the original design, and as part of the original means. Now, I will show to the jury that this perfectly innocent gentleman, S. W. Dorsey, who pleads, by his counsel, for the protection of a doubt and seeks to shelter himself behind the skirts of his wife, was a member of this criminal organization, its head and front in power and suggestions; and that after this alleged distribution between himself and John W. Dorsey and the mythical Peck, on the one side, and Vaile and Miner, on the other, they mutually assisted in carrying out the objects of the conspiracy for each other's benefit. I will show you that when on the 1st of April they divided up the plunder they not only divided up what had been burglariously taken from the National Treasury, but they divided up the burglars tools between the respective distributees, that each might get into the Treasury on his own account, and arranged that if each could not get in on his own account they would combine to help one another. There is much in the papers which my learned brother McSweeney has not seen or don't choose to comprehend.

7th. The law provides that compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and this provision is a declaration of the limit which compensation may reach. The contractor is not necessarily entitled to the utmost limit of compensation allowed by law; and the amount of compensation, within that limit, is left to the sound discretion and judgment of the executive officer who has charge of the subject. The law likewise provides that no extra allowance shall be made for any increase or expedition for carrying the mail, unless additional stock and carriers are thereby made necessary; and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation under the original contract bears to the stock and carriers necessarily employed in its execution; and the stock and carriers necessarily employed in the execution of the original contract mean those then actually in service. The law further provides for an extreme sum in the case of expedition, beyond which the executive officer having the subject in charge cannot allow, but leaves it to his judgment and discretion to allow any smaller amount.

Now, if the jury finds from the evidence that the defendant, Thomas J. Brady, was the executive officer having in charge the branches of the mail service specified in these laws, and that, in the performance of his duties as such executive officer he knowingly, deliberately, and purposely allowed for any expedition on the routes specified in this indictment a greater sum than, according to the evidence before him, was necessary and proper, it is a circumstance strongly tending to establish the charge of a corrupt motive on his part.

Again, the law provides that no compensation shall be paid for any additional regular service rendered before the issuing of the order under which such service is to be rendered. If the jury finds from the evidence that the defendant, Thomas J. Brady, issued an order awarding compensation for additional service upon any of the routes named in the indictment subsequently

to the time when such service was rendered, such order was illegal and prohibited by law; and the jury will regard it as a material circumstance in the consideration of the charge of corruption as made against said Brady.

This proposition, in its detail of fact, is sustained by the evidence in regard to the Fort Garland and Parrott City route where, as you will recollect, the route was shown to be some hundred and ninety or two hundred miles long, and Mr. Brady telegraphed to Sanderson, who was running the route, to run it from Chama to Parrott City seven times a week—from Chama to the junction of the route from Garland to Parrott City, and then from the junction to Parrott City—and that subsequent to the time when that order was made an order was issued *allowing thousands of dollars for seven trips a week over the entire route.* If the subsequent order had been limited to seven trips a week upon that part of the route covered by the telegram there could be no complaint. But instead of limiting the service to that part of the route to which the telegram referred, he extended the service over the whole route, and by an order passed in February, having relation back to January, he paid for service rendered before any order for the service was ever passed. It is directly in the teeth of the law. It is an important circumstance, probably the most important of all, that in the thousand and one circumstances where you find errors and mistakes and contraventions of law, there is no error, no mistake, no violation of law that is not against the government and in favor of the conspirators. I may have something further to say about this peculiar circumstance when I come to give you a specimen of the routes. But be not startled. Fear not. I am not going over these routes. I shall take one or two as specimens. Bear with me, therefore, gentlemen, not with the apprehension of long detention, but with patience, in the hope of speedy deliverance.

The COURT. That route, you say, is from Garland to Parrott City.

Mr. MERRICK. From Garland to Parrott. Yes, sir.

Mr. McLANE. [A juror.] You are wrong, Mr. Merrick; you are speaking of the Ojo Caliente route.

Mr. MERRICK. That is the same thing. Garland and Parrott City were put on at the outset, and then they cut off the termini, and called it the Ojo Caliente route.

Mr. McLANE. [A juror.] I beg pardon.

Mr. MERRICK. That is all right. I am glad you asked the question, because I want you to understand it. I have it marked on my notes. With the permission of the gentlemen on the other side I will show you these maps.

[Mr. Merrick here exhibited to the jury the map of the route before offered in evidence, and explained the direction of the route as originally constituted and as subsequently changed; also submitted the same to the court, and made a similar explanation.]

The COURT. What is the date of that order?

Mr. MERRICK. February 26, 1881, to take effect January 15, found on page 839 of the record.

The COURT. That increase was \$17,910.

Mr. MERRICK. Seventeen thousand nine hundred and ten dollars and seventy-two cents. Now, if this stood alone in its weakness and in its nakedness among the transactions of many years of official life it might be pleaded that it was an error. But it does not stand alone; it stands with many of its brethren of the same blood, and all bearing marks and evidences of their ancestry; being begotten by conspiracy upon the report of a fraudulent functionary, they speak volumes as against these defendants now arraigned before this jury.

8th. *In the consideration of the acts of the various defendants, the jury will bear in mind :*

1st. *That forgery is a crime under the law.*

2nd. *That to alter in any particular, after it has been signed, a paper required or authorized by law to be executed, is a forgery.*

3rd. *That to file any such forged paper in the department of the government, to the purpose of which such paper is addressed, is a crime.*

4th. *That a false oath or affidavit, filed in a department of the government, though not a crime under the common law, is criminal under the statutes of the United States, and punishable like forgery.*

5th. *That the filing of a paper in any department of the government, with the design and intention thereby to deceive any executive officer of the government with reference to a matter subject to his jurisdiction, for the benefit of the person filing the paper or causing it to be filed, is a crime under the statute law of the United States.*

6th. *The presentation of any claim to an executive department of the government for payment, when said claim is fraudulent and so known to be by the person presenting the same, is a crime against the United States.*

7th. *That the presentation for payment of any claim upon a contract founded on fraud, is a crime, if the person presenting the same or causing it to be presented, is cognizant of the fraud.*

Now, gentlemen, you will understand, with submission to the court, that I here ask the court to declare certain acts that have been proved to you to have been done by these conspirators to be crimes, and I ask the court to do this for the reason that men do not ordinarily commit an insignificant or an important crime without some ultimate object, and when you find two men committing two crimes under the law from neither one of which, separate and apart from the other, could any benefit come to either, and yet you find them committing those two crimes, then you will find that the one crime is the co-ordinate of the other, because each is necessary to the common result, and as neither actor could obtain any benefit from the separate crime committed by each without the commission of the crime by the other, there must have been a conspiracy to produce the result of the co-ordinate crimes.

The COURT. There is a difference between concurrent conspiracies and joint conspiracies.

Mr. MERRICK. Certainly.

The COURT. There may be two conspiracies concurrent in time and concurrent and general in purpose, but not necessarily connected.

Mr. MERRICK. Oh, unquestionably there may be two conspiracies concurrent in time to defraud the United States by the same identical operations, and I have no doubt that Brady was in more than two. He is indicted for several, if I am not mistaken.

The COURT. Well, we have no knowledge on that subject.

Mr. MERRICK. That is on the records of the court.

The COURT. The court does not know all that is on its own records, and the jury does not.

Mr. MERRICK. Pardon me. He may have been in more than two conspiracies to do the same thing by the same means. Now, two conspiracies may be concurrent in time, and they may be similar in means and object, but they need not be one and united.

The COURT. They cannot be one.

Mr. MERRICK. They cannot be one; they are two. That I appreciate in this case. The defense will pretend that there were two conspiracies, conceding that there was any conspiracy at all. They will contend that whilst there was one combination—and I use the mild term—in 1877,

and one combination in 1878, that in 1879, on the 1st day of April, that combination divided itself by a distribution of the profits, and thereafter there were two conspiracies or two combinations. That is their defense. My answer is that the one birth, the one being, of 1877 lived successfully in the prosecution of its criminality through 1878 and 1879, from July 1, down to April 1, and that when they undertook to divide up the body, which was incapable of division and incapable of death, all that they did was to divide the profits that the conspiracy, as an independent body born of a combination, was to thereafter make. One would look after what the right hand did and the other would look after what the left hand did, and each would come to aid either hand in the case of an emergency, and therefore, although they tore apart the flag under which they were united, they were yet united in the same purpose under the divided parts of the flag, and it floated together down to this time, when they were indicted by the grand jury of the District of Columbia, using the same object, looking to the same end, using the same means, and co-operating in the same effort. Affidavits made by Peck in February, 1879, were filed by Vaile in April, 1879, after the division.

The COURT. The division was to take place the 1st of April.

Mr. MERRICK. The 1st of April. After the division the conspirators who had devised the instrumentalities in February to perpetrate the fraud, gave those instrumentalities to the respective distributees, and among the instrumentalities given to Vaile and Miner were the instrumentalities devised in February, namely, Peck's affidavit, whilst the conspiracy was still flagrant; and Vaile in April filed those affidavits.

The COURT. That was a division, in your language, of the burglars' tools.

Mr. MERRICK. Of the burglars' tools.

The COURT. Does that divide the conspiracy?

Mr. MERRICK. No, sir. No, sir. You cannot divide the conspiracy. Men may repent and they may retire; but if they repent and retire they must repent of all that has been done; and true repentance is founded on resolution of good action in the future and repentance for what has been done. They must resolve that they will do no more in the future, and if they do act in the future in accordance with the determinations of the original conspiracy the act in the future has relation to the conspiracy, and is an act in execution of the conspiracy.

The COURT. If the joint interest remain.

Mr. MERRICK. Whether the joint interest remain or does not remain is immaterial, for the conspiracy does not depend upon the interest. The conspiracy is not to rob and divide the plunder, but to defraud.

The COURT. What I mean by joint interest is not in the ordinary sense, but the joint interest in the conspiracy, as I explained on a former occasion.

Mr. MERRICK. Yes, sir. The joint interest in the conspiracy remains.

The COURT. An old conspiracy may be divided up and apportioned out, some taking one branch and some taking another, and each party carrying on a new conspiracy on a smaller scale.

Mr. MERRICK. Now, your honor, I will take your illustration. An old conspiracy may be divided up, some taking one part and some taking another part, but the two parts make up the old conspiracy. If there was a conspiracy in respect of these routes it was a conspiracy to defraud the government by false oaths, and after having got the routes, and after having made the false oaths, if the parties divide up the routes and divide up the tools, then it is simply this: We distribute among these parties the body of this original substance of the conspiracy.

The substance is distributed that each may take care of a certain part, but the conspiracy itself remains the same.

The COURT. To use the illustration which occurred to me on a former occasion, an apple may be quartered and divided up so that each party taking his own quarter has a several interest in the apple.

Mr. MERRICK. Certainly, sir; that is very true.

The COURT. But if after quartering it the arrangement continue that all the original owners shall still have an interest in the several quarters, they are not severally owned by anybody. The joint interest remains.

Mr. MERRICK. Yes, sir; that is so.

The COURT. That is the point of their defense, as I understand it.

Mr. MERRICK. Yes, sir. Now, your honor, I am obliged to you for the apple.

Mr. HENKLE. We deny that there ever was any conspiracy to divide up.

The COURT. We are assuming that there was.

Mr. MERRICK. We have got a long ways beyond that. You are talking about things that happened beyond the flood and beyond Noah's day. Now, your honor, I will take the illustration of the apple, delicate fruit, the cause of all our woe. Now, suppose this: There is an apple which is the material substance of a conspiracy, and the conspiracy is to poison brother McSweeny by that apple.

Mr. MCSWEENY. And such a rotten one as you have got, too. [Laughter.]

Mr. MERRICK. We will take a better illustration. Instead of the apple, since he thinks it is probably rotten, we will take an illustration that seemed to be so well suited to his case, and which he so much delighted to use in his argument. Suppose our conspiracy to be to poison brother McSweeny by two chops and some tomato sauce.

Mr. MCSWEENY. Now I am at home.

Mr. MERRICK. Ohio is at home. I thought the most of it was in the District of Columbia. [Laughter.]

Mr. MCSWEENY. Only a trifle of it is here.

Mr. MERRICK. There are two chops and some tomato sauce in a dish, and a parcel of evil-disposed and unappreciative men determined to relieve the State of Ohio and the profession of the law of one of its most valued citizens and one of its most distinguished members by poison. These conspirators have conspired to poison McSweeny. That is their ultimate object. The means by which the conspiracy is to be achieved are chops and tomato sauce, with a reasonable amount of strychnine mixed in with the sauce. Now, sir, they have a common interest in that dish and a common interest in that poison. One has bought the chops, one has bought the sauce, and one has bought the strychnine. Together they mix up the compound and they come together, and they equally divide between the three the chops and the tomato sauce. They afterwards, having divided it up with the understanding that each one will poison McSweeny, go to work and do poison him. Is that conspiracy dissolved? The conspiracy devised the means and prepared them, and the conspiracy apportioned out those means among the conspirators. For what? That each might go on and execute the object of the conspiracy, namely, to poison McSweeny. One of them, when he was going with his chop and his tomato sauce to the distinguished counsel, met him weeping on the Long Bridge of the District of Columbia where he has placed my associate, Mr. Bliss, and approached him: near by there was a man who was going to protect him, when the other conspirator came

along, and arrested his protector and enabled the fellow that had the other dish of chops and tomato sauce to go on and accomplish his purpose. Where does such a conspiracy and its conduct differ from this conspiracy? These routes were to be the object through which the United States was to be defrauded. These parties got these routes. They were interested in these routes. They were the instrumentalities and the means of the conspiracy. The conspiracy by false affidavits and fraudulent and forged petitions enhanced the value of these routes during the flagrancy of the conspiracy, and having run them up from \$50,000 to nearly \$250,000 a year the conspirators came together in 1879 and divided the plunder and gave the burglar's tool suited to each specific piece of plunder to the distributee of that plunder, and say, "Now, come on and we will all go with our respective tools and each severally and separately defraud the United States." For the common cause? Ay, for the common cause. Why? Because in the execution of the conspiracy the value of the property has been enhanced, and each one takes a part of the profits of the conspiracy, and each piece distributed is to be enhanced in value by the false oaths given to the distributee, and that enters into the estimate of the value of the routes distributed. Each goes off, not upon his separate line, but to execute his part of the conspiracy through the very instrumentalities that were determined to be used when the conspiracy was first formed, and through the instrumentalities that were made and created whilst the conspiracy was flagrant. Sir, by such a division no men under the law can relieve themselves from the body of the criminal death that they have invoked upon their own heads in the organization of an original conspiracy. To relieve one's self from a crime is to depart from it. To relieve one's self from responsibility under the law for the commission of a crime is to turn your back upon it. As I said, repentance is the only relief, and repentance is founded upon resolution to do better. Conspiracy never ends when the parties divide the plunder, not for the purpose of avoiding thereafter the commission of the objects of the conspiracy, but with the distinct understanding that each on his own individual responsibility, co-operating if you choose with the others, in cases of emergency, will thereafter continue to carry out those objects, although one may reap the benefit of one piece of the property, and another of another piece of the property which was the common interest of the original combination. Divided up in that way, the law would look with sorrow and with shame upon the enunciation of a principle like that contended for by the other side. I know your honor has only thrown out the suggestion in order to receive the answer which I have given.

9th. *The duty of making contracts on post-routes and changing the same by increasing or expediting the service thereon, is, under the regulations of the Post-Office Department and the acts of Congress giving such regulations the authority of law, committed to the Second Assistant Postmaster-General, and he is responsible therefor; and the orders passed by him in the premises, although entered upon the journal which is signed by the Postmaster-General, derive their authority primarily from the Second Assistant Postmaster-General; and if the jury finds that the orders in evidence in this case, as the orders of the Second Assistant Postmaster-General, were not made by him in obedience to instructions specifically given in that regard by the Postmaster-General, then the Second Assistant Postmaster-General can in no way protect himself from any and all of the consequences, civil and criminal, of such orders by reason of the fact that the Postmaster-*

General signed the journal of the department in which these orders are recorded.

I believe I have read all the prayers. I hope that they may assist your honor to some extent in reaching an accurate conclusion in reference to the law of the case.

Now, may it please your honor, although it may be very true that your honor needs not much enlightenment upon this general subject from the books, nevertheless it is my duty to refer you to the authorities. I think it will not be disagreeable to the court to hear me read a passage or two from some of them.

The COURT. I need as much enlightenment on this subject as almost anybody.

Mr. MERRICK. I beg to read upon the general subject from Wharton's American Criminal Law, from page 2351: Although brother Wilson has not given me his points of law or authorities, I will furnish mine with such fullness of elaborations as will give him ample opportunity for reply.

The COURT. You are not contending for victory here, of course.

Mr. MERRICK. Have I not shown it, speaking in sadness and sorrow? Do you ask what I am contending for? I am striving to do my duty, contending for the purpose of helping the court to uphold the majesty of the law, and to aid the jury. And, whilst I am willing and anxious that the innocent should go, I will, in the performance of that duty, so help me God, if I can prevent it, allow no guilty man to escape the just punishment of his crimes.

The COURT. You are quoting General Grant.

Mr. MERRICK. No, sir; no, sir; I read:

In prosecutions for criminal conspiracies, says Judge King, the proof of the combination charged must, almost always, be extracted from the circumstances connected with the transaction which forms the subject of the accusation.

Most of this is really for the jury:

In the history of criminal administration the case is rarely found in which direct and positive evidence of criminal combination exists. To hold that nothing short of such proof is sufficient to establish a conspiracy would be to give immunity to one of the most dangerous crimes which infest society. Hence, in order to discover conspirators, we are forced to follow them through all the devious windings in which the natural anxiety of avoiding detection teaches men so circumstanced to envelop themselves and to trace their movements from the slight, but often unerring, marks of progress which the most adroit cunning cannot so effectively obliterate as to render them unappreciable to the eye of the sagacious investigator.

Now, gentlemen and your honor, I beg your attention to this:

It is from the circumstances attending a criminal or a series of criminal acts that we are able to become satisfied that they have been the results, not merely of individual, but the products of concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them; but which may be so linked together by circumstances in themselves slight as to leave the mind fully satisfied that these apparently isolated acts are truly parts of a common whole. That they have sprung from a common object and have in view a common end. The adequacy of the evidence in prosecution for a criminal conspiracy to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question for the jury.

Now, I have no objection to your honor's adopting the view of Mr. Chandler and leaving the jury to determine the law. I do not care who determines the law, so far as I am personally concerned in this case; but I will not argue this law to the jury, for the reason that I know it to have been the long and well-established principle of this court that the court shall construe the law. I will withdraw, in part,

what I said as to my indifference, for the reason that I would like the jury to have all the light that a large and liberal intelligence can give, and greatly prefer that it should receive the law from the learned jurist upon the bench rather than that it be allowed to grope in darkness to find it amid the various and contradictory allegations of the respective counsel. I would rather have your honor state what the law is. Once in my life I contended for this same doctrine that my brother has brought forward. It was anterior to the present decade when, with my venerable friend who now sits beside your honor [Mr. Bradley,] I stood in this court in one great case and felt that the exigencies of justice required that I should interpose the jury between the court and the defendant. I did then contend before the jury, and I must confess it was done at the peril of my own liberty, that the jury were the judges of the law. I argued it and I tried to maintain it. I was trying a case where one hundred exceptions stood upon the docket, and where judicial peculiarities and idiosyncrasies had so far modified what I understood to be the principles of the law as to endanger the rightful judgment of the jury. I therefore fought it. I fought the court. I did it boldly, for I was ready to surrender my own life in behalf of the life I was defending. I ultimately succeeded, but even at the time I spoke the words to the jury I did not believe them to be indicative of safe and true principles of law. I do not believe them to be so to-day. But things have changed. Now that a clear-headed and an honest jurist, indifferent between the parties, presides, and that we have a jury equally honest and fair, I say let the rule prevail. You, gentlemen of the jury, take the law from the court, and under the law as you get it from the court record your judgment of the facts upon the records of the court. To you belong the facts. To him belongs the law. I am not afraid of you. I can talk it out on the law as well as my brother, but I prefer to leave it to the court, and when we convene to-morrow morning I will continue this discussion of the principles of law that in my humble judgment regulate the just administration of this case. Then I will pass to a brief consideration of some of the facts, and especially those which connect with this transaction, as the father and originator of the iniquitous scheme, that pure and innocent statesman Mr. S. W. Dorsey.

At this point (2 o'clock and 55 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

No. 14336—208*

FRIDAY, AUGUST 25, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. MERRICK. [Resuming.] With submission to the court, gentlemen of the jury: In the course of my argument yesterday, when I was referring to the order that had been passed upon the route from White River to Rawlins in response to the petition in which Mr. Rerdell was so solicitous to have in the city of Washington before the 4th of March, my brother, Mr. Wilson, seemed to indicate by some signs, although not by words, that my statements did not conform entirely to the record. In order to guard against any possible advantage the other side might take of the cross-examination of Mr. James, which when segregated from his examination-in-chief, may not convey a correct idea of what he intended to state to the jury, I beg leave this morning to call your attention to what he says both in the examination-in-chief and cross-examination, so that you may see Mr. James's direction in reference to the order referred to. That it should be revoked was, as I stated, directly communicated to Mr. Brady, and that Brady made the scornful inquiry, "Does this administration intend to conduct this office upon principles of economy?" I read from Mr. James's evidence, on page 1827 of the record—

I said to Mr. French that I wanted that order revoked. Mr. French said very well; he hoped I found no fault with him for General Brady's acts.

Mr. TOTTEN. I object to that, your honor.

Mr. WILSON. I want to note an exception to this.

The COURT. The court is of opinion that what Mr. French said to Mr. James was not evidence.

Mr. BLISS. I do not care for that. It may be stricken out.

Q. Did you, subsequently, after telling Mr. French that you desired that order to be revoked, at any time have any conversation with Mr. Brady with reference to it; and if so, at what time?—A. I think the next day General Brady came in and referred to my conversation with Mr. French, and asked me if economy was to be the policy of my administration, and I said yes. That was all the conversation I had with him.

Now, what was that conversation predicated of? French communicated to Brady the order of James, that the order on the route from White River to Rawlins should be revoked, and Brady sprang forward, under the impulse of a wounding touch on the pocket-nerve, and rushes the next day into James's room to inquire "What do you mean by this order through French to me? Is economy to be the policy of your administration?" "Yes, it is." Now, on the cross-examination he spoke of the conversation with Brady, at page 1834, and details all that conversation. The conversation he had with Brady was predicated of the order he had given to Brady the day before through French, and which brought Brady into his office to look after his endangered spoliations of the public funds. Now, when my brother comes to refer to this matter, bear this in mind that I have told you now and be not deluded by his forgetfulness.

At the close of the argument on yesterday, may it please your honor, I was calling the attention of the court to some authorities to sustain the principles of law I had formulated and submitted for your consideration. I beg leave now to add to the authorities then read, one or two from which I shall quote very short passages, and first I refer the court to the case of the United States vs. Cole, in 5th McLean, page 610. Indeed, the entire case may be examined with great advantage. At page 610 the learned judge uses the following language. But before reading it let me briefly state the case.

Certain parties were indicted for a conspiracy to defraud various in-

insurance companies by burning a steamboat. It appeared that the different parties who were charged with conspiracy had obtained insurances upon the articles shipped beyond their value, and it was charged in the case that the policies of insurance were fraudulent policies, obtained for the purpose of defrauding the company by destroying the articles insured, and then receiving for them greatly more than their value upon the policies thus fraudulently obtained. In that case his honor says:

If these insurances were made on false invoices of bills of lading, it would afford conclusive evidence that the intention was to injure the underwriters, and it would authorize a presumption against the defendants that they had done anything necessary to be done to effectuate their object, and if the insurance was greatly beyond the probable value of the articles shipped at the place of consignment, it would be ground on which the fairness of the transaction might well be questioned.

It would be difficult to find any case reported in the books so aptly suited to any litigated case of the day as this case and the case now at bar.

If these insurances were made on false invoices, it would afford conclusive evidence that the intention was to injure the underwriters.

If these expeditions and orders of Brady giving extra pay for these expeditions were obtained on false affidavits, it is conclusive evidence of the intention of the parties to defraud the United States. The language I now use is but a paraphrase of the language of Justice McLean, adapting the language in his case to the case now before you.

In the case of *The People vs. Mather*, 4th Wendell, the court, among many points, decides the following at page 230:

The fact of *conspiring* need not be proved: if parties concur in doing the act, although they were not previously acquainted with each other, it is a conspiracy.

Your honor will remember, and the jury possibly may know, that the case of *The People vs. Mather* is a famous case in New York, having reference to a conspiracy contemplating the death of Morgan, the notorious Mason.

In the case of *the United States vs. Babcock*, 3d Dillon, page 585, the court says as follows:

It is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or the means by which the unlawful combination was to be made effective. It is sufficient if two or more persons in any manner or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons actuated by the common purpose of accomplishing that end work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons to effect an unlawful end is a conspiracy, said persons acting under the common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto, from that time, as if he had *originally* conspired.

And you, gentlemen of the jury, will find this principle of the law when given to you by the court, as I have no doubt it will be, particularly applicable to that innocent swain who on Missouri's mountains fed his flock as frugal and innocent as the father of Norval.

Now, again, your honor, I recur to the case of *State vs. Mather*, to read another passage applicable to another important principle of law, the one last discussed on yesterday, and at page 261 his honor uses the following language, and the language comes from a judge who will be respected with the most earnest admiration for his legal learn-

ing as long as judicial tribunals last, and whose memory as a statesman will never die out whilst this country exists—William L. Marcy:

The law considers that wherever they act—

That is, the conspirators—

there they renew, or perhaps, to speak more properly, there they continue their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design. In this respect, conspiracy resembles treason in England, when directed against the life of the King. The crime consists in imagining the death of the King. In contemplation of law, the crime is committed wherever the traitor is and furnishes proof of his wicked intention by the exhibition of any overt act.

Now, sir, if the conspiracy is established as between these defendants to defraud the United States, and there is claimed to be, whether truthfully or not, a division of the subject-matter of the conspiracy, even if it be true that such division took place, yet, when subsequent to that division one of the original conspirators did any one of the acts originally contemplated by the conspiracy for the purpose of making its object—defrauding the United States—effective, the doing of that single act renewed and re-established the conspiracy, if it needed renewal or the breathing of new life into the body suffering from suspended animation.

If your honor please, in the case of O'Connell, in Clark and Finelly, to which reference has been made, the court declaring the finding of the jury upon certain counts of the indictment to be invalid in law, said at page 236:

On the second question we all agree in opinion that the finding of the jury upon the first, second, third, and fourth counts of the indictment are not supportable in law. With respect to the first and second counts, upon the ground that the jury not only find the eight defendants to be guilty of a joint conspiracy charged in each of these counts, but also find a certain number of those eight defendants who have been guilty of separate and distinct conspiracies under the same counts. In respect to the third count—because they find three of the defendants guilty of a conspiracy to effect all the objects stated; the rest of the defendants, except Thomas Tierney, guilty of a conspiracy to effect part only; and Thomas Tierney a still smaller part of the objects mentioned in the third count. And a similar objection in point of principle applies to the finding upon the fourth count, on which all were found guilty of the whole of the charge, except Mr. Tierney, who was found guilty of part only. And the reason and the ground for such opinion is this: That as each count of the indictment charges one conspiracy or unlawful agreement, and no more than one against all the defendants in such count, so the jury could find only one conspiracy of unlawful agreement on each separate count; for though it was competent to the jury to find one conspiracy on each count, and to have included in that finding all or any number of the defendants, yet it was not competent for them to find some of the defendants guilty of a conspiracy to effect one or more of the objects stated, and others of the defendants guilty of a conspiracy to effect others of the objects stated; because that is in truth finding several conspiracies on a count which charges only one. The case of *The King vs. Hempstead* is strong in support of this principle when applied to the case of larceny. The indictment contains one charge; the jury cannot find more than one.

Now, turning back to that indictment, and using its allegations to throw light upon the opinions of the learned justices, we find that the indictment charges—

The COURT. [Interposing.] Are you reading from the decision of the House of Lords?

Mr. MERRICK. I am reading from the decision of the judges presented to the House of Lords.

The COURT. That is what I mean.

Mr. MERRICK. Now, turning back, we find that the several defendants were charged with having conspired in the county-seat of Dublin—

to cause and create discontent and disaffection amongst the liege subjects of our said lady, the queen, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and sedi-

tious opposition to the said government and constitution ; also to stir up jealousies, hatred, and ill-will between different classes of Her Majesty's subjects, and especially to promote among Her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against Her Majesty's subjects in other parts of the United Kingdom of Great Britain and Ireland, and especially in that part of the said United Kingdom called England ; and further to excite discontent and disaffection among divers of Her Majesty's subjects serving in her said Majesty's army ; and further to cause and procure and aid and assist in causing and procuring divers subjects of our said lady, the Queen, unlawfully, maliciously, and seditiously to meet and assemble together.

There are combined in this indictment various and multiplied objects as the ultimate ends to be accomplished by the conspiracy ; to create disaffection towards the Queen generally, to create disturbances in Ireland, to get together large public meetings, to threaten coercive resistance to existing laws in order to secure their modification, and to do various other things ; and the jury found that certain of the parties were guilty of conspiring to do all these things, that certain of the other parties were guilty of conspiring to do certain of these things, and certain of the parties were guilty of conspiring to do others of these things. Now, say the court, *there is but one conspiracy*, and that conspiracy is to do all of these things, and you cannot find that the conspirators conspired, some of them to do some of the things and others to do others of the things, but you may find that the defendants conspired to do them all, and did them all, or conspired to do some, and did some, or conspired to do them all, and did any of them. It was a conspiracy to do a number of things. It was one conspiracy with multiplied objects, but the conspiracy had to be a united agreement between them all to do either all the objects or any one of the objects which the jury might find they had agreed to do. Therefore, whilst the indictment charged one conspiracy to do multifarious things, the finding of the jury was that there were several conspiracies to do different things. Here there is one conspiracy, and one alone, gentlemen of the jury, of which Brady is the central figure, and the genius and the life of which comes from S. W. Dorsey.

Passing from the dry detail of the law, which you will receive from his honor in such clear and luminous exposition that mistake in reference to it will be beyond possibility, I come to inquire into such of the facts as have been left to me to discuss. My brothers who preceded me have dealt with the facts, reasoning back from the acts done by the parties to the existence of the conspiracy prior to the act so done and concluded from the acts the existence of a conspiracy to do them. I propose in a few words to take a different course, and begin at the beginning and go down and meet them as they come up from the other end ; and before I am done uniting what I have to say with the tight and strong rope that they have made from the multiplied threads of action we will draw it around these defendants so that no man on that jury can doubt about his duty, or fail, in the honest compliance with his oath, to perform it.

What is the history of this conspiracy ? His honor has told you in the progress of the trial that the law is that you may, first, in order to show the existence of a conspiracy, prove the personal and the business relations of the parties, and we have shown them. How, for the first time, are any of these parties introduced to you, gentlemen of the jury ? It seems to me that it has been especially the office of the counsel of S. W. Dorsey to habitually recite and avow his innocence in court, wherever an opportunity was offered ; to treat these proceedings with a contempt only short of the contempt with which they apparently treat their brothers in iniquity, saying, practically, as the conclusion from the words they really utter, "We are better than you ; we stand above you and pity you thus struggling in the mire of criminality." A very admirable position for him to take who was the genius

of the whole combination, and who stood in the van like Satan among his fallen hosts.

The first introduction that you have to any of these parties is through Mr. Boone, a gentleman who, as you were told, is here under indictment in court in connection with some of these star-route operations, but not an indictment for defrauding the United States. But you were also told by the counsel who opened for the defendants that he was an honorable man, worthy of every respect and every credit, and he spent some half an hour in paying him a tribute and pronouncing a eulogy upon him.

Now, in 1877, it seems, from Mr. Boone's account, that he was here in Washington, himself a stage contractor, and that he had been for many years a stage contractor; and one feature of his testimony, and an important feature in this case, to which I shall hereafter refer, which will not cause any disturbance or variation in the line of argument now, that I may speak of, is this: That although he had eleven hundred contracts under operation since the letting of 1878, *not a single contract of his was ever expedited*. In 1877 Boone was here in the city of Washington, and he met Mr. S. W. Dorsey in the Post-Office Department, and that is the first introduction of any of these parties to you in connection with this grand scheme. Mr. S. W. Dorsey says to Boone, "I want you to come to my house; I desire to have a conversation with you." An appointment is made, and Boone goes to his house. They sit down to talk, and now, when the conversation is sought to be introduced, you will bear in mind the terrific fight to get the testimony in. These innocent men, whose skirts are so clear of stain that snow would scarcely do them justice in comparison—these innocent gentlemen, who claim to have high characters to maintain and protect, as well as bodies to keep beyond the limits of the penitentiary—apprehending danger from the light that was to come to the jury through this testimony, fought here vigorously and strongly, till the perspiration rolled from their brows, to keep out the light that Boone had to throw upon their machinations. But the court let it in, and the testimony is before you. "What do you want with me?" says Boone. "Well, we are going to bid for the lettings of the mail contracts of 1878. Here is a letter I have from Peck, who is my brother-in-law." Peck seems to be a mythical sort of a creature, or, if he be a reality, he was then so broken down that he was incapable of any active work, and under the dwindling and baneful influences of an ineradicable disease walked the world the shadow of himself for many years before he stepped into his grave. In the practical business of these transactions he never *personally* appeared. One man represents him at one time to the notary public under a guise. At another time Miner signs his name. At another time Rerdell performs the kindly office of forging his name for him. "I have a letter," says Dorsey, "from Peck, and he is going in." Well, they talked it over. "Also, my brother, John W. Dorsey," a Christian gentleman, says the counsel, who illustrates his Christianity by the most flagrant acts of perjury that ever soiled the record of any scoundrel on earth. They claim him to be a Christian gentleman; but if Christian gentlemen are what we ordinarily understand them to be in the Christian church, they are not in the habit of continually lying to put money in their pockets. "Well, who else is going in?" "Well, there is a friend of mine down yonder in Sandusky named Miner." An Ohio gentleman, familiar with Ohio and Ohio ways and Ohio courts. Gentlemen of the jury, my mouth must be sealed. Some men have more experience in difficult transactions than others. May be the criminal dock is not new to all these defendants.

Mr. HENKLE. I think it is.

Mr. MERRICK. Do you represent them all?

Mr. HENKLE. I am speaking of my client.

Mr. MERRICK. I, too, am speaking of your client. *He is the man I mean.* "There is a man by the name of Miner, and he is going in with my brother and brother-in-law." I read from page 1444:

—or one of his friends, as I understood, outside of the parties I spoke of.

Q. You—

That is Boone—

John W. Dorsey and Peck?—A. And Mr. Miner.

Q. Or one of his friends?—A. Or one of Mr. Dorsey's friends.

Peck, John W. Dorsey, and Miner, *or some other one of Stephen W. Dorsey's friends.* Who was making up this conspiracy? Who was gathering around him arms and hands to reach into the public Treasury for his benefit, while his own were apparently unoccupied with pelf? S. W. Dorsey. "My brother and brother-in-law will go in, and Miner, or, if not Miner, *then one of my other friends.*" One of S. W. Dorsey's other facile friends. That was in 1877, gentlemen, the morning of this day of fraud and criminality. In that room where Boone and S. W. Dorsey sat arose the sun, and there was marked his course. There was fashioned the duration and the business of that criminal day.

"Bids are to be put in for the letting of July, 1878, for my brother, my brother-in-law, and you and Miner, *or some other friend that I will let you know about at the time.* I will pick him up. We want you to go to work and prepare these bids, contracts, bonds, &c. You know all about it." Prior to that time we have no word of Peck, no word of John W. Dorsey. In December, 1877, this conversation having occurred some months before, Miner, Dorsey, and Peck came here to Washington, and Miner, having been finally determined upon as the elected friend, stops under S. W. Dorsey's roof, where close together they could confer upon their plans within walls that did not speak. S. W. Dorsey, "Senator" Dorsey, as the gentleman likes to call him, then wore the American toga, and at his house and under the auspices indicated the proposals were filled up. You will find that at page 1445. At that time Peck was here, or at least he was supposed to be here. Boone did not know Peck. Boone was a notary public. At page 1445 you will find Boone's statement in regard to his relations with Peck. In these proposals certain things had to be done by the proposer before a notary public, and an individual calling himself Peck came before Boone, as such notary public introducing himself as Peck by a letter written by Miner, and under the faith of Miner's letter, introducing Peck, Boone took the acknowledgment which he recorded as Peck's acknowledgment, and never *until long afterwards found out that the letter was a lie, and that Peck was not the man.* It was a fraud, and this was probably the first patent manifestation of the fraud conceived and yet hidden in the minds of these conspirators. From this first plain manifestation, gentlemen of the jury, it is evident that to these conspirators truth, honor, and law were nothing. Their obligations were nothing; they were simply wisps of straw upon a giant's hand, and whenever they tied those hands from convenient deviltry or fraud, they were broken asunder and scattered to the winds. It seems as if this was an almost unnecessary fraud. Peck was living somewhere, I suppose, and could have been gotten at in some way. Now, the bids were put in by Miner, John W. Dorsey, and Peck, and the contracts were awarded to the several parties bidding. Boone was to have a certain number, but they chiseled Boone, and he did not get the contracts that it was stipulated he was to have. The bids that were originally in

his name he found afterwards to be changed to the names of others, namely, to the names of the conspirators. They did not intend to have Boone in the conspiracy. He was a useful man to prepare and do the work, but he was a dangerous man to trust with secrets, and S. W. Dorsey did not intend to have in that conspiracy any man for whom *he could not think*; he did not intend to have any man whose actions he could not control. He intended to have a conspiracy of dummies, subject to his authority, and to his alone. Boone was not that kind of a man. Now, as you will see presently, contracts were awarded severally to John W. Dorsey, Peck, and Miner, but upon what terms? Upon the agreement that they were to have a common interest in those contracts. The contracts of Peck were not the separate property of Peck; the contracts of Miner were not the separate property of Miner; the contracts of John W. Dorsey were not the separate property of John W. Dorsey. "By the agreement," says Boone, "there was to be a common interest in those contracts." He says emphatically, that so far as he knows, S. W. Dorsey had no interest in them. Ay, of course he had not. That was a fact that Boone was not to know. That was a family secret between the brothers and the brother-in-law, and the facile friend from Ohio. Why? Because S. W. Dorsey, as a Senator of the United States, under the law of the land, could not be allowed to take a contract or to take an interest. But the time was coming when his Senatorial period would expire, and I have no doubt you will conclude as I have from the evidence that the facile friend and the brother-in-law and brother had agreed with him to take a secret interest, which should bloom out into the fullness of active and visible life the very instant the American people should be gratified by the sight of his retirement from the highest council of the nation. Now we have a community of interest in these contracts, and we have a combination of individuals in the subject-matter of the conspiracy. But still, although Stephen W. Dorsey was careful to keep his hands from observation, nevertheless he could not entirely conceal himself, and he was an active participant in certain of the transactions out of which this common property arose. Says Boone, at page 1440, "S. W. Dorsey directed the forms of the bonds to be sent out, which I did send accordingly. He told me to send the proposals, and *blanks* were to be sent to Clendenning, and bondsmen would be obtained there." Bondsmen were required upon the bids. The law requires that when a bid is put in there shall be filed with it a bond with adequate security that the bidder will take the contract; and, says Boone, "S. W. Dorsey directed me to prepare the form of these bonds and bids, and not only that, but S. W. Dorsey directed *me to send out these bonds to the postmaster at Fort Smith, in Arkansas, Mr. Clendenning, and that the securities would be there provided.*" The letters of Dorsey to Clendenning subsequently offered were excluded upon the earnest plea of S. W. Dorsey's counsel, who now declare to the world that they wanted everything to come in. When Boone was interrogated about the bids and the amount of the bids on the respective routes he said that Miner had the bidding book. Why did they not bring in that bidding book? Boone said that Miner had the bidding book and I asked him to tell me what he had seen in that bidding book, and the court shut me off at their request. No light, gentlemen of the jury, say the defendants, as long as they can keep you in darkness. Yet they told you they wanted all the light. Where is the book? Why did they not bring it in when Boone was on the stand? Well, they took the contracts. Who furnished the securities for

those contracts? The contracts themselves have to have securities that the contracting parties will perform the covenant of the contract. First, you must have security that if your bid is accepted you will take the contract. Second, you must have security when you take your contract that you will perform the contract. Who furnished this security on these ninety or one hundred contracts? S. W. Dorsey. Who were the securities? What were their names? Hoyt and Wheeler. Contract after contract has been read to you with the names of Hoyt and Wheeler. Hoyt and Wheeler on every single contract were procured to assume the responsibility of security-ship for John W. Dorsey, John R. Miner, and Peck at the earnest solicitation of Stephen W. Dorsey. And yet you tell me he had nothing to do with this. Why, he stood among these men like a giant among pigmies, and when the contracts were awarded on the securities that he had furnished for bids as well as contracts, under his direction and his manipulation, through Boone, and he saw in the distant future, shining down the path he was to tread, the golden treasures of the people torn from the Treasury, he lifted up his arms over his cocoonspirators, his Ohio friends and brother and brother-in-law, and said, "Well done, God bless you, my children." And more, whilst this transaction was in progress, moving on to its final consummation, who helped Boone? It was Rerdell. Rerdell sat up nights in Dorsey's committee room. Rerdell, Dorsey's private clerk, says Boone, helped in the transaction. Rerdell was Boone's subordinate, apparently, but closer still to Dorsey. Rerdell was well suited to be used by bad and able men, one of the characters that strong but vitiated minds and darkened hearts and unprincipled characters get around them and need for the accomplishment of their dark and criminal machinations. Rerdell was helping Boone, and S. W. Dorsey was guiding and directing both. "Mr. Boone, have you any records of all these things?" "Oh, no." "Why?" "We did business on grave-yard principles." Ay, better far for these men had they, at the time in the contemplation of prospective guilt but before its actual commission, all enabled some undertaker to do business for them on grave-yard principles. Far better the grave to them then than life now! Eighteen hundred and seventy-eight rolls around. Things are prosperous. The contracts are awarded, and the day for the initiation of the service has come. It is the 1st of July, 1878. What then? At that time things did not seem to be moving quite so smoothly. The end of July comes around and the service is not put on some of the routes. There is danger. Danger where? Not from Brady. Oh, no. He is one of the sweet fraternity brought in by S. W. Dorsey, as I will show you hereafter. There was no danger from Brady, but it came from the publicity of acts which would necessarily, in the event of failure to put on service, be recorded in other offices than Brady's. Oh, if they could only have kept those ugly records down. But they will not down. Like Banquo's ghost—no incantation or invocation will down them.

They stand proclaiming to the stricken heart the guilt of the criminal hand. Those records will go forth to the world, and Brady cannot resist the condemnation of the public when the public know from the record that he is not performing his duty. Something must be done to prevent these records. Thus they reasoned. Now comes one of the most extraordinary events that I ever knew to transpire in the history of two men. The Missouri shepherd comes upon the scene, fresh from the shades of his apple orchards in Independence, and about the end of July he meets with Miner, *their first meeting*. They had

never seen each other on this earth, and bore no kinship save that long removed that goes back to Adam—they had never felt the warmth of one another's palm, had never spoken one another's name—according to Vaile's account. Maybe they hadn't; maybe they had. Maybe the western Norval on the Grampian hills was mistaken. Miner says to him, "My routes, especially Canyon City and Fort McDermitt, are in danger. There is no service on them." What does Vaile do? He goes to Brady and asks Brady to give an extension of time for Miner, Peck, and Dorsey to put service on the endangered routes. It was the first time he had ever seen Miner, and he did not meet John W. Dorsey until the December afterward, and never saw Peck at all, if I am correct in my recollection of the testimony, and yet for a man that he had never met until that day who was co-operating with another man that he did not meet for five months afterward, and who was co-operating with another man that he never saw in his life, and never knew, he goes to the Second Assistant Postmaster-General to *plead for official indulgence to these dearly beloved but unknown friends*. Why, gentlemen, our puny hearts with their small sentiments shrink and shrivel in our bosoms at the thought of this great, big, broad humanity and love. But that is not all. Who was Brady? What was Brady to him? Why, it is just the same question that was asked by the great thinker in our language years ago—

What was he to Hecuba or Hecuba to him?

Was Brady his brother, his friend, his dear companion, who would listen kindly to his importunities and respond with alacrity to his requests? No. He did not know anything about Brady. *He says he knew nothing of Brady, and pushes him away with a contemptuous wave of his hand*. He knew as little about Brady as he knew about Miner. He never saw Brady or heard of Brady until Brady got to be Second Assistant, and then never had any intercourse with him except of an official character, and that of a remote and distant character. "Did you think Brady would serve you?" "No; I had no relations with him at all. I had no love for him nor he for me. *In fact, he had been unkind to me;*" but for Miner's warm embrace, with that great big soul, which took in all humanity, Brady and everybody else was his friend, his heart, enlarged by this new sympathy, grew generous and soft, and everybody was his friend. "Yes; I will talk for Miner. I will plead for Miner; and under the impulse of this great, this broad and sympathetic love I have for Miner, Brady, that I don't know and don't care about, must yield in obedience to the great law of human nature that makes us love people we do not know much better than those we do know." He goes to Brady. Why, gentlemen of the jury, do you believe all this? Can you believe all this? And yet this is a case, gentlemen, where extraordinary things happen, and where the thinker upon human motives and human conduct, and the philosopher who wants to describe the springs of human action might learn wisdom; for Vaile's love for Miner at first sight was not the only instance of love at first sight; not at all. I am not speaking now of that sentimental love at first sight when all the world grows bright at once from the single glance of a sympathetic eye. That is not what I am talking about. I am talking of the love at first sight that rings out the sound of mutual love by jingling the dollars in the pocket. That is the love at first sight that I am talking about. There was another case of it when General Brady rushed into Buell's arms and began negotiating to let him have \$10,000 the very first time he ever

met him in his life. Did not those negotiations terminate in Brady's letting him have \$10,000 to buy The Capital newspaper, which thereafter was to be used by Buell in the name of Brady to pour through its columns malice, slander, and libel upon the honest men of this District, upon his honor on the bench, upon the jury, the counsel for the government, and everybody that dared in the name of the people of the United States to raise hand or voice against these conspirators to rob the Treasury? Good things come from love at first sight.

Well, Vaile goes to Brady, and he has a conversation. Did Brady extend the time? "Not exactly." "Did he extend the time?" "I don't know whether he extended it. I hardly can tell you." He goes out West in the middle of August, this friend of the friendless, for he says himself he was a friend of Miner's because Miner was deserted by everybody else. Well, this generous-hearted man that could take in all humanity and wrap them up in one single greenback, goes out West, and Brady—the man he hardly knew and cared for not at all—Brady telegraphs him, "How many of the routes of Peck, Miner, and Dorsey will you put into operation?" He telegraphs back, "I will take them; I will run them." In steps the Missouri shepherd and out goes Boone. When I wanted to know how it came that Boone went out, you know that the court would not let him tell all that occurred; but Boone, to use his own language, says, "*I was frozen out for Vaile in August, 1878.*" Boone had done the work, manipulated the machinery, and accomplished all, as a man of experience, Dorsey wanted to accomplish. Dorsey needed somebody of experience, and yet he could not have this man in with him and keep him there, because he could not tell him the secret, his object being to have nobody in the secrets of the plot but dummies of his own. He must have a man capable of starting the thing, but having used Boone up to the time that Boone was useful, he goes out and Vaile comes in. Now we have the conspirators, John W. Dorsey, Miner, Peck, Rerdell, and Vaile, and over them the generous, kindly wings of Stephen W. Dorsey shaking down fraternal love, blessings, and directions. Vaile comes in, as I say, and takes these routes. Was it not a strange thing, gentlemen of the jury, that Brady should telegraph to Vaile and ask him to take these contracts? Do contracts go begging? Do public functionaries of the United States petition citizens that they have nothing to do with to perform public duties? Was it not an extraordinary thing that Mr. Brady should thus request him to take those contracts? Bear in mind the service had not been put on certain of those routes. On the Canyon City and Fort McDermitt route, says Vaile, the service was not put on until January, 1879.

Mr. KER. Part of it in December and part of it in January.

Mr. MERRICK. Yes. Bear in mind, too, that the route was expedited before the service was put on, and bear in mind another thing: that coincidently and immediately after the filing of Vaile's subcontracts and after he had made the arrangements to take those routes under the direction and suggestion of Brady, immediately the original contract prices went up multiplied by hundreds and thousands. But the service was not put on several of them or on the Canyon City and Fort McDermitt routes until January. Why did the Second Assistant Postmaster-General allow these men to lag along the way whilst the public was suffering so much for the mail as Mr. Totten and Mr. Wilson and these gentlemen all tell you they were? What was the law of the land on the subject? I showed you, gentlemen, yesterday how Brady trampled upon your laws, namely, the law limiting the expenses of the department to the appropriations made by Congress. Now let me show you how in behalf of

this conspiracy he trampled upon another law. I read section 3954 of the Revised Statutes :

If any regular bidder whose bid has been accepted shall fail to enter into a contract for the transportation of the mail according to his proposal—

That does not apply here—

or having entered into contract shall fail to commence the performance of the service stipulated in his or their contract as therein provided, the Postmaster-General *shall* proceed to contract with the next lowest bidder or bidders in the order of their bids, &c.

And declare the original contract forfeited. Now why did not the Second Assistant Postmaster-General proceed according to law? Why did he allow these men to tarry along the way and not put the service on those routes according to the covenants of their contracts? Why did he waive the obligations of those covenants? It was his duty to declare the contracts void, to forfeit the contracts and to forfeit all the contracts and then give a contract to the next lowest bidder. The law does not say he may do it. It says he *shall do it*. It leaves him no discretionary power; we know that in other cases Brady exercised the power under the law with vigor, with bitterness, and with irritation. Why did Brady declare the McDonough contract forfeited upon which Walsh was doing the work? Says Mr. Wilson it was forfeited because of Walsh's delinquency in not carrying the mail on time. Walsh says it was not forfeited on that account, but it was forfeited because of a failure to carry the mail in accordance with the contract of McDonough on another route. But the contract was forfeited on the route from Santa Fé to Prescott, and it was given to the next lowest bidder. Why did he not forfeit the contract on the Canyon City and Fort McDermitt route? Why did he delay until January, 1879? Why did he allow the service to be delayed on other routes? They had special service on them which the defendants were afterwards required to pay for. Hardly any of the western routes had full service on them, and yet Brady stood quietly by acquiescing in the failure of these delinquent contractors to perform their covenants and giving them additional time running even into the next year. Why did he do this? Why did he so much interest himself in the contracts of Peck, Miner, and Dorsey as instead of declaring them failing contractors on the 16th day of August to send and beg another man to go into them as one of the party? I will tell you why, gentlemen. There is no other answer to it on the face of the earth, because we must reason upon these things as we do upon the ordinary matters of life; when Brady found, and Vaile came and told him that these men had not put the service on, Brady saw that he would lose the money from these various conspirators and friends. Vaile had money to a large amount accumulated through twenty years of profitable experience as a mail contractor. Do not shake your head, Mr. Vaile; you had grown wealthy, and you said yourself on the witness stand that you were "a fair liver" among your orchards, and on your broad fields in Missouri. He had money accumulated by contracts through twenty years. Brady knowing that said, "We will now push Boone out and take Vaile in, and then we will get along admirably without drawing too heavily on S. W. Dorsey"; and so, being interested himself, he failed to discharge his official duty in not declaring the contracts forfeited; and then takes in a man that he thinks will furnish the money, and who becomes one of the conspirators, and thereupon Brady proceeds to grant further and further indulgence; and in order to help them out with the contract in putting on the service

He expedites a route from a few thousand dollars a year up to eighteen or twenty thousand dollars before the horses have trod the road over which the mail is to be carried.

Well, now, gentlemen of the jury, one other law to which I desire to call your attention, is section 3954 of the Revised Statutes, which is as follows:

Any person or persons bidding for the transportation of the mails upon any route which may be advertised to be let, and receiving an award of the contract for such service, who shall wrongfully refuse or fail to enter into contract with the Postmaster-General in due form, to perform the service described in his or their bid or proposal, or having entered into such contract, shall wrongfully refuse or fail to perform such service, shall, for any such failure or refusal, be deemed guilty of a misdemeanor, and be punished by a fine of not more than five thousand dollars and by imprisonment for not more than twelve months. And the failure or refusal of any such person or persons to enter into such contract in due form, or having entered into such contract the failure or refusal to perform such service shall be *prima facie* evidence in all actions or prosecutions arising under this section that such failure or refusal was wrongful.

Of course Brady was not going to get his friends into the penitentiary then. He waited until, a new administration coming in, he should go out of office before he concluded they had better go to the penitentiary.

Now, gentlemen, let me go on and take Mr. Vaile down a little further. When Vaile thus came in he made a bargain. What was his bargain? Let us see. It is dated August 16, 1878, and will be found at page 2201. I have to read this agreement to you, gentlemen, although I am detaining you much longer than I had anticipated. Like you, gentlemen, I am under a solemn oath, and I will do my duty if I fall at this table:

This agreement, dated the 16th of August, 1878, by and between H. M. Vaile, of Independence, Missouri; John R. Miner, of Sandusky, Ohio; John M. Peck, of Colfax County, New Mexico; and John W. Dorsey, of Middlebury, Vermont; witnesseth as follows:

1st. A copartnership is hereby formed by and between the above-mentioned parties, for the purpose of managing certain mail routes in the Western States and Territories. Said routes are all those which have been awarded to said Miner, Peck, and Dorsey for the contract term from July 1, 1878, to June 30, 1882.

2d. Said H. M. Vaile is hereby made treasurer—

Where are your books? They did not keep any. They did business on the grave-yard principle—*treasurer and no books; a half a million a year receipts and no books.* The sublime confidence that these gentlemen showed either must elevate human nature very much in your esteem or debase it very much in your opinion, I hardly know which—

of said copartnership, and the other parties hereby agree, by suitable powers of attorney or drafts on the Auditor of the Treasury for the Post-Office Department, to authorize the said Vaile to demand and receive all mail pay on said routes, and with said mail pay to pay—

Now what was to be paid—

first all subcontractors the amounts due them; 2d, the expenses necessary and incident to the proper doing of the business; 3d, to divide the profits remaining among the parties hereto each quarter, as hereinafter specified.

Now, gentlemen, you have heard a great deal about money advanced by S. W. Dorsey, and which he was to have returned to him out of these routes, and you have heard it said that when the division came in 1879, S. W. Dorsey took these routes simply to reimburse himself for the money that he had loaned. There is not one particle of proof in this case, from the beginning to the end, that S. W. Dorsey ever loaned a single farthing to these people. Vaile says, in his testimony, that he understood that Dorsey had loaned them money, but Vaile's testimony that he so understood is explicitly contradicted by

this agreement which I am now reading, for it says that the money when collected was to be used, *first*, to pay the subcontractors the amount due them; *second*, the expenses necessarily incident to the proper doing of the business; *third*, to divide the profits remaining—after paying running expenses and subcontractors—among the parties thereto, each quarter as thereafter specified.

Where are your books? They did not keep any. They did business on grave-yard principles.

Mr. HENKLE. Left it with Felker.

Mr. MERRICK. Was it left with Felker? Walsh had a bookkeeper in this town. You could have summoned him but you dared not do it. He told you who the bookkeeper was and where he was. He is in the War Department. Abuse Walsh as much as you please. He stands before this jury and community unimpeached and unimpeachable, and I will show you that he has exhibited your clients in their true light, and that under the burning sunlight of truth that he has poured upon them they will melt away from honesty only to disappear behind the doors of the penitentiary. The treasurer has no books. He said they had no books—the sublime confidence of simple and pure hearts!!

3d. Said J. R. Miner is hereby made secretary of the said copartnership, and shall keep an accurate record of the receipts and expenses of the company, and of correspondence with subcontractors and others.

A record written on marble: *Hic jacet.—Requiescat in pace.* Grave-yard principles again.

4th. The profits accruing from the business shall be divided as follows: From routes in Indian Territory, Kansas, Nebraska, and Dakota, to H. M. Vaile one-third, to John R. Miner one-sixth, to John M. Peck one-sixth, and to John W. Dorsey one-third.

From routes in Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Washington, Oregon, Nevada, and California, to H. M. Vaile one-third, to John R. Miner one-third, to John M. Peck one-third.

5th. Before any division of profits is made, the sums which have heretofore been or may hereafter be advanced by the parties hereto.

Not S. W. Dorsey unless he was Peck:

The sums that have been advanced by *the parties hereto*—

There is no provision for any advance from anybody, except the parties hereto—

shall be paid to the parties so advancing such sums, and if the profits are not sufficient to repay the entire sums so advanced at the end of the first quarter, then a pro rata per cent. shall be paid each quarter until the sums so advanced have been fully discharged.

6th. The subcontracts heretofore made between John R. Miner and H. M. Vaile on routes 32020 and 32021 are *bona fide*—

Well, it is quite necessary to declare that they were *bona fide*, as I will show you presently—

and this copartnership have no interest in said routes. The subcontract made to H. M. Vaile on route 32018, giving said Vaile ninety per cent. of the award and ninety per cent. of the increase to six times a week, and sixty-seven per cent. of the increase to seven times a week, and eighty per cent of the extradition is to stand. The subcontracts on 35051, 35053, 44155, and the extra subcontract made on 32018 and filed, were made to protect the company and enable them to discharge their obligations to subcontractors for the quarter ending September 30th, 1878.

In witness whereof we, the parties hereto, have subscribed our names this 16th day of August, 1878.

H. M. VAILE.
JOHN R. MINER.
JNO. M. PECK.
J. W. DORSEY.

This agreement bears date the 16th of August. "When was it signed?" "Oh, it is antedated, it was not signed till November. I signed it in November. We antedated it," says Mr. Vaile. "Mr. Vaile, when you entered into this arrangement and advanced money to run these routes, did you inquire whether there were any subcontracts on these routes or any prior liens?" "No, I did not." "What? Did you risk your money, taking as security for it property which might be liable as security for something else worth more than the property?" "Oh, yes." "Did you ask them if there were any subcontracts on it?" "Oh, no; I did not." "Why, how is that?" "Oh, we antedated our subcontracts. They gave me subcontracts, and they antedated my subcontracts, and whilst they were only executed in the fall of 1879, they bore date way back to the 1st of April, 1878. My subcontracts were antedated several months beyond 1878, I think." Some months beyond the time that the operation of the routes began. "You antedated your subcontracts so that you might cut out and defraud any subcontracts made prior to the date when you really took a subcontract?" "Yes, that is what we did." He told this jury that he had perpetrated, or attempted to perpetrate, that fraud with as brazen a face as ever stared honesty's countenance into shame; that he had antedated the subcontract in order to defraud any intervening contractor between the time that such intervening contractor might have made his contract and Vaile's contract had been actually agreed to. He did not take the trouble to inquire, did not go to the department to look, did not even ask Miner and Dorsey if there were any prior contracts or prior liens. Oh, no; what is the use of these inquiries among brothers. It is true brothers will cheat one another sometimes, "But, brother, you and I have agreed to cheat the rest of mankind, so we might as well begin it on these subcontracts." His very introduction into the transaction, then, gentlemen of the jury, was in the first place by a statement of Miner, that no man who knows human nature would believe for a minute. His next transaction in relation to it was by a negotiation and an act that all the world will recognize as a deep and damning fraud. Well, what more? He goes along on down in the current of time as innocent of what was transpiring as a babe; he did not know a storm from a breeze, like that babe in the cradle that we have heard of in our childhood:

Rock a-by baby on the tree top,
When the wind blows the cradle will rock.

Vaile's cradle was rocking all the time without peril from bough or storm.

And so this country shepherd went on down not knowing what was transpiring in reference to this property. Said I, "Mr. Vaile, do you know when Camp McDermitt and Canyon City was expedited?" "No, I do not." "Did you know when Tongue River was expedited and its trips increased?" "No, indeed; I did not." "Why, you were getting a few thousand dollars on one route. The Dalles to Baker City, route 44155, Mr. Vaile, of which you had charge was originally \$8,288 and October 29, 1878, it was increased to \$18,648. Did you know that?" "Oh, no; I did not know that." "White River to Rawlins was \$1,700, and before May, 1879, it had been increased to \$12,000. Did you know that?" "No; I did not know anything about it." "Redding to Alturas, which was \$2,994, was increased December 3, 1878, to \$26,946. Did you know anything about that?" No; I did not know anything about it." He, *the treasurer* of this association, had routes going up from one to five thousand dollars, to twenty and twenty-five thousand dollars, and yet he knew nothing about it. He may have known

it at the time; did not know what he did with the money; did not know where he kept it, except that he paid it out, or did all that was right, but *what* he did with it he did *not* know. And then, gentlemen, going through with that experience, he passes to 1879, and during that period, when he was so innocent in reference to what was going on, when, as he tells us, he never knew that any effort was being made to obtain an increase of service or expedition on the Tongue River route, or on the Canyon City route, or any other route, he declares, "*I had absolute control over these routes.*" He knew nothing that was being done, although he had absolute control over these routes. Gentlemen, the narrative is too preposterous for human credulity. Now he says, "We come down to 1879, along about the 1st day of April, and we met together and we put in a number of our routes and divided. I was to have 40 per cent., Miner was to have 30, and Peck was to have 30." But he does not put it in that shape. "I took 40," says he; "S.W. Dorsey, representing Peck and Miner, took 60—30 for Peck and 30 for Miner." That was the way. [Mr. Vaile nodded his head in the affirmative.] He says I am right. Peck and Miner were not there probably. Now, S. W. Dorsey comes on the scene again. Peck and Miner were not there, or, if there, says Vaile, "I took 40 per cent., and S. W. Dorsey took 30 per cent. for Miner and 30 for Peck." So S.W. Dorsey took it. Of course he did. Why, and how? Why, how comes it that S. W. Dorsey takes it at this time, being April, 1879? On the 4th of March he ceased to be a Senator of the United States, and his theretofore secret interest might now become public with safety, as he supposed, and he now appears upon the field as an active participant in the manipulations and the profits of these transactions, and the record is burdened down with his receipts for drafts and money, and Bosler comes in as his friend who had loaned him money. Where is the proof that Bosler ever loaned one farthing on these routes? Why did you not put him on the stand? Why did you not bring him here as a witness and let him show that S. W. Dorsey and he had loaned money, and that Dorsey had no personal interest? You dared not do it. He came too close to your brother conspirators. He had looked into the secret chamber where in the darkness you sometimes had a dim light, and you knew we would make him tell the truth. No, sir. Wherever there was a man that could open the window or disclose an aperture, he was kept far away from the witness stand. They did not even dare to put Williamson on the stand, a man whom they had kept out there in Oregon to supervise or help on these routes. No, not one. Vaile they took, the only defendant in the case that opened his mouth. Vaile is put upon the stand.

Mr. HENKLE. Now, if the court please, I want to know if what he says is to be tolerated?

Mr. MERRICK. I say it is not only to be tolerated, but it is right.

The COURT. What was it you said?

Mr. MERRICK. I said Vaile was the only defendant who went on the witness stand. I am speaking of Vaile, not of the other defendants. I am describing Vaile.

The COURT. He is a fair subject.

Mr. MERRICK. Yes, sir; I am fair and right.

The COURT. Let the stenographer read the remarks that are objected to.

[The stenographer then read as follows:]

Vaile they took, the only defendant in the case that opened his mouth. Vaile is put up n the stand.

The COURT. I think, Mr. Merrick, that that is decidedly objectionable.

Mr. MERRICK. He is a defendant.

The COURT. You referred to him as the only defendant whom they dared to put upon the stand.

Mr. MERRICK. I did not say *dared*.

The COURT. Whom they put upon the stand.

Mr. MERRICK. Yes, sir.

The COURT. That implies an imputation upon them for not putting the others upon the stand.

Mr. HENKLE. The court admonished Mr. Merrick yesterday not to do that again.

Mr. MERRICK. Very well, I am going to make that question directly. Vaile is a defendant and here are the defendants.

The COURT. If you strike out the word only——

Mr. MERRICK. [Interposing.] I strike it out. That is what I am going to do now. Vaile is a defendant. There are other defendants. Vaile is a witness upon the stand.

The COURT. You are violating the rule when you say he is the only one.

Mr. MERRICK. I do not say he was the only one. There were other defendants.

The COURT. You have no right to say it in that connection.

Mr. MERRICK. Very well; I want to keep within the rule.

Mr. HENKLE. Now, your honor, I think we have had enough of this. Perhaps the mischief is already accomplished, but I think that the court ought to admonish Mr. Merrick to keep within the rule.

The COURT. I thought that that was a rule of this case that was hung in conspicuous letters in the court-house.

Mr. HENKLE. Your honor on yesterday told Mr. Merrick that he must observe it, and he has transgressed it this morning.

Mr. MERRICK. I have not transgressed it.

The COURT. I think you have.

Mr. MERRICK. I am very sorry, if I have. I do not want to transgress any rule. Now, sir, upon that subject, I submit to the court, as a question of law—I might as well take it up now as later—that, although by the statute of the United States defendants are permitted to testify——

Mr. HENKLE. Now, I object, your honor, *in toto*.

The COURT. I cannot allow that question to be argued in the presence of the jury.

Mr. MERRICK. I thought your honor said it might be argued.

The COURT. It may be argued, but the jury will have to retire during the argument, because, according to my impression of the law, it is a matter that ought not to be mentioned in the presence of the jury at all.

Mr. MERRICK. Very well, I understand the rule. Now, then, your honor goes further to-day——

Mr. HENKLE. You understood the rule before.

Mr. MERRICK. I did not.

Mr. HENKLE. Then you ought to have understood it.

Mr. MERRICK. I ought not, sir.

Mr. HENKLE. Then you are not as much of a lawyer as I thought you were.

Mr. MERRICK. I am not to be talked to that in that way, sir.

The COURT. Gentlemen, I beg that you will not allow this matter to go any further.

Mr. MERRICK. No, sir; I do not intend to allow it.

The COURT. I must stop this quarrel.

Mr. MERRICK. It is all stopped. I understood that I was to argue this question.

The COURT. You can argue it, but not in the presence of the jury.

Mr. MERRICK. I understood I was to argue it when the jury was present. Then when the jury is not present I shall take some occasion to refer to it. I was speaking of Vaile, gentlemen, Vaile the defendant who sits by the side of Mr. Henkle, who was a witness in the case, and who was sworn in the case. I believe I am in order, your honor.

Mr. HENKLE. I have no objection to that.

The COURT. You are very close to the line

Mr. MERRICK. Now in 1879 he says that they drew lots, that he took 40 per cent., that S. W. Dorsey took 30 per cent. for Peck, and that S. W. Dorsey took 30 per cent. for Miner, and after that he says he had nothing to do with the other routes and they had nothing to do with his routes.

Mr. HENKLE. I do not want to interrupt you, but——

Mr. MERRICK. Oh, well, it is not at all material. If I am wrong correct me.

Mr. HENKLE. You are. I have no doubt that it was perfectly unintentional, but you misstated the testimony of Mr. Vaile as to the division of that fund on those routes. Mr. Vaile, as I understand it, said he took 40 per cent. for himself, and Mr. Miner took 30, and S. W. Dorsey took 30 per cent. for John W. Dorsey and Peck.

Mr. MERRICK. That is so. I am much obliged to you. I thought there was one less of these fellows than I have been talking about. I did not know what had become of him. I had actually forgotten him.

Mr. HENKLE. Now you have found out.

Mr. MERRICK. Yes. Vaile took 40 per cent. for himself, Miner took 30 per cent. for himself and then Vaile and Miner hitched up a double team to run the routes and S. W. Dorsey took, as the representative of Peck——

Mr. HENKLE. Of John W. Dorsey.

Mr. MERRICK. Of John W. Dorsey, 60 per cent.

Mr. HENKLE. Thirty per cent.

Mr. MERRICK. Thirty per cent. That is it. After this division of the plunder Vaile and Miner had nothing to do with Dorsey and Peck, and their routes; and Dorsey and Peck had nothing to do with Vaile and Miner, and their routes.

Mr. HENKLE. Precisely so.

Mr. MERRICK. That is so, is it?

The COURT. Let me understand that.

Mr. MERRICK. I want you to understand that.

The COURT. I understood that evidence when it was delivered as amounting to this: That they pooled the routes and divided the proceeds in that way.

Mr. WILSON. No, sir; not a bit of it.

Mr. MERRICK. That is just what they did.

The COURT. That is exactly what I want to know now.

Mr. WILSON. That is the very vitals of this case, your honor.

Mr. MERRICK. Then, if that is the vitals of your case, I will very soon perforate those vitals.

The COURT. Well, proceed.

Mr. MERRICK. Now I will go after those vitals.

Mr. HENKLE. "Lay on, Macduff."

Mr. MERRICK. If those are all the vitals you have got I am afraid you have an abdominal disease from which you will never recover.

Mr. WILSON. We will see when we get through.

Mr. MERRICK. For the present, concede that to be the case, which I shall show you is not the case, that they pooled the plunder on the 1st of April, 1879, that Vaile took 40 per cent. of the plunder, that Miner took 30 per cent. of the plunder, and that S. W. Dorsey, for John W. Dorsey and Peck, took another 30 per cent. of the plunder. Now, I believe I have got it right. After that division Vaile and Miner united their 40 and 30 per cent. of the plunder, and thereafter they had nothing to do with Dorsey and Peck, and Dorsey and Peck had nothing to do with Vaile and Miner. Very well. Now we have got their statement and their *vitals*. Now, I will show to this jury that after that date they crossed over from one to the other wherever a fraud would help either side, and whilst Vaile swears that they had nothing to do with each other, he told what he knew to be a deliberate falsehood on the witness-stand. I will show to you that affidavits made prior to the 1st of April, 1879, when this distribution took place, were passed from one side to the other and filed subsequent to that distribution, and that affidavits were made and crossed over, and petitions inclosed to the Second Assistant Postmaster-General by John R. Miner on other routes than those of Vaile and Miner. The distribution, if there was any, was simply a sham and a fraud, and even if it was a distribution, what does it signify? They had a lot of fraudulent contracts, some of which had been increased and expedited by fraudulent expedients, and which were to be further expedited and increased, and they divided up these fraudulent contracts among themselves that they might respectively go and draw pay upon them. They were not the ultimate proceeds of the fraud. They were the intermediate stages of the fraud. They were not the fully ripened fruit, but they were the fruit in the green to be ripened. What matters it whether they divided then or not? A conspiracy is not broken up by distributing among the conspirators the various transactions they are respectively to do. If a dozen men conspire to go to a bank and fraudulently to get checks certified by a conspiracy with a clerk in the bank, and they are charged with conspiracy to defraud the bank, and it is shown that after they got these checks by fraudulent representations they divided the checks, does the conspiracy end? No. Why? One of the ultimate objects of the conspiracy is to get the checks paid, and when the fraudulent checks are divided up between the villainous conspirators, each man, as he goes to get that check paid, goes in the execution of an object set forth as one of the objects of the conspiracy. You would swear to your false oaths, you would file your forged petitions, and after the forged petitions and the false oaths had enlarged your contract from \$1,000 into \$25,000, then you would divide the contract and tell me there is no criminality in collecting the \$25,000 by any one of the men in the conspiracy? No, sir. It is neither law of God nor of man that by such pretenses man may free himself from the criminality of which he has been guilty. It is a ridiculous, an absurd, and a contemptible device.

I will now take up a paper which I have among my notes, headed S. W. Dorsey, and I will track the conspiracy down. But probably before I do that, as Mr. Henkle seems to have his attention well aroused, I will pay my respects to him for a single moment.

Mr. HENKLE. On what route?

Mr. MERRICK. On route No. 38140, from Trinidad to Madison, not being a Miner and Vaile route. That was one of the routes that S. W. Dorsey took. On page 1101 you will find that on the 10th of May, one

month and ten days after this distribution among the forty thieves, Miner wrote this letter: •

WASHINGTON, D. C., May 10, 1879.

HON. THOMAS J. BRADY,
Second Assistant Postmaster-General:

SIR: I have the honor to transmit herewith additional petition, asking for increase of service on route 38140, from Trinidad to Madison, Colo., and to request that it be placed on file.

Respectfully,

JOHN R. MINER.

What do you say to that?

Mr. HENKLE. You will hear from me on that when the time comes.

Mr. MERRICK. I will hear from him on that! Yes, gentlemen of the jury, and I want you to mark well what he says. Now he and I have agreed, for the sake of this argument, and not as a fact, for I deny it, that on the 1st day of April, 1879, these conspirators met together and divided up the routes; that Vaile and Miner took certain routes, and Peck and John W. Dorsey or Stephen W. Dorsey took certain routes, and that among the routes taken by Peck and Dorsey, not by Miner, was route 38140, from Trinidad to Madison. That we agree to, do we?

Mr. HENKLE. I think that is right.

Mr. MERRICK. Then route 38140 was not Miner and Vaile's route. What had Miner to do with that route on the 10th day of May, 1879? What business had he to touch it? Why should he interest himself in it? And yet on the 10th day of May, 1879, Miner, in a communication to the Second Assistant Postmaster-General, not as agent or attorney, but as John R. Miner, inclosed to the Second Assistant Postmaster-General a petition and asked for an increase upon that route. Had they divided? Had they separated? Had their paths diverged from each other? Probably they had, but they crossed over wherever a fraudulent act was to be done. All these things show the still-continuing community of interest. On December 6, 1879, Miner writes another letter, to be found on page 1105, to Thomas J. Brady. I will read it:

WASHINGTON, D. C., December 6, 1880.

HON. THOMAS J. BRADY,
Second Assistant P. M. General:

SIR: We have the honor to request that the subcontract of S. W. Dorsey, on routes Nos. 38102, 38112, and 38140—

Which was from Trinidad to Madison, Dorsey's own route—

be withdrawn from the files of the P. O. Department and canceled, as the said S. W. Dorsey is no longer a subcontractor on said routes, from January 1, 1881.

Very respectfully,

JNO. R. MINER,
Contractor.
S. W. DORSEY,
Subcontractor.

What had he to do with that route? Why should he be corresponding with the department about that route, and tell them that S. W. Dorsey was no longer the subcontractor, when it was S. W. Dorsey's own route? I merely turn to those two little things for the present. We will come to the larger ones by and by, to that singularly interesting system of acrobatic swearing for which Mr. Miner is so distinguished. I will now follow the regular line of the argument down, beginning with this paper marked S. W. Dorsey. The theory of my distinguished and most excellent friend Mr. McSweeney is, that S. W.

Dorsey never had anything to do with this business at all. Now I must recur to some things said of the transactions when Boone was on the stand. I mean the transactions of 1877 and 1878. Let us see what S. W. Dorsey did in 1878, and whether at the time he was still in the United States Senate he was not soiling the dignity of his high office by covert dealings in transactions which the law forbids him openly or secretly to have anything to do with. On June 10, 1878, S. W. Dorsey writes a letter to Brady in reference to the route from Garland to Parrott City, the one that Mr. McLean spoke of yesterday when he showed how carefully attentive he had been to this evidence. I called it the Garland and Parrott City route, and showed the map, and he said it was a mistake; that it was the Ojo Caliente and Animas City route. They are identical, gentlemen; Garland was cut off at one end and Parrott City at the other, and Ojo Caliente left at one end and Animas City at the other. I was delighted to see that he had paid such attention as to correct me in an apparent though not a real error. They are the same route. It is a very interesting route; and I propose to take this single route as an illustration of all. I intend to take this route alone, because of its interesting features, and because the silver thread of S. W. Dorsey's genius runs all along through it, mixing with the coarse, harsh threads of his minions and tools.

On page 810 of the record will be found this letter:

UNITED STATES SENATE CHAMBER,
Washington, D. C., June 10, 1878.

Hon. T. J. BRADY,
Second Assistant Postmaster-General:

SIR: In consequence of the extension of the Denver and Rio Grande Railroad, it will become necessary to increase the mail service from the terminus of that railroad south of Fort Garland, Colorado, to Santa Fé, New Mexico, to seven times a week with fast schedule. This will give the people of New Mexico and Arizona their mail ten or twelve hours quicker than they get it now.

I write this to call attention to the fact that the route from Fort Garland by Taos to Santa Fé is on the east side of the Rio Grande River, which, for upwards of 100 miles, cuts through an enormously deep and impassable cañon. The railroad runs on the west side of the river, and there is and can be no connection between the line of railroad and the Fort Garland and Santa Fé mail route. The route which connects with the railroad is the Garland, Conejos and Ojo Caliente route. This is the one to be increased, and to which I call your special attention, and ask that you examine your maps before action is taken.

The route from Garland via Taos cannot be moved to the west side of the Rio Grande, as it supplies a number of local offices, including Taos, and as there is another route already in operation connecting directly with the railroad which should be increased.

I send you a diagram received from parties in Santa Fé.

Very respectfully,

S. W. DORSEY.

According to the theory of the other side, and if that theory be true or have a shadow of a probability of truth, what had S. W. Dorsey to do with the Ojo Caliente route on the 10th day of June, 1878? This was a New Mexico route, and Dorsey was a Senator from Arkansas, and had no more to do with New Mexico as a special and primary object of his political supervision than you or I have to do with it.

Arkansas was the State that he was appointed to supervise and look after; and although a Senator of the United States must look to the whole and the entire country, and ought to have a vision broad as the nation, and deep and clear, yet his own State is quite enough for him to attend to in reference to these smaller matters of local mail facilities. He cannot pretend, and his counsel cannot pretend for him, that as a Senator of the United States Dorsey was bound to look after the local mail facilities of

New Mexico. He was bound to look after the local mail facilities of Arkansas, but not of any other State. Why then on the 10th of June, 1878, should he be petitioning the Postmaster-General to increase the Ojo Caliente route to seven trips per week? Gentlemen, I will show you why. I will follow him down through this route from this letter of the 10th of June, 1878, up to the finding of this indictment and show you that he has helped to perpetrate the frauds that have been committed on that route, and helped to rob the Treasury of the money which was stolen from it through the instrumentality of that route, and has fastened on to the pelf he obtained from the Government of the United States through the base uses made of that route. I will show you that in his letters on that particular route he repudiates this idea of a division, and that in a division he took the property to secure himself for money advanced, twisting it to the right and to the left and telling this and telling that contradictory story. He should have had a better memory and wiser discretion, if he did not expect to be caught, than he has manifested; though I must confess that his discretion was very good, his devices were very numerous, his resources were incalculable, and the ingenuity with which he kept from observation deserves as much credit as can be given to any wrong-doer in the world.

At this point (12 o'clock and 25 minutes p. m.) the court took its usual recess.

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AFTER RECESS.

Mr. MERRICK. [Resuming.] With submission to the court, gentlemen of the jury, I have read you the letter of S. W. Dorsey of June 10, 1878, showing at that time his interest in this route 38145, called from Garland to Parrott City, or from Animas City to Ojo Caliente. Now, on the 22d day of December, 1878, S. W. Dorsey made another manifestation of his relation to these transactions and his interest in the subjects of this conspiracy. At page 853 of the record is the following letter, which may be interesting to my friend, Mr. Henkle:

WASHINGTON, D. C., *December 22, 1878.*

Four months before the alleged division of the plunder among these respective distributees:

ANTHONY JOSEPH, Esq.,
Ferdinand de Taos, New Mexico:

DEAR SIR: John W. Dorsey, a brother of Senator Dorsey, is the contractor on the route from Ojo Caliente to Parrott City, once a week. The route was let to J. H. Watts of Santa Fé. He telegraphs that he will stop January 1. Mr. Dorsey is absent at present, and at the request of the Senator I write to request you to put stock on that road and see that it is properly carried until his brother can attend to the matter, and to request you also to let him know at what price you will carry it the balance of the term, three and a half years, once a week, twice a week, three times a week, and six times a week. If your price is reasonable, he will enter into contract with you.

Write to John W. Dorsey, box 714, Washington.

Yours, truly,

JOHN R. MINER.

What interest at that time had S. W. Dorsey in this Ojo Caliente route, again I ask, as I asked in reference to the letter I read before recess? Why was S. W. Dorsey so near and so close to Miner manipulating these transactions? Why was Miner writing to Anthony Joseph at the request of S. W. Dorsey? Why did he not write

at his own instigation and out of the impulses of his own nature touching the importance of the suggestion he professes to make at the instance of S. W. Dorsey? What brought them together? Still under the same roof, still in the same bed, still in the same conspiracy! But more than that. What does he say in his letter? "What will you do this business for at once a week, at twice a week, at three times a week, and six times a week." "We want to make a contract with you if your price is reasonable." Make a contract with us *on the sliding scale*. How did you know it was to be twice a week. How did you know it was to be three, how four, how six? It went up to seven. The prophetic vision of S. W. Dorsey looking into the future by the hand of Miner tells the contractor there would be increases and additions and orders from the Second Assistant Postmaster-General that no man could have foreseen by the operation of an ordinary vision, for what lays in the discretion of an executive officer cannot be foretold. How did they know that the executive discretion was to give them this multiplied number of trips? But their prophecy was realized, and there is not a prophecy they have made, whether of weal or woe, that has not turned out to be as true, according to the manner in which they made it, as any of the prophecies made of old when the prophets promised well-being to Judea or destruction to Jerusalem. They knew as well as those that were inspired what was to come, and they spoke not with the inspiration from above, but with knowledge stimulated possibly by communication from below, and common to the conspirators acting together for the realization of preconceived purposes.

So much at present for the acts of S. W. Dorsey prior to the 1st of April, 1879. April 24, 1879, on this same route, he writes a letter to Brady inclosing a petition saying:

I am personally familiar with the facts stated, and know the necessity for this additional service, and write this simply to add my testimony to that of the petitioners.

On page 855 that letter will be found, and it contains some very remarkable statements:

KANSAS CITY, MO., April 9, 1879.

Hon. A. JOSEPH,
Taos, New Mexico:

DEAR SIR: The department talks some about discontinuing the mail route from Pagosa Springs to Parrott City—

You recollect the relation of the two places on the Ojo Caliente route—

and I write this to ask you to send every protest within your power by petition and letter against such proposition. Do this forthwith.

Also go to Santa Fé immediately and get letters, not petitions, to the Postmaster-General, urging that this route from Ojo Caliente to Parrott City be made a daily line with a fast schedule. Obtain these letters from all the bankers, all the merchants, the governor, secretary of state, surveyor-general, United States attorney, judges of the court, and especially of the military officers. In addition to the letters, get the same persons to sign petitions. Send me at least six or eight petitions. I have written to General Atkinson, Colonel Barnes, Mr. Ritch, and Mr. Wallingford, who you will find in General Atkinson's office. I have also written to General Hatch and Captain Rucker. Get up a petition in Taos, San Juan, Plaza Alcalde, &c. Please go to Santa Fé immediately on the receipt of this, as I wish to have the increase made before I leave Washington. Write to your Delegate also. Send all papers to me direct that are not sent to the Postmaster-General. I leave for Washington to-day. I have taken this route myself on account of Peck's illness.

Mr. WILSON. "I have taken this route myself."

Mr. MERRICK. "I have taken this route myself on account of Peck's illness." That was April 9, 1879, after the distribution, when, according to the theory of the other side, the routes were passed to S. W.

Dorsey, or to Peck and John W. Dorsey through S. W. Dorsey as their representative, routes so passing for the purpose of paying S. W. Dorsey the money he advanced to the combination. What, then, does he mean, if that is the fact, by saying that he took this route *on account of Peck's illness*? What had Peck's illness to do with that route, if the theory of Dorsey's counsel is right that the routes had passed to Dorsey to pay him for the advances he had made to put service on the route? No, gentlemen; S. W. Dorsey in this letter admits that the statement of his counsel here in that regard is false. He took the route, as he says, on account of Peck's illness. The disguise now pretended was not then contemplated, but the other disguise was set out by S. W. Dorsey for his interest in the transaction, namely, that Peck being ill he had taken the route on account of that illness. He asks, with nervous solicitude, that Joseph should go to the capital of the Territory and get petitions signed by the leading officers. He says he has written to these leading men, and the record shows that their responses came; and now, without anticipating what was done or what was the fruit of the seed that he scattered, I will go on according to dates with his relation to the route, and gather in the fruit as I pass through the mazes of the testimony.

On April 30, 1879, S. W. Dorsey writes again to Joseph as follows:

ANTHONY JOSEPH,
Taos, New Mexico:

DEAR SIR: The service from Ojo Caliente to Parrott City has been made three times a week—

The fruit already—

with a schedule of fifty hours, to begin May 12, 1879. Do not fail to start the service promptly upon time, and be sure that the postmasters at the two terminal offices report your arrivals and departures promptly to the department, the 30th of June. If the mail is carried *well now*—

Another prophecy now, gentlemen—

I think it will be made daily July 1st, 1879. I am personally responsible to you for all dues under your contract. Address all letters either to me or M. C. Rerdell, box 706, here.

Truly, yours,

S. W. DORSEY.

That letter of April 30, 1879, guarantees the payment by S. W. Dorsey to Joseph of all obligations arising because of his service on that route, whilst on April 9 Dorsey had written to Joseph that he had simply taken that route *on account of Peck's illness*. In reading the letter of April 9, 1879, in which he says, "I have taken this route on account of Peck's illness," I omitted to read a very important part of the letter, which is contained in a postscript, for the reason that some other matter intervened. The letter is written in one handwriting and the signature in another, and afterwards, in the handwriting of the signature, is the following:

I beg to apologize for the writing of letter. I had a great deal to do to-day, and got this short hand to help, but he makes a sorry mess of it.

Do not have any two petitions written by the same person.

He tells Joseph to get him up petitions, to get up letters signed by leading men, for an increase upon that route, and then charges him not to have any two petitions written by the same person. Why, gentlemen of the jury? Why was it? Without answering the specific inquiry of why, it is enough for us in this transaction to know that it was for the purpose of deceit somewhere. It was for the purpose of having

a palpable falsehood somewhere, for the reason that the petitions coming from the same source, and the fact that they did come from the same source was to be disguised by having them in different hands, the different hands testifying to the falsehood that they came from different sources. Why this concealment, why this disguise? Does honesty in transactions, does truth in statement, seek disguise? Honesty is open and fair. Truth scorns all covering. But this S. W. Dorsey, this pure man of whom my learned brother speaks, starts out in this Ojo Caliente route with the declaration that he needs to deceive and defraud somebody. There was no occasion that he should deceive and defraud Brady. There was no necessity for practicing any arts on him, but there was this necessity for deception. If any one should come into Brady's office and look at the papers upon which he was to act, and upon which he did act, that individual would see the similarity of hands in the different petitions and would therefore see that the force of the several petitions was broken, for the reason that they came from one and the same man; if an investigation should ever take place into Brady's affairs, the difference of handwriting would make broader and stronger the foundations of his official action. It was not, therefore, that S. W. Dorsey needed or desired to deceive Brady. It was that he needed and desired to have in Brady's office papers upon which he could rely for his official malversation when arraigned at the criminal bar of the country. That was the object. It was part of the conspiracy with Brady. "Do not expose me," says he, "do not leave me naked to mine enemies and bare my breast to the arrows of the foe. I will do all I can for you, but throw up around me the barriers of petitions, that when my conduct comes to be inquired into I shall at least have some excuse for the wrong I am doing for you and for myself." And therefore S. W. Dorsey, in response to this plea of the predetermined rascality of a venal official, writes out there to get petitions, and get them in different hands. that investigating committees may be deceived and juries deluded by the fact that they apparently came from different sources.

Now, on June 22, 1879, S. W. Dorsey writes another very significant and very important letter to Anthony Joseph, and I have no doubt you remember that Anthony Joseph was the subcontractor, and the ruined subcontractor on that route. We will have something to say of that by and by.

WASHINGTON, D. C., *June 22nd, 1879.*

ANTHONY JOSEPH, Esq.,
Taos, New Mexico:

DEAR SIR: Your two letters to Mr. Rerdell have just come to my attention, and I make haste to answer them.

In regard to the schedule time of fifty hours from Ojo Caliente to Animas City being too fast, I have to say that you are evidently laboring under a singular misapprehension. Fifty hours' time is about three and a half miles an hour, which is slow walking time for a horse or man; a good horse will walk four miles an hour for eight hours every day in the year.

Bear this in mind, gentlemen:

A good horse will walk four miles an hour for eight hours every day in the year.

The time on that route was originally one and seventy-one one-hundredths miles per hour. The increase was to three and forty-eight one-hundredths miles per hour, less time than a good horse could walk for eight hours every day in the year.

The time is slow compared with the time on almost every route in Colorado. The time on the route from Parrott City to Silverton, over a worse country than your route, is six (6) miles an hour. The average speed on nearly all mountain routes in

Colorado is over four (4) miles an hour, and many of them as high as seven (7) miles, and that, too, over mountain roads.

Of course, your men must go night and day, and if they do that they can carry their mail on an easy walk and make the time. *The mail must be carried on time and three trips a week. We cannot and must not permit* the orders of the department to be disregarded in this respect. You lose your pay and we lose ours by doing so; and to talk of the speed being too great, it is so absurd that we have not the face to go to the department about it.

Two things in that sentence I desire to call your attention to:

You lose your pay and we lose ours.

Who are *we*? Who are *WE*? It is not S. W. Dorsey who loses his pay; it is not Peck who loses his pay; it is not Rerdell who loses his pay; but here is a letter signed by S. W. Dorsey speaking for himself, and himself alone, in which he says that in certain contingencies "You lose your pay and WE lose our pay." Who are *we*? Tell us, gentlemen of the other side, who are *WE*?

And to talk of the speed being too great is absurd.

The speed is not too great. It is absurd to talk of its being too great. The speed you are directed to make is less than an ordinary horse can make in a walk over the mountains, therefore it is absurd to talk of its being too great:

If you expect to make this time by allowing your carriers to run *only* in the *day-time* you are quite right when you say it can't be made, but it is your business to arrange your stations, put on your stock, and get your carriers so as to keep them going night and day.

Your statement that it would cost \$12,000 to run this service in fifty hours is equally absurd.

And yet it was reduced to fifty hours, and instead of paying \$12,000 they paid over and above \$12,000 enough to satisfy the subcontractor and leave a large balance in the pocket of the contractor here. Dorsey got that allowance made and Dorsey knew that it did not cost \$12,000 to run the route. When Dorsey, in reply to his subcontractor, said that the statement that it would cost \$12,000 was absurd, he was representing to the department that it would cost nearly if not over \$15,000 to run it, and got nearly if not over \$15,000 to run it. He was talking with one voice to his subcontractor and with another to his master at the department, or his co-conspirator at the department. He was telling the subordinate whom he was wronging by compelling him to do the service at the small price, that his statement that it would cost \$12,000 was absurd. He was representing to the department in his petitions, in his letters, and in his oaths that to do it at fifty hours for \$12,000 would be ruinous to the contractor. He was writing probably on both sides. He was writing to the department about the oaths in which he estimated the men and the horses. He was writing to his subcontractor about doing the work, and these facts I will develop as we proceed and get at the oath on which the expedition was allowed. He goes on:

That would be at the rate of \$26 per mile per annum, while the average cost of horseback service is less than five dollars (\$5) per mile per annum. I am afraid the trouble is that you are not giving this matter your personal attention, which you will have to do before you will get it in shape.

Now, there is no use of writing to the department about these matters.

"Do not write to the department; do not put your letters on file; do not put on record in the department your statement that it would cost only \$12,000 to run it; do not put your complaints on file where the people who come around from Congress or men coming and looking to a trial in a court of justice, mousing for papers, can find your statement. Stand

away from the department. Keep away from Brady's Office. Keep away from the Third Assistant's office. Put no record in the Post-Office Department." But do what?

Now, there is no use of writing to the department about these matters. We are responsible to the Government and you are responsible to us, and this service must be carried according to the instruction of the department.

"Write communications to us; we are responsible to the department; we will file what we please, but you shall put no paper in that department."

Furthermore, you are doing yourself and us a great wrong in getting postmasters to write the department asking to have the old time restored.

"The postmasters," says S. W. Dorsey, "are seeking to have the old time restored. I am opposed to it." Why? The restoration of the old time means a reduction of price and lessening of income. "You are doing yourself wrong in getting the postmasters to act. Keep the postmasters quiet. It is true they are the elected representatives of the government in remote sections to communicate the necessities of the people to the department here. It is true they are the people to whom the Postmaster-General and the Second Assistant should apply for information. It is true that they have been writing, asking that the old time should be restored because they say it is unnecessary that the government should pay for running the route on fifty hours, but it does not suit my interest," says S. W. Dorsey, "it does not enable me to rob the government. I have the contract on the principle," says brother Chandler, "of *caveat contractor*. I have robbed the country and I intend to hold on to what I have, and you intend to come in and throw light upon the transaction and let the trustee know he has defrauded the *cestuy que trust*. Keep quiet, keep quiet. There are these picket guards of the Treasury in the Western country that is tracked by the carrying of the mail of the nation. Keep them quiet and keep their certificates off the records of the office. Keep all things still. My arms are in the Treasury and we are injured by your interference."

This, I hope, will never be done again. If you want anything, we are the proper persons to write to. You have nothing to do with the department, except through us.

Finally, you can easily make the time required by the department, to wit, fifty hours, *and you must do it without further delay*.

The mail *must* also be carried *three times a week*, or you will be fined until there will be nothing left to pay you or us.

The subcontractor was to pay all the fines and forfeitures.

Do no more writing, but go forward energetically and carry this mail according to your contract, and I will see whether we can pay you something over and above the amount you are now getting, which is \$5,160 per annum, according to our calculation.

I do not promise to pay you any more than the contract calls for, but if you go forward as you should, I have no doubt I will do something additional. I hope to hear that this service is running on time, and three trips a week.

Anthony Joseph is getting \$5,160. He is complaining about the time, saying that it is unnecessary. He wants to go back on the old time, and he tells him to "keep quiet and keep your postmasters quiet, and maybe hereafter I will give you something sweet; I will give you something good. I will not promise to do it, but if all goes right hereafter, maybe I will." "Now, go to sleep little boy, be a good little fellow, and to-morrow morning maybe I will give you something good."

What was the condition of affairs at that time in reference to payments? Joseph was getting \$5,160 for carrying the mail and paying all fines and all deductions, whilst the contractor here in Washington, S. W. Dorsey, who had taken the route on account of

Peck's illness, and was, according to his statement, entitled to those proceeds, was getting \$13,333, clearing \$8,173.04, and not doing one particle of work, or incurring one particle of liability. Joseph was carrying the mail. Joseph was responsible for the delinquencies in the carriage of the mail. Joseph had to pay the fines, and Joseph was receiving \$5,160 per annum whilst the contractor was receiving \$13,333.04, making a net profit of \$8,173.04, and sitting here in Washington, doing nothing on the face of the earth, except writing Joseph to stop the postmasters from interfering with him in his successful attempt at robbing the Treasury of the people. I believe I omitted the original cost of the route. It is immaterial, however; it is big enough and the criminality is dark enough. I congratulate myself, if I have made any mistake it is upon the side of the smallness of the figures and not the largeness. Leaving out the three or four thousand dollars you say I have left out [referring to a remark of Mr. Ker who had spoken in an undertone], \$8,000 of ill-gotten gains went into Dorsey's pockets, enough to weigh him down before an honest jury in any honest country.

Now, on the 30th of April, 1879, he writes a letter to Anthony Joseph informing him that service has been increased to three trips on a schedule of fifty hours, and saying it will be made daily by July 1, 1879. It was made daily afterwards, but not so soon. It was made daily in the January following the July of which he spoke, at an additional cost of \$17,910.72, running the annual price of that route up to \$31,343 per annum, whereas it originally cost \$2,745—running it up by calculations prophetically foretold by S. W. Dorsey, and yet he is the innocent man who has no relation to this conspiracy, and never did any one of the fraudulent acts charged in reference to it.

Now, there are some other peculiar features in relation to this route, and I am not dealing with it otherwise than as a sample route. I am dealing with it in its relations to S. W. Dorsey as a sample route. On the 29th of April the order requested by Dorsey gave the two additional trips a week, and expedition was made at a cost of \$11,774.64, and the account of that will be found on page 814. I say in response to the request of Dorsey, for I have already shown you his repeated requests, and here on page 814 is a letter from S. W. Dorsey to Brady as follows:

WASHINGTON, April 24, 1879.

Hon. T. J. BRADY,
Second Assistant P. M. General:

SIR: I beg to transmit herewith a petition signed by the most prominent citizens of New Mexico, including the chief military as well as civil officers of that Territory, urging an increase of mails on the route named in the petition. As I am *personally familiar with the facts stated*, and know the necessity for this additional service, I simply write this to add my testimony to theirs.

Yours, truly,

S. W. DORSEY.

That letter is dated April 24, 1879, and on the 29th day of April, 1879, five days after the date of that letter, the order was passed giving two trips per week at a cost of \$3,316.80 per annum, and expedition of \$8,457.84; expedition on oaths to which I shall call your attention presently.

At the time Brady passed that order of the 29th day of April, 1879, he had before him the letter of Anthony Joseph, bearing date April 2, 1879, and filed in the Post-Office on the 14th day of April, 1879, informing him that it was a physical impossibility to make the time to which it was proposed to expedite that route, and giving him his reasons for so thinking and a specific and elaborate description of the country. Your

honor will find the letter on page 812 of the record. That letter bears date of April 2, and is stamped in the contract office of the Post-Office Department, "April 14." The order was passed April 24, and the letter states:

TAOS, N. MEXICO, April 2, 1879.

HON. THOS. J. BRADY,
Second Assistant P. M. General, Washington:

SIR: The P. M. at Ojo Caliente has placed before me your communication of the 21st of March, 1879, changing the schedule of departures and arrivals of the mail on route No 38145 (Ojo Caliente to Animas City). As the subcontractor on said route, permit me to inform you that it is impossible to carry the mail on said route once a week inside of 100 hours. The distance is, from Ojo Caliente to Animas City, 181 miles, the road is mountainous and very rough; the mails are very bulky and heavy, and the rivers are very bad to ford four months in the year. The best that I can do, under the circumstances, is to carry the mail through on a schedule of six days; leave Ojo Caliente Monday at 6 a. m.; arrive at Animas City Saturday at 6 p. m. Leave Animas City Monday at 6 a. m., and arrive at Ojo Caliente Saturday at 6 p. m. This arrangement will satisfy all parties, make the proper connections, and allow me just time enough to make the service regular and efficient. Trusting that you will take the above facts in consideration, and do me justice in the premises, I remain, your obedient servant,

ANTHONY JOSEPH,
Subcontractor.

Now, when Mr. Brady, in response to Mr Dorsey's request in his letter on the 24th day of April, passed his order reducing the time to fifty hours, he had before him the letter of Joseph, the contractor on the route, representing that it was utterly impossible to make that time, and at that very period there went from the Second Assistant Postmaster-General's office circulars of inquiry addressed to the postmasters, and the postmasters along the route with extraordinary unanimity sent back these circulars with their responses that the *time of fifty hours could not be made*. The distance circulars were returned to the postmasters, and the postmasters were directed not to make the time less than fifty hours. Again they were returned, the postmaster stating that one hundred hours was the lowest time that should be allowed, and that contest was kept up for some months between the Post-Office Department and the postmasters along this line, the postmasters unanimously declaring that the time could not possibly be made, and the Post-Office Department insisting that the schedule should stand, *and stand it did*. The time was not made. It stood because Stephen W. Dorsey insisted that it should stand. The time was not made, the subcontractors were fined, and the fines were remitted because of the impossibility of making the time, and when S. W. Dorsey met the subcontractor at his ranch in New Mexico subsequently to the time of the remission of the fines he informed him that he (Dorsey) *had never received one cent, and had had no remission of fines at all*, thus falsely and basely misrepresenting the facts to his unfortunate subcontractor, and having stolen the money from the government he then kept it back from the subcontractor, cheating the Treasury on the one hand and defrauding his employed agent on the other hand. Now let us go a little further into that. I say to you, gentlemen, when Brady made that order reducing the time to fifty hours he had before him the conclusive evidence that the time could not be made. Joseph tried it, and he failed. Jaramillo, your honor will recollect, became the subcontractor. His fines eat up his pay, and he then, without receiving one cent for his work, gave \$500 out of his pocket to be released from his subcontract. I think I had better read his reply to a question of

the court, found in the record at page 889. Said his honor, starting back amazed at the narrative:

Let me understand. You carried the mail for nothing and paid \$500 to be released from carrying it?—A. Yes, sir.

But whilst he was doing that S. W. Dorsey was drawing his pay here in Washington City without danger of fines and in security, without danger of work to do. I said to you that Joseph had a conversation with S. W. Dorsey in the West, in which certain representations were made. On page 869 occurs the following:

Q. What do you mean by saying "consume the earnings of the service"?—A. Well, he—

That is S. W. Dorsey—

told me that he was not getting a dollar, or had not received a dollar, from the government for the service that I had performed from the 1st of April, and that, consequently, he could not pay me out of his own individual pocket, I having failed to perform the service as required in the fifty hours.

When in point of fact he had been receiving his thousands of dollars and then had in his pocket a remission of the fines that had been imposed upon Joseph, and taken out of Joseph's pay.

On the 26th of February another order was made giving four trips a week additional, as I have stated to you, at a cost of \$17,910.72, making a total pay of \$31,343.76.

The COURT. Prior to that date it was two trips a week.

Mr. MERRICK. Two trips

The COURT. At first it was one, and the first increase was two trips, and this was the second increase.

Mr. MERRICK. Yes, the second increase, making it four trips a week.

The COURT. Not four trips a week.

Mr. MERRICK. First it was one trip, then two were added, now four were added.

The COURT. I did not know that four were added.

Mr. MERRICK. Two were added on May 12, 1879, and then on January 15, 1881, four. An order was made in February to take effect in January. Does your honor see it?

The COURT. I see it, but I did not understand it that way.

Mr. MERRICK. Yes, sir; that is the way.

The COURT. It was increased one trip and then increased four.

Mr. MERRICK. Which made the seven. And S. W. Dorsey said in his letter it would be done. That made the pay of this route \$31,343.76 per annum; a route, gentlemen of the jury, where the revenues were for the year 1879, \$402.26, and for the year 1880, \$935.82, including all the offices, under a law which requires the increase and the expedition to be made with due regard to the productiveness of the route, and which law, in its feature relative to productiveness, was re-enacted and repeated in 1876 when Congress passed an act directing the Postmaster-General to inquire into the mail service of the United States and its cost and expenditures, in order that the cost and expenditures of the Post-Office Department might be brought within the revenues of the department. We have heard a great deal from these gentlemen about the productiveness and the revenues, and we will hear a great deal more from all the persons who are to follow me, and probably from the two lawyers that are to follow me, Mr. Wilson and Mr. Henkle; but I charge you, gentlemen, when you come to hear them talk of this thing of productiveness, to bear in mind that the policy of the United States for the regulation of its different departments is established by the Congress of the United States as

representing its people, and that that Congress of the United States at the time of the organization of the department required the expedition and increase to be determined by productiveness as the only mentioned consideration to influence the mind of the executive officer having the subject in charge, and that we have not changed that policy since the period of the organization of the department; but, on the contrary, in 1876, by a statute of the United States passed by Congress, that policy was reiterated and an imperative direction given to the Postmaster-General to inquire into the expenses of carrying the mail, in order to reduce those expenses within the limits of the revenues of the department. To say, as Senator Teller stated on the stand, that the Western people have the same right to as expeditious and frequent a mail as the people of the East have, is to announce the wild fallacies of a man seeking for popularity among his own constituents. Commercial business transactions where values change with the rapidity of the lightning need freedom and frequency of intercourse. Wall street must communicate with all the different parts of the United States and the world with great rapidity; and I have no doubt, gentlemen, with all due regard for the men who operate there that it communicates with equal rapidity with the world below. But commercial transactions necessitate rapidity of communication, while the Western farmer asks no especial rapidity of communication. He is satisfied with a mail now and then, for the values he deals with are not subject to frequent and rapid fluctuation. The matters affecting his material interests are not suddenly changed. He deals with none of those sensitive material matters that form the elements of commerce and trade in great commercial centers, and vary from second to second, and from minute to minute. He is not entitled to the same mail facilities that the people of New York, Philadelphia, Boston, Baltimore, and the Atlantic seaboard are entitled to, for the reason that he deals not in the more sensitive commodities. His pursuits are different, his interests are different, his wants are different, and his demands are different. Therefore, I say that under the statute and according to the condition of the country, whatever may be said, productiveness as the primary consideration in the frequency and rapidity of the mail is still the policy of the government as reiterated by Congress in 1876; and in this connection I beg you to reflect how utterly regardless of all law and propriety were S. W. Dorsey and Thomas J. Brady when for their mutual interest Brady passed this order making the route to Ojo Caliente an incumbrance upon the government to the extent of \$31,343.76, when the revenues derived from every post-office on the route amounted, in 1879, to only \$400.26, and in 1880 to \$935.82.

Mr. HENKLE. Will you allow me to ask you a question for my own information?

Mr. MERRICK. It is not to correct me?

Mr. HENKLE. It is not to correct you. I simply want to know whether you mean to be understood as contending that the act of Congress requires that the service shall pay for itself?

Mr. MERRICK. I mean just precisely what I said, and if I were to reflect ever so hard upon your question in order to endeavor to correct my expression I do not think I could do it. You are familiar with the act of Congress of 1876. Do you not think that that act of Congress brings from its apparent temporary repose the policy of productiveness as the paramount question to be considered in increasing and expediting the mail?

Mr. HENKLE. I do not want to enter into a discussion with you now, but simply to understand your position.

Mr. MERRICK. I can't get fair play out of you fellows to save my life. What I mean is that productiveness is the primary and important consideration in increasing the number of trips and the speed. I do not mean that there should not be any line run that would not pay for itself; but I do mean that the productiveness of the line is a thing most material to be considered before everything else, and that it is the policy of the government that the revenues of the Post-Office Department shall in the aggregate pay for the postal service.

Mr. HENKLE. Then can you give us the rule for the relative proportion?

Mr. MERRICK. I do not pretend to deal with matters of statesmanship. I leave them to you, and to Mr. McSweeny, and to other men of learning on your side.

Mr. MCSWEENEY. That is right.

Mr. MERRICK. I am a lawyer and do not aspire to be anything but a lawyer. I will add to what I have already said that I do contend and I believe from what I know of General Henkle personally that in his heart he believes with me in the contention that where there are no better reasons for expedition of speed and the multiplication of trips than those which existed in the Second Assistant Postmaster-General's office in reference to the route from Ojo Caliente to Animas City, where there were on file so many reasons against that expedition and increase, and that where the expedition and the increase are made from an original cost of \$2,745 up to \$31,343.76, with revenues on the route of only \$402.26, it is patent fraud on its face, for which the officer who made it should, in justice to the American people, be sent to the penitentiary. That is what I mean. I hope my brother understands me.

Now the subcontractor on this route, after Joseph had been destroyed and Jaramillo crushed out and required to pay \$500 to save his broken fortunes, was a man named Sanderson, and when this increase was last made and annual pay was run up to \$31,343.76, and Sanderson was receiving of that amount \$18,666.64 for doing the work whilst S. W. Dorsey, sitting here in Washington and manipulating the business along with Brady, and greasing Brady, as well as the business, was realizing only the small but handsome sum of \$12,667.02; a thousand dollars a month out of this one small, gentlemanly, astute, clean, clever operation. Why, that is as much as your honor gets.

The COURT. As much as I get in three years.

Mr. MCSWEENEY. I move for an increase.

Mr. MERRICK. The increases that you get, sir, are increases not for honest men nor through honest ways. Such increases are not for men like your honor; and in this government, until we strike at the root of the fraud and pluck out the venom and the poison, elevate the spirit of the people of the country engaged in public affairs, vindicate the majesty of the law and put it upon a high plane, honest men in the discharge of honest and patriotic duty will be poorly paid, and none but villains, thieves, and robbers will prosper. The time has come for a change in all this business. We will have a change. If there is a thunder-storm along with it that causes some timidity and fear, still we know that the fiercest lightning and the loudest thunder best purify the bad atmosphere. Let this verdict purify the public atmosphere of this country.

But there are still other features of fraud and illegality on this route that are singularly interesting. Among them is the antedated order that Mr. McLean questioned me about on yesterday. There were letters and petitions for increase of service from Chama to Parrott City, and Brady and Dorsey found a first-rate opportunity, and they increased the entire route without one single scrap of paper in the department

to justify it, or make it defensible. All that there was in the department was the request for an increase on a part of the route. They took the part of about seventy-five miles, and they added some eighty miles to it; and not only that, but the increase was made by a retroactive order, passed in February to take effect in the early part of January, and payments were made on it in the very teeth of the statute that forbids the passage of any order to take effect anterior to the date of its passage. Part of that order they say was excusable, because it had been directed by telegram that there should be a multiplication of trips from Chama to Garland. All right. But how about the other part of the route? The other had never been directed by any telegram to be increased, and yet in February trips were added by an order to take effect from January preceding, and payments were made from January, although the trips have never been run. The operation of the order anterior to the date of its passage was, as I told you, positively prohibited by an act of Congress, but I have already discussed that, and have no disposition to consume time by useless repetition.

Still worse remains behind. On what oaths were these expeditions granted? Now, gentlemen, I desire to call your attention to these oaths. They are the pious declarations on the evangels of Almighty God of a Christian gentleman, according to the counsel on the other side. Listen:

Hon. THOMAS J. BRADY,
Second Assistant P. M. General:

SIR: The number of men and animals necessary to carry the mail on route 38145, on the present schedule and three trips a week, is five men and fifteen animals. The number necessary on a schedule of fifty hours, three times a week, is twelve men and forty-two animals.

Respectfully,

JOHN W. DORSEY.

CITY OF WASHINGTON,
County of Washington:

John W. Dorsey, being duly sworn, deposes and says that the above statement is true, as he verily believes.

Sworn to and subscribed before me this 26th day of April, 1879.

That was filed in the Post-Office Department on the 26th of April, 1879. Now, on the 11th of March this same John W. Dorsey swears that on the present schedule the number of men and animals necessary to carry the mail on this route is three men and seven animals. What are we going to do with that, your honor? Shall we expel him from the church? On the 11th of March, 1879, he says that the number necessary to carry the mail on the present schedule, the schedule now used, for I am not talking about the future, is ten, three men and seven animals. On the 26th day of April he swears that that same number that was ten on the 11th day of March has got to be twenty. Why, he is a double liar. He could not have been mistaken. This was no speculative thing as to the future. It was a statement as to the present, and it was before Brady, and he knew it was a lie when he passed his fraudulent order; or, if he did not know it was a lie, his only escape is behind stupidity, and you all know, gentlemen, that he is not stupid. But another interesting fact was before Brady at this time. What is it? There is a most extraordinary thing that I do not understand. Possibly brother Henkle may explain it, or brother Wilson, or I may think over it and get it right by Monday morning. The oath that specifies twenty men and animals as being used was filed on the 26th day of April, 1879.

The COURT. That was the same day it was made.

Mr. MERRICK. Yes. I think perhaps I can explain this after all.

Certainly I can. One oath, gentlemen, was made in Vermont, and the other was made in the District of Columbia. He had got into a purer atmosphere down here, and that accounts for it. Now, it was filed on the 26th, the oath I am speaking about. Allow me to read you a letter that inclosed it:

HON. THOMAS J. BRADY:

DEAR SIR: I have the honor to transmit herewith a statement of the number of men and animals that are required on the route from Parrott City to Ojo Caliente, on a schedule of fifty hours—

Of the oaths that I have read to you, that of the 26th of April is the one that speaks of fifty hours. The other is for eighty hours. It does not affect the matter, because he is speaking of the present number—

three trips a week. Considering the character of the country, the mountains to be crossed and the streams to be forded, the time proposed—fifty hours—is equal to seven miles an hour on an ordinary road. It is an extraordinary undertaking to make this time, but believing that the interests of the public service, as well as that of the people—

I wish brother McSweeney would read this for me—

of this section demand it, I will undertake it.

What do you think of the date of that letter? It inclosed an oath made on the 26th day of April, 1879, and the letter is dated April 23, 1879, and it is marked filed April 24, 1879. Why, they must have been doing this business at Henderson's room.

THE COURT. In regard to the apparent conflict between those two oaths, may it not be explained by the fact that the first oath was made in regard to the eighty-hour schedule?

MR. MERRICK. No. I will tell you why. That is the reason I did not read the last part. The hours of decrease have nothing to do with the number used. The question is how many horses and carriers are necessary on that schedule for three trips a week, and that is one proposition.

THE COURT. It might be the same number of trips, but they might have been running on an eighty-hour schedule when the first oath was made, and on the 26th of April, when the second oath was made, a fifty-hour schedule. Were not the two oaths made with respect to different schedules?

MR. MERRICK. The two oaths were made with a view to a reduction to different hours. The first oath in Vermont was made looking for a reduction from one hundred and sixty-eight hours to eighty-four hours.

THE COURT. That is what I supposed.

MR. MERRICK. The other was made looking to a reduction from one hundred and sixty-eight hours to fifty hours.

THE COURT. That explains it.

MR. MERRICK. No, it does not.

THE COURT. Perhaps not.

MR. MERRICK. Your honor will recollect that you said that as to the number of men and animals it would require upon any untried schedule in the future, it was speculative; but as to the number it did require at present, there was no speculation about it; that one was a speculative oath upon the future, and the other was as to the present time.

THE COURT. That is what you are saying now. I do not know that I said it.

MR. MERRICK. You said it at the beginning of the trial. Now here is an oath that says the number of men and animals necessary to carry

the mail on route 38145, from Ojo Caliente to Parrott City, three times a week, is three men and seven animals *on the present schedule*. Now the other says the number of men and animals necessary to carry the mail on route 38145 *on the present schedule three times a week*, is five men and fifteen animals. That is just the same as the other in substance.

The COURT. But you have not read it all.

Mr. MERRICK. I know I have not, but I have read enough for my purpose. I have read enough to show what he swore was necessary on three times a week at one hundred and sixty-eight hours. He swears in one oath to a total of twenty and in the other to a total of ten. Now the hours which it is proposed to reduce the time to are fifty in one case and eighty-four in the other; but there can be no question about its taking the same number to run the mail on one hundred and sixty-eight hours.

The COURT. If he is swearing to present service he must be swearing to a fact.

Mr. MERRICK. He is swearing to the present service.

Mr. KER. It was ninety hours after Garland was taken off.

Mr. MERRICK. Yes, but it is immaterial what it was. The oath was that it takes on the present schedule *ten men and animals*, and afterwards he swears that for the same service which in Vermont he said would take ten men and animals, that it would take *twenty men and animals*. Not only that, but will your honor tell me, as a legal conundrum, how this oath, that was not taken until the 26th day of April, 1879, got inside of a letter written on the 23d of April, and filed on the 24th of April in the department? How did it get there?

The COURT. The letter was in anticipation of an oath which he intended to make.

Mr. MERRICK. But he says he incloses it in this letter. These are things that are interesting. Your honor I will have to keep it to think over. Here is a letter written on the 23d. Now if it was not filed I should say all right; but it was filed. What do you mean by filing? It becomes a record of Brady's office. Here is an oath written three days afterward, sworn to three days afterwards, and filed three days afterwards, that purports to be in this letter. If it got in that letter it must have got in there by the connivance of Brady. It was all done in his office. How that transaction was done outside of his office I do not know. I cannot conceive. It is the birth of the child anterior to the birth of its own mother. The babe came into the world first, and the mother afterwards. I cannot understand that operation. Now, they reduced the time down to fifty hours. My brothers talk about petitions. They are the barriers that protect Brady. They are the things that he acted on. They are his justification. They are the creed to which he turns with Moslem devotion, as the Mussulman turns to Mecca and bows. What were the petitions in this case? On February 24, 1879, petition for three trips a week and a shorter schedule. On April 16, 1879, five petitions, each saying three trips a week and a shorter schedule. On April 26, one petition asking daily service. On May 13, one petition asking for daily service and faster time; not one solitary word on the face of God's earth about fifty hours, a time which he was told by his postmasters could not be made, which nobody petitioned for, and which is not mentioned in a single paper, except the oath filed by the Christian gentleman in the office of the Christian officer. It is not mentioned anywhere but in that oath of John W. Dorsey. His first oath sworn to up in Vermont looked to eighty hours; but that was not

enough. The second oath looked to fifty hours, and except that oath, at the time the order was made, there was not a solitary petition in that office looking to fifty hours. Some months after the order was made petitions came in to back it up; but when it was made there was not a scrap of paper, there was not a word of advice, there was not an echo of a sound in Brady's office naming fifty hours. No, sir. It was a clean, clear, plain, manifest abstraction from the Treasury of thirty-odd thousand dollars at the instigation of S. W. Dorsey, and for his benefit as well as for the benefit of his associates in crime.

At this point (2 o'clock and 53 minutes p. m.) the court adjourned until Monday morning next, August 28, 1882, at 10 o'clock.

MONDAY, AUGUST 28, 1882.

The court met at ten o'clock and twenty-five minutes a. m.

Present, counsel for the government and for the defendants.

Mr. MERRICK. With submission to the court; gentlemen of the jury: At the last session of the court, I devoted myself to the task of showing you the connection that S. W. Dorsey had borne to the transactions under consideration from the time of their original inception in 1877 down to the time of the finding of this indictment. I had shown you by the testimony of Boone, that it was S. W. Dorsey who called the alleged conspirators here to engage in the criminal combination, not they who, being combined, had invoked his pecuniary aid; that these conspirators were men of his own selection, whose course in reference to these matters had been directed by him, and had not been a course selected originally by themselves; that whilst he declared to Boone that his brother and his brother-in-law would be two members of the organization, and had indicated that Miner would be another, he made to Boone the significant statement that possibly it might not be Miner, but that if not Miner it would be some friend of his, namely, a friend of S. W. Dorsey's. I regard that statement as very significant, and as a very important piece of evidence, as showing that he was the artist who was putting together this criminal mosaic of character and men, and that whether it would be Miner or not was a question that he would determine, and if not Miner it would be one of his own personal friends to do the office of friendship for him in the association in which he was to place him. I had then followed S. W. Dorsey through his connection with the Ojo Caliente route, showing that from the beginning, as far back as 1878, whilst still in the Senate, he took a profound interest in the profitable character of that route and exercised his influence in getting that route improved in the elements that would secure lucrative return; and I traced him down to the end, showing you the corruption which characterized that route, of which corruption he became the beneficiary. Now, I shall not attempt to interfere with or to go over other routes in this case. *Ex uno disce omnes*. From this route that I have explained to you, you may judge of all under the light thrown upon them by my learned brothers who have preceded me in explaining to you the testimony that has been presented for your consideration. All the others are like unto this; all the others are characterized by the same frauds, initiated in the same criminal purposes, and conducted through their various stages by the same infinite variety of criminal conduct; by petitions some of which were forged; by petitions where whole sheets of names from a distant and remote State or Territory were pasted on the paper containing the list of names of residents in

the Territory through which the route ran; by affidavits that are so manifestly untrue on their face that no man of ordinary capacity could for a single instant give them faith or credit; and that through these instrumentalities routes which had been let originally at a moderate price grew to be the source of immense income, in which income S. W. Dorsey participated, and that S. W. Dorsey's name figured as the beneficiary in receiving the money and in receiving the drafts upon which the money was paid. Before I pass to the next point let me say to you that whilst the testimony of Boone, as enlightened subsequently by the testimony of Rerdell, which I shall come to by and by, shows the time in and about when this conspiracy was organized, the precise period of its organization is an entirely immaterial question. It may have grown up as things grow up and not have come into perfect and full being in response to the first wishes and purposes of its organizers. All things grow and all things develop; and progressive development is in this world in reference to criminal acts, as well as all other transactions, a universal law. This conspiracy originally conceived, *possibly* in the purposes of a useful and innocent partnership, soon developed into a guilty combination. Now, it may be asked, and will be, and it has been along through this trial, among the many frivolous questions emphasized into apparent importance, when was this conspiracy organized? It is immaterial. It may have grown from day to day and from time to time, provided it was in existence on the 23d day of May, 1879. That will be sufficient for the purposes of this case. If it was in existence *then* in any of its parts it is immaterial at what time it was formed. The precise period of its formation may be in this, as in all conspiracies, a question impossible to establish, for as the law books tell you—you have heard me read them to the court—conspiracies are formed and organized in the dark, proved by outside and circumstantial testimony, and you can never get at the facts directly and by direct proof unless some one in the combination chooses to come out and disclose them. In determining the facts there are many in reference to which we can never reach a precise conclusion except by deduction from the circumstances; but I want now to impress upon you that the precise date of its formation is utterly immaterial. You must judge whether it existed or not by the circumstances surrounding it as shown by Boone, and then by the more important circumstances that subsequently transpired when the conspirators put in operation the instrumentalities through which the conspiracy was to defraud the United States. Men do not interlace their conduct one with another, they do not co-operate one with another in the performance of co-ordinate parts of a single act, which co-ordinate parts are necessary to the completion of the act, and which act is necessary to the ultimate development of a purpose for their mutual benefit, without being in mental harmony and mental combination as to what they do. Accidental circumstances seldom transpire to co operate with each other to produce practical results. The human mind designs its schemes as the manufacturer designs the watch. Take a watch for illustration. Look at its wheels. Open the watch, examine it, and you find it pursuing a regular course, following the sun in his circuit, wheel interlacing with wheel, wheel interlocking with wheel, each turning the other, all moved by a mainspring, producing the common result of recording the circuit of the father of the day. So in a conspiracy, act interlocks with act, wheel moves with wheel, and the whole machinery systematically operates to produce the common result designed by its organizer in obedience to some mainspring of action, which in this conspiracy was self-gain through the robbery of the public Treasury.

Now, gentlemen, I will make one further remark in this connection before I come to discuss the mutual aid, and show you how these wheels interlock, and that is to again complain of the effort of the other side to keep out the light and preserve the darkness. My learned and distinguished brother from Ohio [Mr. McSweeny], for whose ability and personal character I entertain the highest respect, stated in his opening to the jury that for his client, S. W. Dorsey, unstained by criminality, and untouched by wrong, everything should be explained to your entire satisfaction. Among other things he said that as to the books of S. W. Dorsey—you remember it, gentlemen, it is not worth while for me to read it, but I can if necessary—they should be brought into court and placed in the hands of counsel, and counsel should examine them and pick out what was proper in the case without disclosing the secrets of private matters, and they should be given to the jury. Where are these books? When was the promise redeemed? Did the testimony in its progress and development touch S. W. Dorsey so closely as to make him fearful of further disclosures? Did it come too near home? Would the promised books have explained some unexplained matters in the evidence? Why make the promise unless you meant to keep it? If you meant to keep it, why have you not kept it? What has changed your mind? I told you, gentlemen of the jury, on the two days when I was before you, on different occasions, that it was manifest to you, as it is to me, and has been painfully manifest to you throughout the case, that darkness was the policy of the other side, and that the exclusion of light was the practice they had adopted from the commencement of this trial. Their deeds are evil, and they prefer the dark. I do not blame them that they seek security in that place alone where security can be found, namely, where they cannot be seen; but, I do blame them that they gave promises of light, with assurance and audacity unsurpassed in any court of justice, and then forgot the promise with a facile oblivion that surprises one at the ease with which the human mind can cast behind it what it once knew.

Now, gentlemen, I have said to you that this conspiracy in its progress, through its various means, and by its various devices, operated to the common result like the works and wheels of a watch to the common result for which the watch was made. All right, says the learned counsel, but S. W. Dorsey had nothing in the world to do with this thing except to lend his brother money, and to lend his brother-in-law money. We have heard a great deal of talk about dead soldiers, and living soldiers, and lame soldiers. We have nothing to do with them. Why are they lugged in here except to introduce a false issue and to secure sympathy for the protection of guilt? If there is innocence, talk of facts and not of flowers and soldiers' graves and the tears of soldiers' widows. Facts, not folly, in a court of justice! Let the country reward the soldier, but let the courts punish the guilty! They say that Dorsey lent them money, and that was all he did. Where is the proof that he ever lent them a farthing, except that Vaile says he understood he lent them money? Whether he lent them money or took an interest directly in himself—and I presume you cannot doubt but that the interest was taken directly in himself—it is quite immaterial; for you, gentlemen of the jury, as practical business men, know that it is very often the case that the return of an investment made in a doubtful security is a much larger emolument than even a partnership in the security in which you have made the investment; and if S. W. Dorsey loaned these men money to help them in this transaction, he is as much a conspirator as they are, and as deeply imbued with criminality as they are. It is immaterial whether he bought out and out, or invested as a lender. It is evi-

dent from the testimony that he took the routes, collected the money, and put the money in his pocket, money which was the proceeds of the perjuries and the forgeries which have been explained and proved to you. But they answer that in 1879, on the 1st day of April, there was this division of which I have spoken, a division of this apple, rotten as the learned counsel said it was, and rotten as I believe it to be by the virus of criminal iniquity, and that he took his part of it and thenceforth had nothing to do with the others. Now, as the court has said, and as the court will say to you, the apple, divide it as much as you please, is the same apple still. You cannot shake off the criminality by any such device. But what followed after this division? Were the respective distributees independent of one another? Now let us see, gentlemen of the jury, whether they were or not. The routes which are said by Vaile to have been taken by Vaile and Miner are as follows: Vermillion to Sioux Falls, Kearney to Kent, Bismarck to Tongue River, The Dalles to Baker City, Canyon City to Camp McDermitt, and Julian to Colton. Those are the routes that passed to Vaile and that passed to Miner, and which routes constituted the copartnership fund between Vaile and Miner, as Vaile represents it. All the other routes then passed, as Vaile said, to Stephen W. Dorsey for Peck and John W. Dorsey. Of the six that passed to Vaile and Miner there were four upon which Peck was the original contractor, one upon which Miner was contractor, and one upon which Peck was contractor. They then and there agreed, according to Vaile, on the 1st day of April, that they should become the property of Vaile and Miner. Now bear in mind that if this be true Vaile and Miner had nothing to do with the routes that went to S. W. Dorsey, and Peck, and John W. Dorsey, and they had nothing to do with the routes that came to Vaile and Miner. As my brother Henkle seemed a little restless and anxious for something upon which his intellect could feed, on Friday I furnished him with two of the cases to which I will now refer. On route 38140, from Trinidad to Madison, on May 10, 1879, Miner sends petitions to Brady asking for an increase of service. On the 10th of May, 1879, Miner sends petitions asking for an increase of service on a route with which he had nothing to do, and which in the distribution had passed to S. W. Dorsey, Peck, and John W. Dorsey; with which Miner had no more to do than you or I. Why had he crossed over? Why did he go to the other side? Simply in obedience to the obligations of the conspiracy, to carry out its object for the common benefit, or for the benefit of the men who had taken that route with a view to the prospective enhancement of its value, that prospective enhancement following as a part of the consideration for the transfer to Miner of the routes that Miner received in the distribution of the funds. Again, on December 6, 1879, Miner writes to withdraw S. W. Dorsey's subcontract, and Dorsey signs with him. What had Miner to do with that? Again, he writes returning the contracts and the subcontracts on a route in which he had no interest. On April 18, 1879, Miner makes the oath on route 38135, from Saint Charles to Greenhorn. What had he to do with the Greenhorn and Saint Charles that he should undertake to make the oath upon it, if on April 1, 1879, Greenhorn to Saint Charles had passed to S. W. Dorsey, Peck, and John W. Dorsey? Why should he cross over? Well, gentlemen, it seems that although they claim the instrument is broken, its wheels, though torn apart, search each other out, and by mutual attachment come together; and the watch, though scattered over the country, is reunited in its respective parts, and they all beat time to the mandates and designs

of the original conspiracy. The following is the oath to which I referred:

WASHINGTON, D. C., *April 17, 1879.*

Hon. THOMAS J. BRADY,
Second Assistant Postmaster-General:

The number of men and animals necessary to carry the mail on route 38135 three times a week on the present schedule is one man and one animal. The number necessary to carry the mail three times a week on a reduced schedule of seven hours is two men and four animals.

Respectfully,

JOHN R. MINER.

DISTRICT OF COLUMBIA,
County of Washington:

Personally appeared before me the above John R. Miner, and made oath to the above statement the 17th day of April, 1879.

W. F. KELLOGG,
Notary Public.

What had Miner to do with that route? They tell you that the contractor must make the oath. No; the subcontractor may make it, and John W. Dorsey makes two oaths on a route here with which he had nothing to do either as contractor or subcontractor. Brady must have known the fact, for Brewer had called Brady's attention to the fact that Vaile was only subcontractor when one of his oaths for expedition was filed. But here Miner goes forward and makes that oath. Now, I will not comment upon the falsehood of the oath. That has been shown to you already. What was the consequence of that oath of Miner's on a route with which he had nothing to do, made April 3, 1879, and filed April 18, 1879? Miner makes the oath. On June 26, 1879, the time was reduced from twelve hours to seven, at a cost of \$2,630.40, the original cost of the route being \$548. By the difference between two thousand—

Mr. HENKLE. It was reduced from sixteen.

Mr. MERRICK. Reduced from sixteen hours?

Mr. HENKLE. Yes.

Mr. MERRICK. Then my twelve hours is an error?

Mr. HENKLE. I have no doubt.

Mr. MERRICK. It is immaterial. Say sixteen. Reduced from sixteen hours to seven. That is immaterial. For the reduction, whatever it was, \$2,630.40 was paid. The original cost had been \$548. By the difference, then, between \$548 and \$2,630.40 Miner benefited the parties having the route, with whom he had no longer any interest, if their theory be true.

Now, gentlemen, I say in this connection, that even if it be true that on the 1st day of April this distribution took place, and that distribution should be an obstructive feature in the case for the government, when Miner went over and made that oath he re-established and renewed the conspiracy, and the other side, by accepting the oath, co-operated in the re-establishment and renewal of that conspiracy.

It also appears that Peck made an oath February 1, 1879, on route 34149, Kearney to Kent. What had Peck to do with Kearney to Kent? Kearney to Kent went to Vaile and Miner. Now, when Peck made that oath February 1, 1879, he was interested in it, for Kearney to Kent was then part of the common stock undistributed. That oath was filed on the 3d day of April, 1879. By whom and for whose benefit? By Vaile and Miner. That oath, so made whilst the conspiracy was flagrant, was filed April 3. What is the consequence? July 12, 1879, the route was reduced to thirteen hours at a cost of \$2,200, and one trip was added at a cost of \$1,122.41; the original cost was \$868. By an oath then made by Peck in February, 1879, in respect of a route

which passed to Vaile and Miner on the 1st of April, 1879, Vaile and Miner filing the oath on the 3d of April, derived a benefit of some three or four thousand dollars by an increase of pay on that route. Was not that a renewal of the conspiracy? That oath has been before you, and you have seen its character and been taught how to regard it.

Again, Peck made an oath December 30, 1878, on route 46132, Julian to Colton. Julian to Colton was another of the routes of Vaile and Miner, passing to them in the distribution. The oath was made back in December by Peck. It was filed April 11, 1879, after the distribution. Now, the filing of the false oath, as well as the making of it, is complained of in the indictment. What was the result of that oath? On June 24 two trips were added at \$2,376, and the time was reduced to twenty-six hours at \$5,346. The original cost was \$1,188, and \$7,722 was added to this original cost for the benefit of Vaile and Miner on an oath of Peck made in December, 1878, and filed by Vaile and Miner April 11, 1879. Hence it was, your honor and gentlemen of the jury, that I said that this distribution, if distribution there was, was a distribution not only of the plunder they had already realized, but a distribution of the burglars' tools with a view to the realization of further plunder. Why did they have to distribute the burglars' tools? These tools were made whilst the conspiracy was hot. When they came to divide up the routes, as each tool fitted the particular door that was to have been burglariously broken open to get at the Treasury, whoever in the distribution had a particular door assigned to him necessarily had to have the key, and as Miner had the door to route 46132, he had to have the key that Peck forged in 1878, and then when he reaches the door he turns Peck's key and opens the door given to him burglariously to enter, and thereby plunders the United States. Was not the conspiracy flagrant when he put a key in that door—the key made months and years before by Peck? Gentlemen, the position is too palpable to justify discussion, and unless the other side can bring forward some more rational and plausible condition of things for these parties or for S. W. Dorsey, to excuse their conduct, than that this plunder was divided on the 1st of April, and therefore the iniquity ceased whilst crime was still going on, they had better at once take the verdict and plead for mercy.

And now, gentlemen, leaving the record evidence, it becomes my duty to call your attention to the oral testimony affecting the subject of a conspiracy as given by Walsh, by Buell, by Clayton, and James, and MacVeagh. I number Buell among the other witnesses for the reason that, although we desire to appropriate nothing that belongs to the other side, Buell, in the course of his cross-examination, so damaged the defense by the disclosure of some of Brady's secrets that he is probably a useful witness on the side of the government. The truth was certainly wrung from him with some difficulty. Cross-examination is a very hard ordeal to pass through with a court that desires the facts to go to the jury and counsel disposed to wring them from a reluctant witness, and we had to get at the secret he earnestly desired to keep from disclosure.

And now, gentlemen, I propose to show to you that Mr. Walsh is confirmed in his statement by the record and confirmed by Rerdell by statements made at different times and remote periods in relation to facts about which neither could have compared notes, and that they mutually confirmed each other; and I propose to show you that Rerdell is confirmed by the record, and I propose to show that Buell confirms and does not confront and contradict Walsh, and that the three combined establish facts which are so important and material that without the ex-

istence of a single record in the case this jury would be compelled to find a verdict of guilty against the defendants.

Now, my learned brothers have thought proper to assail Walsh not only in court, but out of court, and the terms which they have applied to him in court seem but pale reflections of the vigorous denunciations and billingsgate that are found in the press of Mr. Brady. Perjurer, liar, scoundrel, and all sorts of anathemas are denounced against him, yet not one particle of proof is introduced, when they could get the proof if it existed, to contradict his statement.

I will take up Mr. Walsh first. You remember, gentlemen, with perfect distinctness, I have no doubt, the statement of his interview with Brady on the 28th day of December, 1880, and their first attack on Walsh was that Brady was not here in the city on that day. Gentlemen, there was no reason on the earth why Walsh should locate that interview on the 28th day of December, 1880. There was nothing peculiar about that day, and what happened on that day relative to other days, and what happened on other days that made it all important that the interview should take place on the 28th day of December, 1880. Walsh might therefore very well say, "It was on the 28th day of December, or thereabouts, I do not recollect which," and wherever a man is making up a story you all know that he seeks to leave himself as much latitude as will guard against possible detection. If a man has never had an interview with another man he will not, if determined to swear falsely that he has had such interview, fix it any particularly specified time. Again. If he does assume to locate it on a specific day, at a specific place, he will, before telling his story, definitely ascertain beyond possible doubt that the man with whom he had the interview was at that place on that day. But, as a general rule, he will say, "I had an interview with him on that day, or I think about that day, really I can't remember the date. It might have been some other day. There is nothing particular to fix it in my mind. I had a note without a date, but there is nothing particular"——

The COURT. [Interposing.] Does not that note say the 28th of December, without stating the year?

Mr. MERRICK. I think it does. The memorandum he made on the back I speak of.

Mr. WILSON. Not a bit of it.

Mr. MERRICK. The note——

Mr. TOTTEN. [Interposing.] The note was dated the 28th of December.

Mr. MERRICK. That is right. It may have been the 28th day of December of the year before just as well—just as well. Would he have brought that into court had he been disposed to lie? I will bring it down closer directly. Would he have brought it into court had he been lying? No; unquestionably not. They say Brady was not here on the 28th, and they fling out their banner and gather under it with much rejoicing, and read a letter—two, three, four—from French, of the 28th of December, signing himself Acting Second Assistant Postmaster-General on that day. They put him on the stand and they make him swear that never did he act as Second Assistant Postmaster-General when Brady was here—never; and then, that Brady was not here from a certain time to a certain time, and that he acted as Second Assistant all the time. What was the consequence? [Referring to a letter press copy-book.] Here is a letter of the 28th of December signed by Brady in his official capacity. The preceding letters of that day are signed by French. Counsel say that may be it was the last letter written on that day that was signed by Brady. That some clerk might have remained in his office after regular hours, and that Brady signed the letter

next morning. Such a thing might be a *remote possibility*. But do you think it is likely, gentlemen of the jury? This letter stands here on this book dated the 28th of December, 1880, signed by Brady. When was that letter signed? Why do you not explain where Brady was if he was not here? I know the burden of proof does not shift in a criminal case ordinarily, but all the laws on earth, common or Congressional, cannot stop the operations of the human mind. It will reason. You can no more make a greenback equal to gold by simply legislating that it shall be, than you can prevent a man from reasoning by passing a resolution forbidding him to reason. I present you the conclusive proof that on the 28th of December, 1880, Brady was in his office discharging his official duty. I present you Brady's declaration that he was there on the 28th. Now, if Brady told a falsehood I cannot help it. He is bound by his declaration. His declaration is, that "on the 28th day of December I was in my office discharging the duties of Second Assistant Postmaster-General." Not only that, gentlemen, but Mr. French saying he never did act as Second Assistant Postmaster-General during the day when Mr. Brady was there, is met by two letters of the 27th, when French seemed to have acted as well as Brady. December 27 there is a letter signed by Brady; December 27 there is a letter signed by French; December 27 there is another letter signed by French, and another signed by French, and another by French. Then you see, gentlemen of the jury, that Mr. French is laboring under a very great error, and that his extreme solicitude in behalf of his former official companion has led him to put in the solemn shape of an oath that which he should never have allowed to pass his lips. That Mr. French and Brady acted both on the 27th and 28th is proved conclusively by this letter-book [indicating].

Now, Mr. Walsh states the relations between himself and Brady, and that he was lending Brady money from time to time, sometimes taking notes and sometimes not, and why this peculiar relation existed I will explain to you hereafter. My brother makes a point of the fact that Walsh had made a mistake in his account, and that he had presented Mr. Hine with an account stating among its items an item of \$1,200, when it should have been \$12,000. Here was Mr. Hine's own letter saying that the amount of this item for which he was directed to bring suit against Brady was \$12,000 and not \$1,200. A letter from Mr. Hine to Mr. Walsh, specifying the items upon which, as Walsh's counsel, he had brought suit, says that this \$1,200 should be \$12,000. Now, he was lending money to Brady from time to time, and among other sums loaned was the sum of \$13,500 handed to him on the 12th of April, 1880, at the banking house of Hatch & Foote. Now, gentlemen, pay attention to this. Brady had written or telegraphed to Walsh, he says, to deposit the amount of \$10,000 as a credit with Hatch & Foote, but he did not make the deposit. He waited until Brady came to New York and then lent him \$13,500 in the office of Hatch & Foote. He took a note, and by referring to his check he fixes the date of payment in Hatch & Foote's as April 12, 1880. Now, gentlemen, you know that no banker will allow any individual to look at the private account of any other person. Henry W. Ragley, the bookkeeper of that banking house, was summoned and testified that on that very day, April 12, 1880, Brady deposited to his credit \$10,000, the entry being marked c. What does that mean—check or cash? It means cash, or check and cash. On that very day, the 12th day of April, 1880, when Walsh says he handed him that money in the office of Hatch & Foote, Brady deposits \$10,000 to his, Brady's, credit, and Walsh has told you that Brady telegraphed him to deposit that amount to his credit, but he did

not make the deposit, for reasons which he explained to the satisfaction of any reasonable man. He waited till Brady came on and handed him the money, and on the very day Brady got the money Brady made the deposit. Now, gentlemen of the jury, if Brady did not get that \$10,000 from Walsh, where did he get it? If he did not get that \$10,000 that he deposited on that day with Hatch & Foote from Walsh, from whom did he get it? Why has he not proved whence it came? He was on a salary of \$3,500 a year. A man on a salary of \$3,500 a year, if he gets a sum of \$10,000 in his hands knows how he gets it and from whom he gets it. No man knew better the importance to his case of showing where he got that \$10,000 or \$12,000 than the gentleman who sits before me. [Mr. Wilson.] No man knew better than he that to prove that Brady got that \$10,000 somewhere else than from Walsh would be actually and substantially a fatal contradiction of Walsh. Why did you not prove it? No matter where he got it. No matter how he got it. It was of importance that he should show that he got it somewhere else than from Walsh. Did he not recollect? Did this gentleman who sat at the gate of customs, so to speak, of the star service gather in so largely that \$10,000 was a mere song? Or was there a power of reproduction of the particular \$3,500 he got as a salary that made it equal to twenty-five, thirty, and fifty thousand dollars per annum? No, gentlemen; he knew where he got that \$10,000. He knew the day that Walsh testified, and he knows now where he got it, and if he could have proved that he got it from anybody but Walsh he would have proved it. I respect the learning and esteem the character of my brother on the other side. He is too good a lawyer not to have proved so important a circumstance if he could, for if he could have proved it and did not prove it, he deserves to be dismissed from the bar.

There is another interesting fact about this matter, but I will not stop to speak of it further than to give it passing notice, and that is that Brady was at this time needing money. He was in the midst of the Congressional investigation. He had invested largely in the polite literature of the day. He had bought *The Capital* and was laying the foundation for the *Critic*. He was attending to legislation, and he was running post routes and star routes, and doing a variety of things, but the question of whether or not he needed money need not be discussed, for the fact is not denied that on that day he got \$10,000 from somewhere.

Now, Walsh says that Kellogg gave him \$15,000 worth of Price drafts on Corpus Christi and San Antonio and a note of Price for \$5,000, one-half for Kellogg and one-half for Brady, which he collected and applied as a credit on Brady's debt. If not true, why did they not contradict it? Why did they not call Kellogg? Nothing would have given me greater pleasure than to have seen Mr. Kellogg on that stand. I would have hailed him with delight. Why did they not call Kellogg, if Walsh's statement in that regard is not true? He was here. As to the Corpus Christi and Indianola drafts, why did they not call Price? Price was not here. He was at Saint Catharine's, *and they knew long before I did where he was*. The other side knew long before I did where he was to be found. If he could not be brought here on a *subpœna*, why did they not send out a commission to take his testimony? There was plenty of time; there was plenty of law for it, and plenty of courtesy on the part of the Government to acquiesce in what they might desire. But they clamor that Walsh had no books, and that a man who keeps a small bank account and discounts postal drafts and lends out a little money cannot tell the truth unless he has books. Walsh had books. He did not make en-

tries of all these things in his books. He made entries of some, and of some he did not. He told you who his book-keeper was, Ben. Sheckells, now in the War Department? Why did they not call *him*? Mr. Totten said, as if he thought you would be deluded by any such thing, that we ought to have called him. Why? We need no confirmation of Walsh. He stands unimpeached, and all the billingsgate they can pour upon him will never soil his character or impair his credibility as a witness. One of the counsel even went so far as to speak of his contradictions in the Spofford case. It was not in evidence. If he contradicted himself in the Spofford case, why did they not prove it? I tried the Spofford case as counsel for Spofford against Kellogg. Walsh was a witness, and I defy you to find a contradiction in his evidence in that case. His testimony in that case related to transactions in New Orleans; but, however, it was there among the documents printed and of record; why did they not bring it in?

Mr. WILSON. Will you let me have a copy of your brief?

Mr. MERRICK. Yes, sir; certainly. I will send it to you to-day, and if you can find a word in the brief impeaching Walsh in any way, I will make you a present of anything you may choose to demand that I am able to give. I did not impeach him; never. But if I had wanted to impeach him, I would have been above impeaching him by simply crying out hard names at him; at least until those names had a just foundation in the proof offered, and arose out of it and compelled their utterance by the obligation upon every man to call the thing by its right name, as I always do. I think my learned brothers on the other side ought to be the last men to talk about books. Where are Vaile's books? Receiving half a million a year! Treasurer! Disbursing half a million a year! No books! Grave-yard principles! Where are Miner's books? Secretary! Bound by agreement to keep them! No books! Silence, gentlemen, about books! Do not say books again!

Now, gentlemen, the learned counsel would say that Walsh and Brady had nothing to do with each other. That Walsh had confidential and personal business relations with Brady, is shown by a letter asking the loan of Chattanooga stock to the amount of \$25,000.

Mr. WILSON. In this case?

Mr. MERRICK. Yes, sir.

Mr. WILSON. No, sir.

Mr. MERRICK. It is true. Excuse me, sir. The letter is not in the case, but Mr. Wilson asked him about the letter to fix the date, and he said he had a letter from Brady, asking him to lend him \$25,000 worth of Chattanooga stock, and from that letter he fixed the date; but when I offered the letter, your honor would not allow the letter to come in. It was objected to.

The COURT. There is no evidence of the existence of the letter.

Mr. MERRICK. Yes, there is.

The COURT. Except his declaration.

Mr. MERRICK. Oh, no; except his declaration and the offer made in court.

The COURT. I understand that you say his testimony is corroborated by that letter.

Mr. MERRICK. Oh, no; by a letter.

The COURT. There is no proof of that.

Mr. MERRICK. None except what he says.

The COURT. Then what he says corroborates what he says.

Mr. MERRICK. Yes, sir; take it in that way if you choose. What he says corroborates what he says about the letter. I offered it and it was

objected to and ruled out. Mr. Wilson interrogated him about the letter. I will turn to what he said. There is no letter in evidence; only the date.

Mr. TOTTEN. It had no date.

Mr. MERRICK. Oh, yes. Don't trouble yourself. I will get it.

Mr. WILSON. I want to see how far you will go.

Mr. MERRICK. I am going up to the end of this case, and to the demonstration from the facts of the melancholy and painful conclusion to me that your clients have been guilty of a criminal conspiracy to defraud the United States; and when I am done I do not believe that any sensible man will entertain a doubt upon the subject.

Mr. HENKLE. It is about time you began it.

Mr. MERRICK. Now, your honor, as I understand it, he undertakes to fix the date by a letter which he says is from Brady. That much is in evidence. The letter itself was not admitted. That is settled.

The COURT. The letter, then, cannot corroborate his statement.

Mr. MERRICK. One moment. The letter was not admitted. He stated what the letter was. Was that letter from Brady? If it was not, why did you not prove it? The letter is not in evidence, but the fact that that was Brady's handwriting is in evidence, for he fixed the date from that letter. The letter was identified as the handwriting of Brady, though its contents could not be read. Now, if that is not Brady's letter why did you not prove it? Before I proceed further with Walsh, here [producing a paper] is Walsh's letter to Brady in December, 1880, asking for that original interview, and Brady's answer is written upon it:

Will be there at 12.30.

Do the gentlemen deny that that is Brady's writing? If it is not Brady's writing, and this communication was not received by Brady and sent back by him with this indorsement upon it, why did they not prove it? Walsh swore that that was Brady's handwriting. They had French on the stand, who knows Brady's handwriting perfectly. Why did they not ask French if that was Brady's letter? There was no necessity for us to bolster Walsh up; but if they wanted to impeach Walsh they might have called Uncle Billy, the man, I believe, who made the fire in Sheridan's room. Why did they not call Sheridan, who might have known something of it? Why did they not ask Adamson if he took the note? They called him. He was transferred from the post-office to Brady's paper and was still his protégé. Walsh said he sent the letter by a page. French says there never was any other page. If that is not Brady's handwriting on the back of the letter why did they not prove it was not Brady's handwriting? They attempted to prove that the page they suppose took the letter was not in Brady's service in the department at the time, but admit he got the letter and wrote on the back of it, "Will be there at 12.30." The material and direct proof plainly within their reach, of an all-important fact, if fact it be, was not brought forward.

Now, they ask why did not Walsh tell his counsel about the notes that Brady had taken? Why did Walsh permit Brady to take those notes and carry them off? It was a strange transaction they say. It is a transaction that needs explanation I admit, and I am prepared to give an explanation. "Why," says brother McSweeney, with all the Irish in him rising, "did he not fight for his notes?" The reason, gentlemen, was this: He was in Brady's power and knew the character of the man in whose power he was. Walsh had at that time a valuable contract

on the Santa Fé route in New Mexico, No. 40101. The original cost at which he had taken that route under processes that I do not think entirely free from trouble, was \$18,500. From \$18,500 per annum that route was run up to \$135,975; and thus he stood with this route at \$135,975, as he tells us in his testimony, and I do not go outside of it, asking Brady to pay him back the money he had loaned to him. Brady had it in his power to ruin him. Had Walsh asserted his rights as against Brady, Brady would have gone to his office, and by a scratch of his pen Walsh would have been a ruined man. He was completely subject to Brady's power. His financial life was Brady's breath. Knowing Brady as he did, knowing the official corruption that soiled the pages of his office, and knowing the malice that instigated some of his acts, the only wonder is that Walsh ever demanded his money at all. The only wonder is that he did not allow Brady to keep it. I have no doubt that when Brady took it originally, Brady believed it was to be treated as a payment for his official corruption. But that he should not under those circumstances have throttled Brady is plain enough. Brady tells him, "Sell your route. Get out." Walsh determines he will try to sell. He knows there is danger ahead and he does try to sell. He makes the effort after that interview, but lets it go along quietly, so far as his personal relations with Brady are concerned and his financial relations with him. Finally, he brings the suit and does not tell his counsel about those notes. Why? For the simply reason that if he told his counsel the circumstances connected with the abstraction of the notes by Brady, he would be obliged to tell him all the interview when Brady took the notes, and how Brady said the notes were paid; and if all the facts went to the public, there was no hope of his ever getting his money except by a judgment, and Brady would come into court and swear the case out of court, as he is now prepared to do by the aid of Walsh's lawyer. Now, gentlemen, what hope had Walsh if he did not tell about the notes and the manner in which Brady appropriated them? The hope that Brady, when the suit was brought, knowing that there was an avalanche impending over him, might, in order to prevent the ultimate trial of the case, and Walsh's public statement of the facts which a trial would necessitate, pay the debt before the case matured for trial. Would not you have done the same thing? And suppose Brady had taken your notes under those circumstances and you had used all the ordinary means of persuasion, would you not have gone along by gradual stages of coercive processes and brought suit without telling of the scandal in the hope and the expectation that he would pay the money in order to save the ultimate development of the scandal? It was the wisest and best thing that Walsh could do under all the circumstances; for if the scandal was out then there was nothing left but to fight in the arena of the law. But as long as the scandal was not disclosed there was the hope that Brady would pay the debt to prevent disclosure.

Brady said to him in that interview that these petitions were mere matters of form. Gentlemen, does not the record confirm the statement that they were mere matters of form? Is it necessary for me to go over them in order to show you that on the Ojo Caliente route no petition asked for fifty hours, and yet it was reduced to that time? The petitions asked for a different and a longer time, and yet it was reduced to fifty hours on the oath of the contractor. On route 35115, from Vermillion to Sioux Falls, Brady writes to Bennett that the old time cannot be restored, as it would be an injustice to the contractors. This was a route where the contract was for the sum of \$395 originally, and it had been increased to \$6,133, and

where the revenue from the offices was \$240. Petitions to restore the old schedule and make the time longer were disregarded utterly because it would be an injustice to the contractor! Is it necessary for me to show you that on route 38113, from Rawlins to White River, the petitions all asked a reduction from one hundred and eight to eighty-four hours, and the only paper on file speaking of forty-five hours was the oath of John W. Dorsey, filed April 26, 1879; and that French said in reference to that route that it seemed to them at the department that the reduction was not sufficient, although it cost a *great deal more* money to reduce it to the time named in the oath and not to the time named in the petition? Shall I show you on route 41119, from Toqnerville to Adairville, that the petitions asked for a reduction from sixty to forty-eight hours, and that by an order of July 8, 1879, the time was reduced to thirty-three hours on the oath of John M. Peck? On the Eugene City and Bridge Creek route, No. 44140, Peck's oath, made on the 22d of January, 1879, specified fifty hours instead of one hundred and thirty, and was filed May 24, 1879, and an order was made on June 26, 1879, for \$1,466.10, which, with the order for increasing the trips, made a total of \$21,460.89, as against an original cost of \$2,468, and yet the petitions asked for no such reduction of time. The same is true of route No. 36142, from Julian to Colton, where there were petitions, but the time was reduced according to the oath, without regard to the petitions. Where petitions came asking for a reduction of time and an increase of pay that reduction was made and that increase was granted; but where protests came from postmasters or petitions from citizens to take off increases of speed or to take off trips and reduce the pay the petitions were disregarded. The whole course of the office shows that Brady's statement to Walsh that petitions were but a sham, and a covering and a veil for fraud was perfectly true. The record therefore sustains Walsh's statement. That he did make these statements to Mr. Walsh seems to be regarded as a matter of surprise by the counsel upon the other side. Walsh and he were in easy, intimate, pecuniary relations, as is shown by Walsh, and were dealing with these mail routes. Brady knew that he had Walsh in his power, and did talk and could talk to Walsh in a confidential and determined way. In view of the relative positions they occupied to each other, it seems to me that the course pursued by each was entirely natural. But, gentlemen, there is one feature about this circumstance that has excited my amazement and indignation, and has excited a feeling within me that has run, I must confess, all through what I have done and said since I first heard the utterance to which I am about to refer, and that is the assertion by one of the counsel for defendants that this Government of the United States has hired Walsh to come and swear upon this stand. The counsel upon the other side have charged, one in language harsher than the others thought proper to be used, that there were fines to be remitted, and that Mr. Attorney-General MacVeagh and Mr. James were "*angling for Walsh*" with the promise of remission of these fines. In the name of my country, I throw back the foul slander in the teeth of the man that made it. That this nation, through MacVeagh and James, or any of the honorable men who occupy the high positions they occupied, should condescend to subornation of perjury in a criminal case is a foul libel upon the country that any citizen ought to be ashamed to make, and for the making of which he ought, if he has any conscience and any sensibility, to forever reproach himself, unless he can prove the justice of the accusation. James in the discharge of his duty may have remitted fines, or they may not have been remitted. I know nothing about it. But it was the discharge of a high

executive duty; and that it was done for the purpose of subornation of perjury or influencing Walsh is a vile, false calumny. It was said that another officer of the Post-Office Department had participated in this arrangement and manipulated these same designs and purposes; that Mr. Woodward had been the toad sitting close to the ear of Mr. Walsh, seeking by his devilish arts to win his favor to this perjury. Gentlemen, there is not a more honorable man in the service of the United States than Mr. Woodward. Faithful to his duties at all things, independent in fortune, and serving the country in the office that he now fills as much from the love of country as from any other motive, he rises above the plane of the men who assail him, and moves in an atmosphere whose purity would be destruction and death to the debased characters of the men who attack him. There is not a more honorable man who walks the continent of America to-day; and that this great government should in the trial of a criminal case seek to influence a witness for the purpose of achieving a conviction is an accusation so shocking that I had never supposed I should hear it made in this or any other court. All that the Government of the United States wants is justice, and it demands from you a verdict founded upon justice, and justice attained through truth, substantial truth, as developed in evidence, and untainted and unstained by purchase, fraud, or design.

Now, gentlemen, they attempt to rebut the testimony of Walsh by Mr. Buell. Buell says that he received no money from Walsh for Brady; that Walsh paid him a thousand dollars for services he was to render to Walsh. This is a strange story that Buell has told, and it deserves some serious consideration. Buell was the printing clerk of the Senate at twenty-one or twenty-two hundred dollars a year, and he states that he had an arrangement with Mr. Walsh.

The COURT. He was clerk to the Printing Committee.

Mr. MERRICK. No, I think not.

The COURT. Was he not clerk of the committee?

Mr. MERRICK. No; he was clerk of the Senate under Mr. Burch. Mr. Burch was Secretary of the Senate, and Buell was printing clerk of the Senate at twenty-one or twenty-two hundred dollars a year in December, 1879, and in January, 1880; and he states that in the early part of January, Mr. Walsh asked him to do some services in connection with the star-route investigation, and agreed to give him a thousand dollars for what he was to do. He says that this conversation occurred after Walsh's route became the pivot of the Congressional investigation. Now, gentlemen, the resolution demanding that investigation was offered in evidence, and will be found in the record. The inquiry arose out of a message from the Post-Office Department informing the Congress of the United States shortly after the opening of the session that there would be a deficiency of \$2,000,000 in the star-route funds, although, as I explained to you the other day, every cent of money that had been asked for by Brady and the Postmaster-General for the star-route fund had been appropriated for that fiscal year. Amazed and surprised at this demand, Congress ordered the subject to be investigated. The resolution was offered on the 8th day of January and passed on that day in the House, and on the 12th day of January the committee convened and called Mr. Brady before it. Mr. Blackburn, who was the chairman of the subcommittee, told you that it was some weeks before Mr. Walsh's route became the subject of serious inquiry. That would certainly run it down into February, and yet Buell, who was hired, as he says, to manage the affair of Walsh's route, tells you that he was hired when that route became the subject of discussion

in the committee, and not until that time, and yet he further says that he was hired in the first days of January, and the checks which Walsh produced, and which he says were used to pay Buell, are checks bearing date the first days of January.

Now, what are the probabilities? This was an investigation of the star-route service generally, and of Brady's manipulation of that service, by which Congress was surprised to find that there was likely to be \$2,000,000 of deficiency in the appropriation. Brady was the man against whom this storm was directed. Brady was the man who had to fear the searching inquiries of Congress. Brady was the man who was to be interrogated, and whose books and actions were to be overhauled. Buell says that he met Brady for the first time in February, and that by the 1st of March Brady had loaned him \$10,000 with which to buy *The Capital*. I called your attention the other day to the singular fact that this acquaintance should have become so intimate, and this love so warm at one single interview, that \$10,000 should be given up as the assurance of its earnest simplicity, and its broad and fierce heat. Buell tells us that the very first time that he saw Brady he opened negotiations for that money and succeeded in getting it; and for what was it, and why was it given to him? That *The Capital* might be used to shield and protect Brady against the thunders of this investigation, and to assail the men in Congress who were assailing Brady. Brady's interest therefore is apparent at once, and apparent in connection with Buell, who comes here as a witness to swear for him, as his editor who libeled the court, the counsel, and the jury in this prosecution. Brady gives him the \$10,000, and he buys the stock, and Brady takes Buell's note, and subsequently gives up the note, and Brady takes the stock, and he tells us that Brady is to-day the owner of *The Capital*, as he is also of the *Critic*. Now these things come from him with great reluctance. It needed the power and the mandatory direction of the court that he should speak, in order to get from him what we did get.

Now, gentlemen, seeing the relation between Buell and Brady, as established on that first interview and kept up subsequently, and seeing the relations between Walsh and Brady, which do you believe of the two, Buell or Walsh? Now Buell swears that he published this card on January 26, 1881:

SUNDAY MORNING, *June 26, 1881.*

•
SOMEWHAT PERSONAL.

The following is an extract from a printed letter, dated Cincinnati, June 23, which I received yesterday from my esteemed friend and colleague, Colonel Don Piatt:

"I met B. on the cars yesterday, and he wished me to inform you that Gibson & Co. were after you, and expected to secure your indictment and conviction on a charge of being bribed while clerk of the Senate. They claim to have checks or a check in support of their charge."

I have heard that the above statement had been given out in the form of a rumor from room 59 some time ago, but have never before been able to reduce it to form sufficiently tangible for notice. I have also heard that Mr MacVeagh has made a somewhat similar statement to the President.

I have to say that it is not true; THAT I NEVER RECEIVED, WHILE PRINTING CLERK OF THE SENATE, ANY CHECK OR CHECKS, OR ANY MONEY, OR ANY OTHER VALUABLE CONSIDERATION, FOR THE PURPOSE OF INFLUENCING MY ACTION, PUBLIC OR PRIVATE, FROM ANY SOURCE WHATEVER.

Now, gentlemen, there you will perceive that Mr. Buell gives a direct contradiction to himself. But you saw him on the stand, you heard him testify, you saw and appreciated the difficulties I had in getting from him the little I could get. For instance, here are two or three

pages where I had to follow him with question after question in order to get this answer:

Q. Where is your stock?—A. It is pledged.

Q. "Put up the spout," is it not, with Brady?—A. Well—

Mr. TOTTEN. [Interrupting.] Now, your honor, will that do?

Q. Was not the whole stock put up with General Brady at the outset upon the condition that he was to furnish the requisite amount of money to run the machine?—A. All the money that he loaned is secured by stock as collateral.

Q. Was it not all put up as collateral with him?—A. As far as I know, yes; I suppose it was.

Mr. MERRICK. There it is at last. Now we will take a recess.

Now, gentlemen, belief is not a thing regulated by rules of law. There are artificial rules which tell us that we ought to attach a certain degree of importance to one piece of testimony and a certain degree of importance to another piece of testimony. But rules of law cannot regulate belief. It is a something which each man obtains through a process—through a process of his own, and of which he himself may be unconscious—which each man's mind adopts in reference to everything that he sees and observes in the course of life; and when you see a witness on the stand, judging from what he says, comparing it with other testimony that has come to your knowledge, impressed with his manner either favorably or unfavorably by some slight or significant circumstance that is immaterial almost in itself, by a variety of things surrounding and accompanying the giving of the evidence, you believe or you do not believe, and you may not always be able satisfactorily to trace it, although careful thought may enable you to analyze it.

Now, I submit to you, gentlemen of the jury, as between these two men on the stand; as between the testimony they respectively give in reference to the various transactions of which they speak—Walsh and Buell—in view of the manner in which they stand confirmed by other evidence in the case, which do you believe and which do you disbelieve? Which will you credit? Walsh's testimony, sustained as it is, or Buell's testimony, contradicted by himself, lame and halting through all his examination, and finally declaring that whilst a clerk of the Senate he never received any money at all from anybody to control his actions; Buell, who came here as the paid man of Brady, running two of Brady's papers, or Walsh, an independent man, whom Brady has injured, but, gentlemen, whom the Government has never specially benefited or hurt. Which of the two will you credit?

Now, we must go a little further and see which of the two are confirmed by any of the testimony not heretofore discussed in this case. I now ask your attention for a little while to a piece of testimony that has not been often referred to—the testimony of Messrs. MacVeagh, James, and Clayton. I will say to you, gentlemen of the jury, that the record confirms Rerdell's statement as made to MacVeagh, and Rerdell's statement as made to MacVeagh confirms Walsh's statement as made on the witness-stand. Says MacVeagh, and I must read this to you:

He said that the Postmaster-General had requested him to repeat to me substantially what he had already told him, which he said he would proceed to do. He then said that his first connection with this matter was as secretary to Senator Dorsey while Senator Dorsey was still in the Senate; that there was what was known or what he called the Dorsey combination formed, of which Senator Dorsey was a member, with John W. Dorsey, and a man named Miner, and a man named Peck, and a man named Boone for a while, who afterwards was dropped out of it, and a man named Vaile, as I remember it. He said his first duty in it was to assist in the preparation of the blank bids or proposals and bonds which were prepared in bulk and sent out West to be filled up in blank and certified.

Now, gentlemen, do you believe that? Do you believe in the first place that he made that statement to MacVeagh? I think that is not

contested by counsel on the other side. If he made the statement to MacVeagh, is the statement true? Now, what motive had he for making the statement to MacVeagh if it is not true? Counsel on the other side, condescending to smallest things, say that he made this statement for the purpose of getting his father-in-law a small clerkship of a thousand dollars or so; that he made the statement for the purpose of getting an opinion about the Jennings matter, which was never before MacVeagh at all. These gentlemen who are counsel for these men charged in this indictment, and not for Rerdell—these other men—say that Rerdell is so base a dog that he would go to the Attorney-General and deliberately lie upon his lifetime associates and the men who gave him bread in order to obtain a position for his father-in-law. They gave him a worse character than we give him. They give him a worse reputation, a baser heart, a more corrupted nature than even I would be willing to give him in the discussion of these facts to the jury. Now, is his statement true?

Boone tells you, gentlemen of the jury—and Mr. Carpenter paid him particularly a very beautiful tribute—that there was a combination formed; that S. W. Dorsey asked him to his house, and they there discussed who should be members of it, and that the members were Peck, John W. Dorsey, and Miner, or some other friend of S. W. Dorsey to be afterwards selected, and himself, Boone, and that he, Boone, was afterwards frozen out to make way for Vaile, and that his duty was to prepare these bids and blank bonds and send them West where they could be signed by the securities and come back to be used in the department, and that in that work Rerdell helped him. Now, what does Rerdell say, long before Boone had ever opened his mouth, for Boone, as he told you, had done business *on grave-yard principles*, and on grave-yard principles the mouth of his knowledge had never been opened? Boone tells you precisely the same thing that Rerdell does; for hearken again whilst I read:

He then said that his first connection with this matter was as secretary to Senator Dorsey while Senator Dorsey was still in the Senate; that there was what was known or what he called the Dorsey combination formed, of which Senator Dorsey was a member, with John W. Dorsey, and a man named Miner, and a man named Peck, and a man named Boone for awhile, who afterwards was dropped out of it, and a man named Vaile, as I remember it. He said his first duty in it was to assist in the preparation of the blank bids or proposals and bonds which were prepared in bulk and sent out West to be filled up in blank and certified.

Now, this statement of Rerdell is made a year ago and over, and Boone's testimony is given here for the first time in reference to the transactions that took place at the inception of this conspiracy, and is identical with Rerdell's statement. Now, let us look a little further:

He said he did a great deal of the clerical work, and also of the work of representation at the department, as well as in the preparation of the matters.

Now listen:

That the plan was to take them (the contracts) at much lower bids than they were worth, or than other people would take them at, and then have them expedited and the service multiplied by General Brady.

Is he not confirmed by the record? Does it not appear from the record that the members of the combination took them at lower bids than anybody else would make? Does not Vaile say that they were losing contracts, and nobody could carry them on the bids originally made? Did not Vaile tell you that if his contracts had been forfeited nobody would have taken them at that price, for, says he, "There is nobody as big a fool as I am"? Does not the record show you that they were ex-

pedited and increased by Brady until from being losing contracts they became largely remunerative contracts? Is not Rerdell plainly telling you what the record now shows to have been the truth? Has he not told you what was the design and the means, and have you not seen that design and those means carried out on the face of the records brought here from the Post-Office Department?

He said that General Brady was a party to this plan.

And then there comes a discussion as to whether that is competent or not, and the court overrules the objection, stating that the testimony is competent as to Rerdell, but that the confession under the circumstances does not go to Brady. The court says:

I think that I was in error when I excluded his statement in regard to Brady. I shall let the whole story in and instruct the jury that they are to take no part of it as binding upon anybody or as evidence against anybody except the man himself.

Then Mr. MacVeagh goes on:

And he said that they were assisted by the officers of the department in the Sixth Auditor's office, mentioning Mr. McGrew, and Mr. Lilley, and Mr. Turner. He said that these awards were made upon the bids for about one hundred routes—

Precisely as Vaile told you—

as I understood him, in round figures, between ninety and one hundred.

Now, mark, a most extraordinary statement:

That after Senator Dorsey left the Senate there was some subdivision of them (the routes) by which he and Mr. Bosler, of Pennsylvania, became interested in some thirty; that he represented them before the department, and that one of the things necessary for General Brady to have WERE PETITIONS IN FAVOR OF THE INCREASE OF SERVICE OR EXPEDITION, AND ALSO AFFIDAVITS OF THE SUBCONTRACTORS OR CONTRACTORS AS TO THE REQUISITE INCREASE IN MEN AND ANIMALS THAT THEY WOULD HAVE TO USE UPON THESE ROUTES.

Now, remember, gentlemen, there could be no collusion about this business. This is a statement made long ago. Has it not all turned out to be true? On the other side they claimed that there was a division. Vaile on the stand says that he took 40 per cent., Miner 30, and S. W. Dorsey for Peck and John W. Dorsey took 30. That is Vaile's testimony, and here says Rerdell in this statement—

That after Senator Dorsey left the Senate there was some subdivision of them by which he and Mr. Bosler, of Pennsylvania, became interested in some thirty; that he represented them before the department, and that one of the things necessary for General Brady to have were petitions in favor of the increase of service or expedition, and also affidavits.

Have you not found, gentlemen, throughout this case, that it was necessary to have petitions, and that it was necessary to have affidavits, and have you not found how they were got up? Rerdell tells you how they agreed to get them up at the time.

Let us go a little further:

He said attorneys were used wherever they were thought to be necessary, by employing persons and getting signatures, AND WHERE THAT WAS INCONVENIENT THEY MADE UP THE SIGNATURES.

Attorneys were employed to get up petitions, and get up signatures, and where that was inconvenient they got up the signatures themselves, and he himself carrying out the design, as he understood it, forges a half a dozen names, Postmaster Hall's among others. He takes a list of two sheets of names from Utah, and pastes it on to an Oregon route, and he gets up an affidavit. They write each other's names and interlace and intercommunicate by the discharges of these kindly offices of reciprocal forgery for one another.

Now, gentlemen, Rerdell talked about forgery, too. Let us see :

When the expedition for the increase of service had been allowed he stated some percentage that General Brady was to have, but I am not clear about the amount.

Rerdell states that Brady was to have some percentage. He tells MacVeagh that was the understanding and agreement, and Walsh says that Brady said that that was the common understanding with the contractors, and Walsh and Rerdell, without even a word exchanged between them, confirm this fact to the jury.

Now, gentlemen, a little circumstance going to confirm a witness may build him up and make him as a rock against the power of the other side. Walsh is confirmed in what he says Brady told him by what Rerdell told the Attorney-General. Walsh says that Brady told him that in all these transactions he was to receive a certain per cent. Rerdell tells the Attorney-General that in this conspiracy it was understood that Brady should receive a certain percentage. They confirm one another :

But I am not clear about the amount. It was in the neighborhood of 30 or 40 per cent. Then he said the contracts were usually sublet—

That is so, you will observe—

and the fines and penalties fell upon the subcontractor—

That is so ; you have seen it. The fines and penalties all fell upon the subcontractor—

under the terms of the subcontracts they drew ; that when these were remitted General Brady came in for a percentage of those.

That is just what Walsh said—precisely what Walsh said—and this statement is made to MacVeagh before Walsh had ever opened his mouth about the Brady notes :

He said he had brought with him, as evidence of the way in which the petitions for increase and expedition were gotten up, two letter-books from which he would read some letters, some of them written by him and some of them by Mr. Dorsey—as he said, Senator Dorsey—employing men to go around and get up the necessary petitions.

You had proof of this, gentlemen, from Taylor :

He said that he represented these people indifferently and that their interests were interwoven so that they acted for each other.

You have seen that. They acted for each other. They signed each other's names. Why, gentlemen, it is a plain history of the whole conspiracy. It tells you exactly everything in relation to it. And though it may have fallen upon dull and unintelligent ears if read to you at the beginning of this trial, yet after the learning you have derived from the close examination of the records you have so regularly and habitually attended to, it shines like the sunlight, illumining the whole corridor of this criminal way, and everything stands out in bold relief, indistinct, unintelligible no longer. There is no vague speculation needed now, no reasoning of possibilities from present transactions, no interposition of the ordinary operations of the laws governing the ordinary operations of the human mind to get one fact out of another fact. Here is the chain, the magic chain, of previously devised criminality binding all these facts together, gathering them before the jury, and defying you to disbelieve the charges made in this indictment. Let us go on :

He then stated also that when the Congressional investigation was started in 1880, or in the winter of 1879, I am not sure which—

Q. [Interposing.] Before you come to that point allow me to ask if he exhibited his books? Did he state to you that he made an entry on any books?

The WITNESS. That was the point I was coming to.

Mr. MERRICK. Pardon me for interrupting you.

A. [Resuming.] With reference to the last preceding Congressional investigation, he said that it was feared that he would be called before it and be required to produce any books that were kept of these transactions. He said there was a book, a tell-tale book, as he called it, which had the entries in it crediting very considerable payments under assumed names; that one of these names stood for General Brady, and one for a Mr. Turner in the Post-Office, and that these payments could not be accounted for; it was found necessary, therefore, to prepare a new book in case he was subpoenaed; that he therefore feigned sickness for a period of ten days, until a person had been employed here who, under his directions, his markings of this book, had prepared a new one, in which these items were carried to profit and loss, and the book was in a condition that it might have been safely presented.

Where are the tell-tale books which Mr. McSweeney promised to give me? What was it he was to give me, the tell-tale books or the fraudulent books? He did not give me either. Which was he deterred from giving me by the evidence? Why did he not bring them in? Why did he make the promise? Oh, gentlemen, it was thought when this case was begun that the Government knew nothing about it; that it could never get to the inside of these transactions, and difficult was the way, I must confess, and hard the labor through these devious figurings and papers to get at the exact facts of this criminality. But when they found that we had broken the shell and got into what the counsel called the *vitals of the case*, they found it safest then to give no light even in made up books, but to keep darkness surrounding the case and darkness in the jury-box, and the closer it comes to the intensity of Egyptian darkness the safer it is for the criminals. He was not required to produce the book when he came to be examined before the Congressional committee, and now comes one of the most extraordinary and interesting circumstances, to which I am going to ask your particular attention:

He said that he had been in a good deal of difficulty upon that occasion—

See if you can find this route. You all know these routes by heart—

that the testimony was upon a route that had been originally taken in the name of John W. Dorsey for half its cost, for \$3,000, when the cost was \$6,000, and that they had made a subcontract by which they agreed to pay \$6,000 for the service as allotted, but in this subcontract they had agreed with the subcontractor that if certain increases or expedition, I am not sure which, were allowed, then they would pay him a certain amount, and then if certain other increases and expedition were allowed they would pay him a certain increased amount, and that when these increases were made subsequently the contract was so transformed by them that instead of being a losing contract at \$3,000 a year it became a gaining contract by \$10,000, and the next increase made it a gaining contract, I think he said, by \$24,000 a year.

Do you see anything there that you recognize?

Then he said that had been also, to make his situation more delicate, jerked suddenly, about the time the investigation was threatened or commenced, from fifty-odd thousand down to three thousand again, and then let up to \$20,000—

Do you recognize it?—

and he said that he told them that with a record like that with which he was dealing, and the evidence of which was in the department, he thought his testimony, while not false, was as little unfavorable and as little dangerous as it could have been made by anybody.

Do you recognize that route? Why, gentlemen, it is Mineral Park to Pioche. That is the route—original pay, \$2,982. From January 16, 1879, two additional trips and expedition, \$19,318; from August 1, 1879, additional trips, \$29,300, making it \$52,033.33. It had gone up, he says, to \$50,000, paying \$24,000 net a year, and then he says from fifty-odd thousand dollars it was jerked down again to the original cost. All this is confirmed by the record.

What next? From January 22, 1880, there was an order cutting off expedition, and six trips, taking from the contractor \$49,051.33, and reducing the cost on the route to \$2,982, and January 28, 1880, the pay was again raised and paid at \$29,733.33, of which Rerdell speaks,—Mineral Park to Pioche. Mr. MacVeagh did not know anything about it at the time; we did not know anything about it at the time, but he comes and tells the whole scheme of the conspiracy, the way the whole thing was to be done, and not only that, but he tells us of one particular route in which these schemes, by his instrumentality, had to be put in operation in such a way that it bothered him most terribly in testifying before the committee, so that he did not want to lie to the committee, and had not lied, and he had done the best that he could, and he thought they were more or less dissatisfied with him, though he only endeavored to serve them.

Now, gentlemen, I submit that if there could have been a doubt in this case after the close of Mr. Bliss's argument, and the winding up of Mr. Ker's presentation of the record alone, when you come to supplement those arguments by the testimony of Boone first, then of Walsh, then of Vaile, and then of Rerdell's confession, doubt can find a home in no mind not too weak or strained against justice to be permissible upon a jury.

At this point the court took its usual recess.

AFTER RECESS.

Mr. MERRICK. You see, therefore, gentlemen of the jury, that the testimony of these men interweaves, so to speak, that the woof and the warp, through the loom of investigation, form the cloth on which the jury may safely repose. Boone and Rerdell confirm one another in all details and particulars of the original transaction, each confirmed, especially Rerdell, by the recorded facts as they have been spread before you; and Rerdell and the recorded facts with reference to Brady confirming Walsh beyond the possibility of question; whilst even Buell, called in as a last resort to help attack Mr. Walsh, falters and falls in the assault, and comes into the ranks of the witnesses for the prosecution.

Walsh further is confirmed by the banker from New York testifying that on the very day upon which he made this payment of \$10,000 that sum was deposited in that bank to Brady's credit. About that you can have no doubt, for the reason that if the \$10,000 so deposited was not derived from Walsh, the person from whom it was derived is known to Brady, and Brady could have had him here to testify before this jury. One singular feature in this transaction, as developed by the evidence, is this: Buell says that Brady, after flying to his arms from the impulses of a love at first sight, and wrapping him in \$10,000 of greenbacks, also bought the Critic, as well as The Capital. On \$3,500 a year, where did Brady get the money to deal so extensively in the polite literature of the day? Where did he get the means to invest in the precarious stock of a newspaper? And, not only of one newspaper, but of two; one a weekly, The Capital, and the other a daily, the Critic. Are any of you newspaper men? Do any of you know the cost of a newspaper? You do, Mr. Foreman, and I do, for, as you know, I have had something to do with an experiment in which \$4,000,000 backed the paper that went under in two years. Probably in me it had weight enough.

Mr. MCSWEENEY. The editorials were too heavy and sunk it.

Mr. MERRICK. That is what I say. The editorials though, brother **McSweeny**, were in behalf of the Democratic party.

The COURT. Four million dollars?

Mr. MERRICK. I say we had four millions to back it. Not of the capital. The capital was only a hundred thousand dollars of cash paid up, but two years saw it exhausted. Your honor recollects the paper. I think when we stopped we divided \$25,000. It was not all gone, but there was four millions of money in the stockholders standing back of the paper.

Mr. MCSWEENEY. There were millions in it.

Mr. MERRICK. There were millions of votes in it, but not millions of money, brother **McSweeny**. We advocated the right in politics, but we were on the wrong side of the financial question. Why, gentlemen, there is no more expensive luxury in the world than a newspaper. Ten thousand dollars paid for the stock of *The Capital*!! The machinery of the *Critic* bought, all the appliances of a newspaper bought for the *Critic*! Not less than twenty thousand dollars more. Where did he get the money? Living humbly and pleasantly on Capitol Hill, he transfers himself to one of the palaces of the city just north of the President's House.

Mr. WILSON. Is that in evidence?

Mr. MERRICK. It is in evidence he lived on Capitol Hill, and you asked Walsh whether he saw him on Capitol Hill or at his other house. The humble collector of revenue that had Walsh indicted in Louisiana spreads out the gilded wings of a gorgeous member of high society, as Second Assistant Postmaster-General; wealth decorated his mansion, wealth adorns his surroundings, wealth enables him to buy two newspapers, one enough to ruin any man of ordinary capital. Where did he get the money? Not from Chattanooga stock. They wouldn't let us touch that. Where came all this sudden wealth? Where is the Aladdin's lamp? I wish that Mr. **McSweeny**, the honest, hard-laboring, able, and eloquent lawyer from the West, had the wealth to establish a democratic newspaper to advocate democratic principles; but he has it not, and he would be bankrupt in six months if he attempted to do it. But Brady could venture upon these experiments. Why should he venture? What has been the object of these papers? Not the maintenance of political principle, not the advocacy of great questions affecting national importance! He bought these papers for the reason that he was in peril and in danger. Their object was not the object of a high-toned, cultivated press to instruct the public mind and to forewarn the people of approaching public danger. Their object was to defend him against investigation; to defend him against inquiry; to prejudice the public mind in his favor, and to corrupt the public heart that he might be safe in the enjoyment of his peculations, and secure from the condign punishment that ought to await his criminal acts. What have these papers been doing in the progress of this trial? This city has been, day after day, and week after week, as the proof shows, stirred up to its inmost depths with libels, slanders, and vituperations on the court, the jury, and counsel, and laudatory commendation of these men who have lost all regard with their brother men, except with the class that prefer the guilty to the innocent. And yet, on the other side, they complain of the press of the country, that it is assailing the defendants; that it is seeking to influence the administration of justice; that it is seeking to constrain the verdict of the jury. The free press of this country, gentlemen of the jury, is one of the safest and surest guards of our rights, our liberties, and our constitutional privileges. Its editorial corps are on the watch-towers of the Republic to forewarn the people of approaching danger.

They are the thoughtful, thinking investigators of great public truths and passing transactions, and arouse the public mind from the ordinary occupations of the day to give some thought to those matters which interest them in their corporate capacity as citizens. My brothers complain that the whole press of the country is assailing their clients. It is true, as they state. The press is assailing them. Why? Because on the evidence before this jury they are guilty, and in the name of the people of the United States that press is demanding a verdict of guilty.

Gentlemen of the jury, you are trying these defendants, but the whole people of the country are trying you and me. This is no ordinary case. This is no common litigation. I speak of it not to influence you at all. I speak of it only in this regard: As men of honor you desire the approval of your own consciences. As men who have taken an oath before high Heaven to discharge your duty, you desire to answer rightly at the judgment for the manner in which you have discharged the obligations that your oath imposes. As citizens of the country you would do right, that whatever storm may assail you, you will be able to defy it. The majority of the men of the United States do not often think wrong. The majority are ordinarily right. I am on trial and you are on trial, as well as these defendants. There is to be a verdict of the people in our favor or against us, as there is to be a decree in Heaven's chancery for or against us in respect of the manner in which we shall have performed our duty, when arraigned before that high court we shall stand for judgment in the presence of the Great and Eternal Judge. I invoke you, therefore, to discharge your full duty in all respects under your oath to yourselves, under your oath to your country, and under your oath to your God.

If any one of you entertains a doubt, it is your duty to withhold your verdict or your vote, says my learned friend McSweeney. Conceded. If any one of you entertains a doubt, withhold your vote. In the very plea that he makes he presupposes guilt, guilt on ordinary judgment, guilt on the balance of the evidence; and he asks the protection of what remains, namely, the shadow of a doubt. Doubt, as the court will explain to you, does not mean some speculative possibility of innocence, but it means that doubt which a well-organized and reasoning man will feel on all the testimony, and which doubt says to the man who is about to judge, "Judge not rashly, for hereafter the vision of this judgment will stand at your bedside and disturb the repose of the night." Judge not rashly, for hereafter conscience will reproach you. But be not timid, gentlemen of the jury, about doubt. Stand up firmly like men made in the image of Almighty God, and if you believe according to the impulses that regulate belief in the human heart, stand to your belief, and flee not from shadows that were only made to frighten fools. The doctrine of doubt is fully laid down in the authority in 3 Dillon, from which my learned brother, Mr. Chandler, in his most excellent address, read to you, and in which I heartily concur. It is also laid down in the Webster case in one of the volumes of Massachusetts reports, to which I need not refer. Third Dillon embraces all that is needed. If, gentlemen, when you retire to your rooms you find a juror doubt, respect his doubt. Respect always in life the opinion of your fellow-man. But as your characters are all now bound in one judicial organization *as the jury in this case*, ask him to give a reason for his doubt. Am I not right, brother Henkle?

Mr. HENKLE. Yes.

Mr. MERRICK. *Ask him to give a reason for the faith that is in him, or if there is no faith in him to give a reason why there is no faith in him. Ask him to reason with you. Give him fact after fact, conclu-*

sion after conclusion, and unless he has intellectual power to brush them away, *beware of that man*. He who after sitting in that jury-box for ninety days and hearing all the facts in this case and the arguments that have been presented to him, cannot give a reason for what he believes or a reason why he does not believe, deserves to be carefully looked after and closely criticised and questioned.

Offense's gilded hand may push by justice;
And oft 'tis seen the wicked prize itself
Buys out the law.

I cannot believe and I will not believe that offense's gilded hand has ever reached its poisonous fingers beyond the limits of this jury-box. God grant that it never has. I will not in this connection again even quote the language of my learned friend, upon the other side, General Henkle, *that he who does not think as I do must have been paid to think the other way*.

Gentlemen of the jury, among the great offenses that can be committed in a government and especially in a free and republican government, official peculation is the greatest and the worst; and when official peculation seeks auxiliary aid in conspirators from among Senators and leading statesmen to accomplish its purpose, it then becomes dangerous indeed. As I said to you a few days ago, whilst the other side has asked your sympathy for the feelings of husband and wife, parent and child, I have nothing to say to arouse your hearts to those sympathetic emotions that bring tears and often lead to error. I would have you, like justice, cold as icicles and firm as steel. If there is a plea to be interposed at all by me it is a plea for my country. It is a plea for the United States and the preservation of her institutions. This jury, by its verdict, will mark one of two eras. It will mark the commencement of an era of official purity, under honest and virtuous principles, and with a just appreciation of legal and moral duty, or it will mark an era of official peculation and conspiracy against the Treasury of the United States under the sure protection of perverted law. After great wars great relaxations of moral principles inevitably follow. Temporary suspensions of justice often also follow. After our late great war, in which the majesty of the Republic was vindicated against men in arms, there followed a relaxation of moral principles that stained us with a reputation for corruption. That period is passing away, and the atmosphere purified by the development of moral sentiment is now again being satisfied alone with propriety and virtue in office. This trial is the great culmination of that sentiment, and this verdict will either mark the end of official corruption or the beginning of official peculation to a greater extent than we have ever seen it, by assuring to those who so offend that the law will never harm the offender.

Gentlemen, some time ago, in the struggle of this country to free itself from the shackles of corruption which seemed to be fastening upon her, and to move forward into the virtue which is now dawning, there was an important trial of a minister of state before the United States Senate. In that trial, a now distinguished member of the United States Senate from Massachusetts [Senator Hoar], a most accomplished scholar, a true patriot, and an elevated gentleman, appeared as one of the managers of the House. This Senator stands in the foremost ranks of the Republican party, and his personal integrity adorns him not less than his distinguished patriotism and high intellectual culture. He said:

I have heard the taunt from friendliest lips that when the United States presented herself in the East to take part with the civilized world in generous competition in the arts of life, the only product of her institutions in which she surpassed all others beyond question was her corruption. I have seen in the State in the Union foremost

in power and wealth four judges of her courts impeached for corruption, and the political administration of her chief city become a disgrace and a by-word throughout the world.

Tweed was afterwards arrested, tried, and convicted.

I have seen the Chairman of the Committee on Military Affairs in the House, now a distinguished member of this court, rise in his place and demand the expulsion of four of his associates for making sale of their official privilege of selecting the youths to be educated at our great military school. When the greatest railroad of the world, binding together the continent, and uniting the two great seas which wash our shores, was finished, I have seen our national triumph and exultation turn to bitterness and shame by the unanimous reports of three committees of Congress—two of the House and one here—that every step of that mighty enterprise had been taken in fraud. I have heard in the highest places the shameless doctrine avowed by men grown old in public office that the true way by which power should be gained in the Republic is to bribe the people with the offices created for their service, and the true end for which it should be used when gained is the promotion of selfish ambition and the gratification of personal revenge. I have heard that suspicion haunts the footsteps of the trusted companions of the President.

Technical difficulties secured immunity from punishment to the minister of state then arraigned before the Senate; but hearken to the voice of one of your great leaders, coming down to you from that high tribunal:

I have heard the taunt from friendliest lips that when America appeared in competition in the East at the Industrial Exhibition she excelled in nothing but her corruption.

How long, say the people from afar, "HOW LONG, O, LORD, HOW LONG"!

The hour has struck for the end. The hour has come for the redemption of our country, for the restoration of honor and virtue above perjury and disgrace, for purification in office to be substituted for its corruption, for a true and safe guardianship of the Treasury of the people to be put in place of those who will sell the keys and pilfer the vaults.

Peculation in office, the most frequent form of official corruption, is the most frequent and the most potent factor in the production of those revolutions that cause the downfall of states; and if, as has justly been said, the safety and perpetuity of republics, more than all other governmental organizations, depends on the virtue of their citizens, we can neither too closely watch nor too rigidly punish the crime which more than all others saps the life blood of national existence.

When Jehovah, through His prophets, thundered His anathemas against the kingdoms of Judah and Israel, and predicted to them their speedy overthrow, He specified official corruption and official peculation as one of the reasons that specially drew down upon them the vengeance of Heaven. The sublimest of the prophets says to them:

Thy princes are rebellions, and companions of thieves: EVERY ONE LOVETH GIFTS, AND FOLLOWETH AFTER REWARDS.

And the official corruption of Israel kept pace with its moral depravity and its frequently repeated deflections from righteousness.

In the luminous pages of the historian of the Decline and Fall of the Roman Empire multitudinous illustrations are found of the corrupt governmental conditions that first caused the great Roman republic to fall a prey to the military despotism of the Cæsars, and ultimately made both the republic and the empire, civil liberty and civil society, an easy spoil to the Goths and Vandals. The night of barbarism which enveloped the fairest regions of Europe, and the anarchy and chaos that supervened upon the downfall of the old Roman civilization, are directly traceable, and are in fact traced by all the historians of the time, to the official corruption and the almost universal peculation of the officials

intrusted with the political administration of the Roman Government. Every provincial governor was a plunderer; every judge was a bribe-taker; every subordinate official combined and confederated with every other subordinate official to extort money from private individuals as the price of immunity from official annoyance, and to steal money from the public treasury under the pretense of services never rendered. Offices were bought and sold, *as they sometimes are now*; and even the empire itself was once put up for sale by a lawless soldiery and knocked down to the highest bidder. Unprincipled adventurers sought and obtained the highest offices of government, not for the honor which they might have been supposed to confer, but for the opportunities of theft and plundering the public funds which they afforded. It was no wonder that, when the barbarian invader came from the forests of Germany and Scandinavia, the plundered and oppressed people of the Roman provinces did not regard the dismemberment and overthrow of the great empire as an unmixed evil. Rome was rotten with official peculation, and it fell. And so will fall every nation in which official honesty is not enforced by a severe public sentiment and the severest penalties against delinquency and crime.

When, in later days, wearied with the multiplied wrongs of centuries of tyranny and feudal oppression, France arose in the terrible might of an aroused and enraged people and avenged her long sufferings in a sea of indiscriminate slaughter, the immediate moving cause that led to the violent excesses of her great revolution was the universal and almost ineradicable spirit of peculation that seemed to animate every official connected with the administration of government, from the prime minister to his lowest subordinate. Under color of office, and through the instrumentalities of official position, taxes were wrung from an impoverished people to be divided up between the minions of power and the holders of office; and these reveled in all the extravagances of a riotous luxury, while the people needed bread and perished from want. When the Marats, and the Dantons, and the Robespierres appeared upon the scene—corrupt, cruel, wicked, unprincipled, infamous, though they were themselves—they appeared as the avengers of the official corruption that made such men possible.

When, in the supposed zenith of his power, the Third Napoleon precipitated the struggle with Prussia that was to terminate in his own downfall, he relied with implicit confidence upon a governmental organization supposed to be complete.

But official peculation had thoroughly done its work. The empire was undermined and destroyed with official corruption and it fell, and upon its ruins was reared a republic which is now profiting by the lessons that those officials taught, paying her debt with an extraordinary rapidity that passes all understanding and past experience, and teaching the duty that official obligation is synonymous with virtue, and that crime will reap its rewards most speedily when it is found in those in official position.

Two nations of the world, Russia and Turkey, keep Europe and civilization in a state of constant suspense and danger. To the official corruption of those two nations are the suspense and danger due more than to any conflict of religious ideas or national aspirations. Official corruption makes all good and honest government impossible in those countries; and the consequence is a condition of turbulence that is a standing menace to all other nations. In Russia *nihilism* is the direct and legitimate result of official peculation, and official peculation, it is well known, is the rule and not the exception in that unhappy country.

As for Turkey, an honest official is a political impossibility, and it has been remarked that, in that country, no system of pensions is needed for services of any kind, civil or military, for every man in official position always uses his opportunities to lay by sufficient to provide for all future necessities, to say nothing of future luxuries.

If we would not become like Russia or Turkey, like France under the Third Napoleon, or Rome under her Cæsars, it is imperatively necessary that we should preserve the purity of our government and severely punish peculation in office.

There is no surer evidence of national decay than the existence of any considerable amount of peculation among officials. The vitality and well-being of a nation are in precise proportion to the official purity with which the administration of its public affairs is conducted. The lesson of history is uniform, and without a single exception, that official purity is the invariable concomitant of national vigor and true national greatness; and that, on the other hand, official corruption and peculation in office go hand in hand with national decline and national ruin, and are in fact the principal causes of national disaster. Under republic or monarchy, democracy or aristocracy, it is all the same; no government can live while its officials thrive by peculation. If a free government especially is to perpetuate its free institutions, it cannot too severely repress the manifestations of official delinquency to which it is subject, like all other governments, though it is to be hoped not to the same extent.

The men who administer the governmental affairs of a free people are presumed to be the representatives of the people; to be the representatives not only of their wisdom and intelligence, but also of their virtue. When such administrators and representatives become generally corrupt, such corruption is an infallible evidence of the general decay of virtuous principle in the people.

But strong and vigorous is the life-current of a people when a jury of the country invoke by their verdict the condemnation of the law on the faithless trustees of the people, and such I expect to be your invocation in this case. In the name, then, of the people of the United States, and through the Government of the United States; in the name of honesty and honor, and of the outraged majesty of the law; in the name of the sanctity of the Treasury of the United States against invasion, and which these men have burglariously entered, and which these officials have permitted to be burglariously entered; in the name of our hope for the future; in the name of the preservation of our institutions and the supremacy of the law, of right, and of honor over vice, criminality, and illegality, I demand from you, gentlemen of the jury, a verdict of guilty against these defendants.

If your honor please, the Attorney-General, who will close this case on behalf of the United States, at the request of the counsel who have represented the government, desires to refer to certain authorities, of which I may not have made full references, which would prevent the other side from the right of reply. I therefore beg leave to present through your honor to the counsel of the other side the brief of the Attorney-General of such authorities as he will use, in which brief his points are fully elaborated and the authorities specifically applied.

The COURT. Handing it to the court will be of no use. The other side must have notice of the authorities.

Mr. MERRICK. Then I hand it to the other side. [Submitting paper to defendants' counsel.]

Mr. WILSON. If your honor please, and gentlemen of the jury, if I

were going to start out to devise a scheme by which a nation could be ruined, could be brought to disgrace, overwhelmed with dishonesty, such as my friend so graphically depicted in the closing remarks he has just made to you, to make absolute certainty of the result, I would do exactly what these learned gentlemen have been seeking to do in this very case. I would go before the juries of the country and would appeal to them to trample all the laws of their country under their feet. I would do just as has been doing here before you. I would do injustice to the citizen; for whenever a Government fails to recognize its own laws and to stand by its own laws and by its sworn officer, perpetrating the most gross and flagrant injustice upon a citizen, that government is on the high road to ruin and it does not deserve to live.

Gentlemen, some three months ago it fell to my lot in making the opening statement to this jury to make use of these words, which I beg leave to read :

I expect, gentlemen of the jury, before this case closes, that my good friend here [Mr. Merrick], who always wants to be just will make good his promise made at the early stage of this case, and will say to this court and to this jury, "There is no cause of complaint against Mr. Turner, and he must be dropped out of this case." I expect, gentlemen of the jury, with the utmost confidence, that that will happen, and that his honor will say that this young man never ought to have been dragged into this controversy. I say to you, gentlemen of the jury, that there will be no proof that Mr. Turner ever conspired with anybody.

I expressed that hope and I expressed that confidence, and I said to the jury that these gentlemen never would prove that Mr. Turner ever conspired with anybody. Now, gentlemen, what has come to pass in this case? It is admitted that what I said was true. But it was with the greatest pain that I witnessed the counsel for the government in the same instant that he conceded that there was no cause of complaint against Mr. Turner, draw his stiletto and make a stab at the reputation of Mr. Turner. Gentlemen of the jury, he used these words :

In reference to Turner the evidence does not leave my mind free from doubt; and whilst I do not believe him unstained by criminal conduct in receiving money, as Rerlell stated in his confession, or irregularities in official conduct, I do not believe that these men introduced him into their confidence and made him familiar with the secrets of this conspiracy as a member of the conspiracy. For him, therefore, repentance and reflection. And since he has heard the grating of the penitentiary doors so close to him, let that sound go with him through life, serve to quicken the better sentiments of his nature, elevate and improve his character, and make him hereafter a better and more useful man.

Gentlemen of the jury, that was the unkindest cut of all, and as that goes into this book, and goes out to the world in the pages of the record of this case, I must be permitted to send along with it my protest against that most cruel injustice. What syllable of evidence, gentlemen, is there that has appeared in all the weary weeks of the trial of this case to indicate in the slightest degree that Mr. Turner ever touched a dollar of the money that was derived from any of these contracts, or ever received a farthing from any one of these contractors? Is there anything, gentlemen? I appeal to you as jurors, and as honest, fair-minded men, in all the record of this case is there a syllable of proof tending to show that he ever received a farthing from any mortal man improperly? And yet the counsel for the government feels called upon to say that he has heard the gratings of the penitentiary door closing behind him, and feels called upon to say, in the presence of this jury, and in the presence of the country, that he has been receiving money improperly from these contractors. Why, gentlemen of the jury, this serves to illustrate what gross and cruel injustice can be committed under the guise of a criminal prosecution. In all this evidence Turner's

name has not even been so much as mentioned excepting that in the course of the discharge of his official duties he had written upon the face of certain jackets a brief statement of what was contained on the papers inside of those jackets. Who has ever mentioned his name in this case excepting in that way? Nobody. Who has ever intimated anything against him excepting what cropped out in the statement of Rerdell, which I will talk about hereafter? Where is there a syllable of legally competent testimony that in any way connects him with these transactions, excepting simply these indorsements that were made in the course of his clerical duty upon the back or the face of these papers?

Now, gentlemen of the jury, every one of those facts was known to this prosecution months and months before this indictment was found. This prosecution knew just as well months before this indictment was found that there was no cause of complaint against Turner as they knew it when Mr. Merrick confessed that matter in the presence of this jury, and yet, notwithstanding that, they have brought him into this indictment, knowing that he was not guilty, and have held him here before this jury and the country for more than three months of trial without the slightest prospect of convicting him, and knowing that he was not guilty. If you want to destroy a government, my friend, pursue that kind of a course towards its citizens. It is worse than peculation of money; it is the destruction of character.

When this case is ended, gentlemen, I know that Mr. Turner will go out again into the world with the warmest sympathy of all men and all women who know the circumstances of this case. And when the heat of this case is over, when this strife is ended, and cool judgment shall come to my friend to take the place of intemperate zeal, he will regret that he ever made that additional assault upon Mr. Turner.

Now, gentlemen, this is, as it seems to me, a lawless prosecution. It is certainly a complaining prosecution. My brother Merrick has told you that this prosecution has been all the time fighting in the dark. He told you that last Thursday, I think, for the first time, and he returned to it again this morning. He says they are fighting in the dark. It has absolutely come to pass in this case that the prosecution are insisting before the jury that the defense ought to be coming around and giving them some light in regard to the case. You remember that he first made that remark when he came up to read his prayers, as lawyers call them, to the court. He turned to the jury and said: "These fellows are keeping us in the dark. They have not given us their prayers. We do not know what they are going to ask the court to instruct you, and here we are, three or four of us, and the Attorney-General coming after us, and we have been at work at this case for a couple of years and we have had all the newspapers at work at it, and all the newspaper correspondents at work at it, and these fellows are keeping us in the dark yet."

Now, what is the matter with them? Why, gentlemen, he had forgotten two things. In the first place they made this accusation against us. They ought to have known what they were charging us with, and they ought to have known what evidence they had to sustain that charge. That much to start with. But he had forgotten a couple of things. Here was my brother Ker, who stood before this jury for three days——

Mr. KER. [Interposing.] A half an hour too long.

Mr. WILSON. He says he was a half an hour too long. He was about three days too long. But he stood here for three days before this jury and never said law once. He did not give us the benefit of any instructions that they were going to ask the court to give this jury. He did

not disclose to us the principles of law which they say we had violated, nor the rules of law which they would insist upon should be maintained for the purpose of convicting us of that charge. That was keeping us in the dark, gentlemen, you will observe. And then, after a while, here comes along my brother Bliss, and he stands here before you for two days more. That was about two days too much for this case. And what does he do? Does he present these instructions? Not at all. Does he discuss law before this jury to enlighten these defendants as to what they are called upon to meet so far as legal principles are concerned? Oh, no, gentlemen, nothing of that sort; but he repeats over and over again petitions, and affidavits, and letters, and all that sort of thing, and says law never once, scarcely. But after they had had these five days, when my brother came to stand here he complained of us that we were keeping him in the dark. My brother called it a trick [to Mr. Merrick]. Do you recollect that?

Mr. MERRICK. I do not know that I used that word exactly.

Mr. WILSON. He said it was a trick.

Mr. MERRICK. You know I offered to show you the prayers, and you told me that I should show them when Mr. Chandler should come in.

Mr. WILSON. You have explained that to the jury.

The COURT. As to these prayers, they have not yet been formally submitted to the court.

Mr. MERRICK. I was under a false impression. I thought I had submitted them.

The COURT. You have read them.

Mr. MERRICK. They are printed in the record, sir.

The COURT. Very well; I do not suppose the other side are going to pray at all.

Mr. MERRICK. I do not suppose they are, sir. I suppose they are beyond praying for.

Mr. WILSON. Now, gentlemen, my brother calls that a trick. I suppose that is like a great many other things he said during the course of his speech.

The COURT. The other side have the time until the close to present their prayers.

Mr. WILSON. We have been patiently waiting to get what their authorities were. The paper containing them was handed to us a few minutes ago. We have not had time to look at them yet.

But it is a trick. Well, there is no individual who has been longer at the bar who is connected with this case than my brother Merrick, and I presume he knows as much, having had long experience, about the tricks of the profession as anybody connected with this case, and if I were to apply his mode and adopt his method of looking at this matter, and were inclined to retort upon him, I would say, "My brother Merrick, you have been inclined to play a trick on us. You did not let Mr. Ker say anything about these things, and you did not let Mr. Bliss say anything about them, and when you got up here you set forth your law for the first time."

Mr. MERRICK. Be fair. I offered them to you before Colonel Bliss opened his mouth. I offered to read them to you.

Mr. WILSON. Now, gentlemen, as to this matter of fighting in the dark, it is not for a prosecution to be fighting in the dark. They have no right to be fighting in the dark. It is their business to know their case before they accuse a citizen. It is their business, their duty, to know whether a citizen has committed an offense before they institute a prosecution which subjects him to expense, which endangers his

liberty, and which affects seriously his character. They ought to know their case. They ought to know whether they have the evidence to support their case before they launch it before a court and a jury, and it is not for them to come here and say that they are fighting in the dark. It is not our business to furnish them with light.

A government ought always to be zealous for justice. It ought to conceal nothing that discloses innocence. It should insist upon nothing but the strictest adherence to the law; for, gentlemen, how can a government which can only exist in law hope to live when itself it becomes a law-breaker? How can a government hope to prosper when itself it sets at defiance the laws that are intended for the protection of its citizens? Why, gentlemen, my very learned friend falls into the error of supposing it was his duty to urge upon you, and he has urged upon you to set the law at defiance, as I will show you in a moment. Why, he says, and he brings it here as a cause of offense against us, as an evidence of our criminality in this case, that we objected to the indictment and moved to quash it; and he says to you that we have objected to evidence right along through this case; that while they wanted to shed a flood of sunlight upon this case by the introduction of testimony, we have stood here in the way obstructing the letting of testimony before this jury; and he has told you that we are here on a plea of mercy. I use his exact language in that. We have presented to this jury the doctrine of reasonable doubt. He says that we are taking refuge behind the statute of limitations; and all these things are brought before you for what purpose? To induce you to find these defendants guilty. They are brought here as an indication to you that you ought to find these defendants guilty. If it does not mean that it means nothing whatever. Gentlemen, was there ever such a prosecution before? When before, in all the history of criminal jurisprudence, has it been urged against the accused that they asked for the proper administration of the law? Who before ever stood in the presence of twelve men and urged that it was against the defendants that they asked that the law be obeyed?

He told you that he was pleading for the stability of our institutions. *For the stability of our institutions!* Upon what foundation do our institutions stand if not upon the foundation of the law? Take from underneath our institutions the law, and our institutions will and ought to disappear forever. Why, gentlemen, what are these rules that we have been insisting upon? There is a celebrated case here in a volume that lies before his honor—the case of Daniel O’Connell, whose name has gone into history, and whose fame will be as enduring as time. He was charged with others with a conspiracy. He was indicted for a conspiracy. He objected first to the grand jury that found the indictment. Then he objected to the manner in which the petit jury was selected before which he was to be tried. Then he objected to the indictment itself, and then to the testimony, which was brought forward by which he was to be proven guilty of the charge. Then he objected to the verdict of the jury. So he stood in the presence of that court and objected at every step and insisted at every step that the law should be obeyed, and that he should not be tried in defiance of the law. Finally it came to pass that the case came before the highest tribunal in the kingdom, and Daniel O’Connell’s theory of it was sustained. Gentlemen, the books are full of similar illustrations. The practice is an every-day practice, and it is the only safety for the citizen; yet Daniel O’Connell, according to the logic of my friend Merrick, must have been a guilty man, because he was insisting upon the preservation of the

principles of the law. These rules, gentlemen, are the result of the best thoughts of the ablest jurists running through the centuries. They are rules that have been laid down by the most thoughtful men for the preservation of human rights, the rights of life, the rights of liberty, the rights of property, and the rights that a man has in his character. When these defendants are arraigned here charged with a crime, I appeal to you, gentlemen of the jury, is it to be imputed to them as an offense that they ask you and ask the court to be governed by the law? What is to be said of such a prosecution?

Now, what is this law, gentlemen? History is filled with the struggles of men to protect themselves against the wantonness of arbitrary power. It came to pass that when those who created this government framed a Constitution which should be preservative of the liberties of the people, they wrote down in that Constitution that no man should be tried for any capital or otherwise infamous crime except by indictment found or presentment made by a grand jury. Now why was that? It was simply for the purpose of providing that no citizen should be tried except he was advised of what he was to be tried for. The indictment is the accusation. In this country, therefore, gentlemen, before you can try a man you must give him notice of that for which he is to be tried. Then, gentlemen, as to this matter of rules of evidence. They say we objected to evidence. So we did; and before we get through we will see who objected the most. What are these rules of evidence? They are simply rules founded in justice and reason, by which the guilt of a defendant is to be established, governing and guiding, to the end that justice alone shall be attained. Then this question of reasonable doubt. What is that? Is that created for the purpose of evading justice? No, gentlemen. There can be no greater injustice than to punish an innocent man. Whenever a man is accused he is either guilty or he is innocent. You would not punish an innocent man; and therefore, before you can punish, the evidence must prove the man's guilt. Whenever it stops short of proving his guilt he is innocent in contemplation of law, and that is all there is to it. These are some of the grand principles of the law. They are sublime in their simplicity. They come home and appeal to every man, and they are within the comprehension of the plainest citizen. Will you try a man without advising him of what he is accused? No. Every man says no. It takes no deep and settled philosophy to tell you this. Now, gentlemen, as I said, telling what he is accused of is simply indicting him. That is what the indictment is. It simply informs the party of that of which he is accused. After you have accused him, will you try him for something else? Would you find him guilty of something you have not charged him with? No. Everybody says no. If you were to attempt to do so you would simply be violating the law that provided that he must be indicted before he can be tried. That indictment, gentlemen of the jury, is required to set out specifically and in detail the accusations against him, so that when he comes before a jury of the country he may know with absolute certainty of what he is accused. And when you come to try him after you have indicted him, or presented this accusation, would you convict him upon what some man might say he heard some other man say about him? Every man instinctively says no to that question. Would you convict him upon some flying rumor that some newspaper correspondent may have set afloat, or that some man may have set adrift on the street? Would you try him upon such testimony as that? No. Every man says no. If he is accused of a conspiracy, will you allow some other man to confess for him that he was in that conspiracy? Would you

allow some other man who might be associated with him in the indictment to come up and confess for him? Let every man take this thing home to himself. You and I are charged with a conspiracy. I go out in the highways, the lanes, and the by-ways, and I confess that you are guilty of the conspiracy. Do you need to think of that to satisfy you that that would be the grossest outrage upon your rights? No, gentlemen; it requires only to state a proposition of that kind to show every man that these things cannot be. That is the testimony we have been objecting to.

In the course of his argument to-day my brother Merrick referred to certain matters. He wanted to know why we did not put certain witnesses on the stand, mentioning Kellogg and mentioning Price. Gentlemen, in connection with just what I have been saying, perhaps you will remember that we did put Peterson on the stand, and perhaps you remember that when the question was asked Peterson a couple of distinguished lawyers jumped to their feet in an instant as though they were jumping-jacks in a box. "I object," they said. Oh, but, we said, we want to throw a flood of light on this case. We want to show what manner of man Walsh is. But these gentlemen objected. I shall come to that point again after awhile.

After all this legal proof has been received and your minds are not convinced, I want to know if you would find a party guilty anyhow? Of course not. Then they say there is the statute of limitations. I had that thrown at me the other day by Colonel Bliss. I think you will bear me out, gentlemen, when I say that I have said less about the statute of limitations than anybody else of counsel in the case who has talked at all.

Let us see what it is about this statute of limitations. It is no new thing in the law. It has its purpose to subserve. It is the device of very wise men for very wise purposes; that is to say, it is interposed to prevent prosecuting officers and courts, and everybody else, from bringing a citizen to trial upon old and stale accusations. It is interposed because in the process of time men's memories fade away, evidence disappears, and what the accused could have made perfectly plain if it had been brought to his attention when the occurrences happened, it may be utterly impossible for him to explain after the lapse of time. Therefore the law has said, and wisely said, that the prosecution must be diligent, it must bring its accusation within a reasonable time, so that it shall not take advantage of the loss of evidence by the passing of time and the passing away of the memory of man. Therefore, it is written in the statute book:

No person shall be prosecuted, tried, or punished for any offense not capital, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed.

Gentlemen of the jury, that is the law of the land. It was put in the statute book for the purposes that I have indicated to you. Yet it is imputed to us here as an offense, and they say we are seeking to shield ourselves from crime because we say to this jury, "Stand by the law."

At this point (2 o'clock and 53 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

TUESDAY, AUGUST 29, 1882.

The court met at 10 o'clock a. m.

Present, the Attorney-General and counsel for the Government and for the defendants.

Mr. WILSON. [Resuming.] May it please your honor and gentlemen of the jury: Up to the adjournment last evening I had been attempting to show you that this is a law-defying prosecution; that you are asked to disregard those wise rules of the law which have been laid down for the protection of us all; that if we take exceptions to the indictment, it is to be construed by you into an evidence of our guilt. If we question the competency of evidence, it is to be taken as an indication of guilt. That if we ask that the proof shall rise to the degree that is required by law, it is a plea for mercy under the disguise of an appeal that we stand by the doctrine of reasonable doubts; and to these I will add that they have persistently and earnestly, and against the admonition and a protest of the court, endeavored to induce you to defy a statute of the United States.

At the adjournment I was speaking of the statute of limitations, which provides that no man shall be prosecuted—you remember the language of that statute, gentlemen: "*No man shall be prosecuted*," is the language of that law—unless the indictment is found within three years after the offense is alleged to have been committed; and I may just as well at this point as any other say all that I have to say upon that subject.

[To the court.] I apprehend, if your honor please, that there is some difference of opinion between the court and the counsel for the defense with reference to the particular point to which I now propose to address myself for a few moments. It has been up once or twice before in this case, and as we propose to submit to your honor before this case closes an instruction upon this point, I deem it to be at least due to the court, as well as to myself and the cause of my client, to add a word on that subject. If this offense was ever committed there was a time when it was complete, and the testimony should be such as to enable the jury to know when that offense was committed, otherwise this statute of limitations, of which we are talking, is a dead letter on the statute book, and the benefit of it never can accrue to an accused party. Now, I think your honor will agree with me, that when it was committed, and when it was complete, from that moment the statute begins to run. Whenever an offense is completed the statute starts on its journey.

Now, conspiracy is not different from any other offense in that regard. What is a conspiracy? It is an agreeing of parties, two or more, together either to do an unlawful act by lawful means, or to do a lawful act by unlawful means. But it is the agreeing together that constitutes the offense. That was the offense at the common law. It may be said that an additional element has been put into this offense by the statute, to wit, that that offense is not complete until an act pursuant to the agreement has been done. Let us take it in that way, if your honor please.

Now, assuming that that is the case, then when the parties agreed and did an act pursuant to that agreement then that offense was a completed offense and then the statute begins to run. Now, I submit, if your honor please, that it will not do to say that every time an act is done it is a renewal of the original agreement. Such a rule would completely nullify the statute.

Now, this offense of conspiracy is just exactly like any other offense. Like the offense of murder, when the blow is stricken and the man is dead the offense is complete. Like the offense of burglary, when a man turns the key or lifts the window and enters the building the offense is complete. Like the offense of larceny, where the party takes the goods of another and carries them away the offense is complete. And so of conspiracy. Here is a definite and distinct act which the parties have to perform; that is to say, they must agree together, and when they do agree together, whenever that is, that offense is complete.

The COURT. You would date then the running of the statute from the formation of the conspiracy?

Mr. WILSON. I would.

The COURT. And although the conspiracy might continue a long time after that, still that the statute runs from the inception of the conspiracy.

Mr. WILSON. I say that the offense is the agreeing of the parties together. Now, let us see what the court says in this case in 100 United States, page 34, United States vs. Hirsch:

The gravamen of the offense here is the conspiracy. For this there must be more than one person engaged. Although by the statute something more than the common-law definition of a conspiracy is necessary to complete the offense, to wit, some act done to effect the object of the conspiracy, it remains true that the combination of minds in an unlawful purpose is the foundation of the offense.

The COURT. Undoubtedly. This court from the beginning of this trial has intimated no other doctrine.

Mr. WILSON. Well, what I have understood to have been intimated was, that the offense continues, and that every time after an agreement is made that a party does an act the offense is renewed.

The COURT. Very likely I have intimated that doctrine.

Mr. WILSON. That is the doctrine that I am combating in this case, if your honor please.

The COURT. I think you have some reason to.

Mr. WILSON. That is the very doctrine that I am combating in this case.

The COURT. For your argument.

Mr. WILSON. Certainly for the purpose of my argument. Now, this indictment is under the act of 1879. It must be under that act. It cannot be under any other act.

The COURT. 5440.

Mr. WILSON. No, I beg your honor's pardon, it is not under 5440, the act is approved the 17th of May, 1879, and that act repeals 5440.

The COURT. Read that act.

Mr. WILSON. [Reading:]

That section 5440 of the Revised Statutes of the United States be amended so as to read as follows:

If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than \$10,000, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court.

The COURT. Wherein is the difference between that act and section 5440?

Mr. WILSON. The difference is in the degree of punishment.

The COURT. That is the only difference.

Mr. WILSON. That is the only difference, and Mr. Justice Miller has

decided emphatically, and directly, that that did repeal section 5440. But, he says—I am sorry I have not that act here—that another act provided a saving clause in order that an indictment might be found under section 5440, although it was repealed. That is what he said.

Mr. TOTTEN. That is the thirteenth section of the Revised Statutes.

Mr. WILSON. That is section 13 of the Revised Statutes, and the court has decided that explicitly.

The COURT. That, practically, is of no consequence then.

Mr. WILSON. It is of just this consequence, if your honor please, every act that was done under section 5440, which is repealed, was done more than three years before the finding of this indictment. Now, they had the right, under section 13 of the Revised Statutes, to indict the party for the offense committed under section 5440, even after 5440 was repealed. They had the right to do that, but if your honor please, if they had indicted for that, then the statute of limitations would have barred it, because that section was repealed more than three years before this act of 1879 was passed. Now, my point is simply this, that they cannot bring forward those acts prior to the 17th of May, 1879, under this new act and indict for them under the new act. That is a legal impossibility, if your honor please. And why? Simply because the Constitution provides that no *ex post facto* law shall be passed. They cannot reach back to an old statute more than three years ago and bring those acts forward and indict for them under the act of 1879. I say that that is a legal impossibility, because it would be a violation of the Constitution of the United States. Therefore I say that acts committed prior to the 17th of May, 1879, cannot be prosecuted under the act of 1879.

Now, these parties agreed, or they did not agree, one or the other. If they agreed, then they offended. If they committed an overt act, then the statute began to run. I simply make these observations in anticipation of the presentation of a prayer which will have your honor's consideration, I know.

[To the jury]. Now, gentlemen, when, according to the prosecution in this case, did these defendants agree together? Mr. Ker left that in clouds. He touched it gently if at all. He said very little about it. Mr. Bliss said that the original combination of these defendants was lawful and proper, but that out of them by some sort of a slow growth this conspiracy grew into existence and became definite; that the parties agreed together and it came to be a criminal combination instead of a lawful combination. That is the way that he left it. But my brother Merrick told you with a great flourish of trumpets and much rhetoric just when this combination was made. He told you that he was going to bring these parties together, bring their heads together around the table; that he would show you just when and just how this unlawful combination was made—when and how and under what roof. Where did he locate it? Where did he bring these parties together? Why he told you, gentlemen of the jury, that it was in the fall of 1877, in the house of Senator Dorsey, or in his committee-room, I do not remember which, but before these parties made a bid; that in 1877 they met together and there and then this criminal combination was made. Now if that is true, according to my theory of the law—what the court will say about it ultimately I do not know; it may probably differ with me and I am not going to stand here and insist before you that you are to take the law unto yourselves, and be a law unto yourselves, and determine a law for yourselves. Although I believe that that is the right of the jury, I shall not fly into the face of his honor upon that subject. If this theory of the

law for which I contend is the true theory of the law, then, gentlemen of the jury, my friend Mr. Merrick has given away this case utterly, because he says that these men combined and confederated and agreed together in the fall of 1877. He says that the originator of this scheme to rob the Government of the United States was Senator Dorsey; that he was the very Lucifer of this whole business.

As to Dorsey, my brother Merrick thought that this testimony was a very flood which was to drown him, but brother Bliss thought it was not very much of a shower so far as Dorsey was concerned. My brother Merrick had a great deal to say about the newspapers, and he has told you a great deal about what the newspapers have said and are saying in regard to this case. Well, the newspapers, it happens, saw this very wide difference that existed between Mr. Merrick and Mr. Bliss upon this subject, and one of them went so far as to say that they were going to watch and see whether the learned Attorney-General was going to side with Bliss in saying that this was not much of a sprinkle, so far as Dorsey was concerned, or whether he was going to side with Merrick and say that it was a flood so far as Dorsey was concerned. And that brought out this: [Taking up a newspaper slip.]

"To the Alexandria"——

The ATTORNEY-GENERAL. [Interposing.] Wait, wait. Is that proper, your honor?

The COURT. No.

Mr. WILSON. Never mind, I will pass it over. I thought that as so much liberty had been taken as to what the press had said, that it would not be out of place for me to follow in the footsteps of my illustrious predecessors.

I will come back, gentlemen. If Mr. Merrick is right, then I say the offense was committed in 1877, and these gentlemen have violated the law which provides, as I have read, that no man shall be prosecuted unless the indictment is found within three years after the offense is alleged to have been committed.

Now, gentlemen, one thing more illustrative of the spirit and character of this prosecution. In his argument to you Mr. Merrick made use of this language:

Conspiracy has become the common crime of the country. Conspirators live and flourished in Missouri and in California. Here in the shadow of the Capitol is the theater for the practical realization of their profits, and one of the great difficulties that we have in this prosecution to contend with, gentlemen, is that the cohesive power of bad men is stronger than the cohesive association of good men. This conspiracy is a compact body of strong, leading men, represented by strong and leading counsel, against the Government, and not only does the compact body work for the acquittal of these defendants, but all the other conspiracies, the whisky conspiracy that Mr. Chandler knows of, the land conspiracies in the Interior Department, and the innumerable conspiracies that are formed here in the shadow of the Capitol feel the throb of sympathetic love with this conspiracy now in peril, appreciating the fact that above them all hangs the fearful chain whose links will be broken by the breath of justice to fall and crush them. They all rush together to help these Treasury robbers and receive the assurance of immunity from future speculation in a verdict that shall give freer range to these conspiracies all over the country. I am not surprised that brother Chandler smiles.

My brother Chandler ought not to have smiled. He ought to have exhibited sadness and sorrow that the representative of the Government should have stood here before this jury and asserted to you that there were conspiracies in the Interior Department; that there were conspiracies all over this land, and that these other conspirators were flocking in here to aid these defendants in getting rid of this charge against them. What evidence is there of anything of that kind in this case, gentlemen of the jury? Is there any? No; and if my brother Merrick,

or the learned Attorney-General, or my brother Ker, or my brother Bliss had even offered to prove a thing of that kind before this jury his honor would have rebuked them. And yet, gentlemen of the jury, these things are brought here by this prosecution to affect your judgment and your verdict in deciding upon the law and the facts of this case. It shows, gentlemen of the jury, to what straits these gentlemen are driven for the purpose of making out a case against these defendants.

Now, gentlemen, Mr. Merrick says that this is not a case of simple criminality, but of conspiracy. Now, just what he means by that I am unable to say. I have always supposed that when you charge a man with a crime, you charge him with a crime, and you prove that crime on him if you can, just like you would prove any other crime upon him if it were charged against him.

I have been endeavoring in what I have said heretofore, gentlemen in this case to show to you that a part of the law of this case, a part of the law governing the prosecution of citizens for crime, is to give the citizen notice by an indictment of that with which he is charged. The Constitution requires it. The law requires that that charge shall be specifically made. The law requires that that charge must be proven, and when a man is brought before the bar of this court for the purpose of trying him for a crime, he is tried for that crime and no other.

Now, gentlemen, such being the law, the next thing and the first thing and the most important thing that we have to do in this case is to find out what it is they have charged in this indictment, and if we can find out definitely and with accuracy what has been charged, and confine ourselves to that, we will very greatly simplify this case, and your duties will be very much narrowed and will be kept within the provisions of the law.

What is this charge, now, gentlemen? I think I can state it in a few words, and state it with what will be conceded to be accuracy. What does it charge? It charges, first, that John W. Dorsey had seven lawful contracts for carrying the mail. Then it charges, second, that John R. Miner had five lawful contracts for carrying the mail. My friend Ker shakes his head.

Mr. KER. It does not say that.

Mr. WILSON. Do you in that indictment impeach the integrity of a single one of those contracts?

Mr. KER. It is all printed there.

Mr. WILSON. It is all printed there, gentlemen. I say that that indictment concedes that Dorsey had seven lawful contracts for carrying the mail, that Miner had five lawful contracts for carrying the mail, that Peck had seven lawful contracts for carrying the mails, and then it avers that on the 23d day of May, 1879, John W. Dorsey, John R. Miner, John M. Peck, Harvey M. Vaile, and Montfort C. Rerdell were mutually interested in said contracts. Now let us see. I read from page 13 of the indictment:

And that thereupon and thereafter, and within the space of sixty days after the making and signing of said several contracts for carrying the mails, the said Postmaster-General did deliver to the Auditor of the Treasury for the Post-Office Department a duplicate copy of each of the contracts aforesaid, and that thereupon and thereafter, to wit, on the said 23d day of May, in the year of our Lord one thousand eight hundred and seventy-nine, at the county and District aforesaid, and within the jurisdiction of the said court, the said several contracts and agreements so made between the said United States of America and the said John W. Dorsey and the said John R. Miner and the said John M. Peck as aforesaid were in full force, effect, existence, and operation, and then and there, to wit, on the said 23d of May, in the year of our Lord one thousand eight hundred and seventy-nine, at the county and District aforesaid, and within the jurisdiction of the said court, the said John W.

Dorsey, John R. Miner, and John M. Peck, together with one Stephen W. Dorsey, one Harvey M. Vaile, and one Montfort C. Rerdell were then and there mutually interested in the said contracts and agreements made between the said United States of America and the said John W. Dorsey, John R. Miner, and John M. Peck for carrying and transporting the mails on and over the said post-routes—

Naming the routes—

and were then and there mutually interested in the money—

Mark you—

were then and there mutually interested in the money to be paid by the said United States of America to the said John W. Dorsey, John R. Miner, and John M. Peck for carrying and transporting the said mails on and over the said post-routes in accordance with the said contracts and agreements as aforesaid; and the said contracts and agreements were then and there held, owned, and used by the said John W. Dorsey, John R. Miner, and John M. Peck for the mutual and pecuniary benefit, interest, advantage, gain, and profit of them the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell as aforesaid.

There is much more in this indictment, gentlemen of the jury, to the same effect, and I do not propose to trouble you by reading it; but running through two or three pages of this indictment they are particular to state that these routes were held, owned, and used by these parties for their mutual benefit and gain. The indictment was drawn by my friend from Philadelphia [Mr. Ker], and he could not have drawn it in any other way and united all these defendants in this case. If he had drawn it in any other way than that there then would have had to be more than one indictment. If these parties did not hold these contracts for their mutual benefit and gain, but one was held for the benefit of one, another for the benefit of another, and another for the benefit of another, they would have had to have just that many indictments in this case. So that to unite these parties in this prosecution it was necessary for my friend to draw that indictment in that way, and it is no criticism upon him that it is so drawn.

Then they say that on the 23d day of May, 1879, the defendants, John W. Dorsey, Miner, Peck, Stephen W. Dorsey, Vaile, Rerdell, Brady, and Turner conspired by means of false petitions, and by various other means that are set forth in this indictment, to defraud the United States for the mutual benefit of all the parties, including Brady and Turner.

The COURT. I do not exactly understand it as you have stated it. You say that the indictment charges that by means of false affidavits, false petitions, &c., the conspiracy was formed.

Mr. WILSON. No, your honor.

The COURT. That is what you say.

Mr. WILSON. I thought I corrected that. I say that they conspired by means of these things to defraud the United States.

The COURT. That is correct.

Mr. WILSON. That is the way I intended to put it, and I thought I had corrected myself.

The COURT. I thought it was an inadvertence.

Mr. WILSON. I do not intend to be inaccurate, because that is the very language of the indictment.

The COURT. The conspiracy was formed, and these were the means to be used to carry out the purposes of the conspiracy.

Mr. WILSON. Let us not be mistaken about that. Here is what the indictment says:

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, unlawfully

did fraudulently and maliciously combine, confederate, conspire, and agree together between and amongst themselves by means—

Of these things.

The COURT. It is just as I supposed.

Mr. WILSON. Now, gentlemen of the jury, that in brief is the charge in this indictment and there is no other charge. We are here to meet that charge. Let us get it clearly in our minds without reading from this paper. Let us get it clearly in our minds just what it is. When you come to clearly understand this indictment, you have greatly simplified the labors of this jury. It is that three of these parties, John W. Dorsey, Miner, and Peck, held these contracts, that then Stephen W. Dorsey, Vaile, and Rerdell became mutually interested with them in the contracts, and that then these parties agreed with Brady and Turner to defraud the United States, using the means mentioned in the indictment, and that that was done for the common benefit of all these parties. I think I have stated the indictment so far as the charges are concerned. That indictment, gentlemen of the jury, the Government must prove. Those charges the Government must prove. I say *prove*. Nothing is to be left to inference. Nothing is to be presumed except that one presumption that always stands forth in a criminal case, the presumption of innocence of everyone of those charges. Nothing is to be left to conjecture. I repeat it, gentlemen, the Government must prove these charges and prove them not by a bare preponderance of evidence as in a civil case, but it must prove these charges beyond a reasonable doubt, and as has already been said to you several times in this case, that means to prove them by such a degree of testimony as to exclude every other reasonable hypothesis than that the defendants are guilty of the charge. If the proof that they offer is consistent with innocence then it does not prove guilt. According to my understanding of this indictment, gentlemen of the jury, the Government must first prove that these parties conspired as they have charged. Of course they must prove that. Now, my friend Merrick, as I said awhile ago, said that this was no common crime, no charge of common criminality; but it was a charge of conspiracy. Well, gentlemen, they have got to prove in some way or other that these men conspired or agreed together. That is their charge. They must prove that they agreed with each other. They say, "Oh, but conspiracy is hard to prove. Men do not conspire out in the street or in crowds. They get into secret places and there they make their agreements with each other." Is not the same true with reference to almost all crime? Is it not true with reference to burglary? Who goes out in the street and makes his preparations for burglary and informs the world that he is going to commit burglary? Who does so with reference to larceny? Who does so with reference to murder? Anybody? No. So that, so far as conspiracy is concerned it does not differ in this respect from any other of the crimes in the catalogue. Well, they say, it must be proved by circumstantial evidence just as in a thousand other cases you prove a man's guilt by circumstantial evidence. You find that your house has been broken open in the night. There is the fact. It has been burglariously entered. Who did it? Nobody saw the man who did it. There was nobody there to give you information as to his crime. How do you prove it? By circumstances. There is snow on the ground, and as he walked away he made a track. You measure the track, and going a little ways you find that he has dropped something, or he has left some other circumstance lying along his pathway. After awhile you find a man whom you suspect. You measure his shoe and you find his shoe corresponds

with the size of the track, and so you go on from one circumstance to another, one circumstance linking on to another, until you have connected the burglarious entering of your premises with that particular man. That is proving a case by circumstantial testimony. It is link added to link, link added to link, until you have got a chain that cables him to that crime. That is proving a case by circumstantial evidence. Just so with a conspiracy, you must prove it by circumstances; but when you undertake to prove it by circumstances, every circumstance that you make use of or seek to make use of must be proven by that degree of testimony of which I have spoken. As was aptly said by my friend who preceded me on behalf of the defendants in this case, no cable is stronger than its weakest link. It so happens, and of course it must be the law and undoubtedly is the law, that whenever a link is gone from that chain, the whole chain is utterly worthless and valueless:

Whatever link you strike, tenth or ten thousandth,
Breaks the chain alike.

Now, gentlemen, before I proceed further I want to say another thing in regard to this matter. They are seeking to prove this case against my client, General Brady, by what they call circumstances. I want you to bear in mind that every circumstance upon which they rely is a separate and distinct official act. It is not a case where one link is connected with another link, where one thing leads on to another thing, and so travels on until you get to the end of the chain, but each one of these acts is a separate and independent official act that General Brady was performing in the discharge of his official functions. Now, what next must they prove? They have got to prove that the parties conspired. They have got to prove that the parties conspired for the purposes named in this indictment. It will not do, gentlemen, to charge them with conspiring for the mutual advantage of a dozen men, and then prove that they conspired for the advantage of one man. They must show that these parties were mutually interested in these contracts as they have charged. That is their averment, and that is a material averment in this case. It is the very soul of this case; otherwise, gentlemen of the jury, you would have here the opportunity to find parties guilty of half a dozen different conspiracies under this indictment. And if it turned out that this thing was for the benefit of Vaile, and that thing was for the benefit of somebody else, and the other thing was for the benefit of Stephen W. Dorsey, you have this case divided up into three or four different conspiracies. It is one or nothing.

Now, gentlemen, let us see if we cannot further simplify this case as to its facts. Let us go back to where Mr. Merrick starts this conspiracy, and see if a plain, straightforward statement of the facts as they exist in this case, as shown by the record in this case, and unadorned by any of my brother Merrick's rhetoric, does not very greatly simplify it. What are the facts? Let us leave out imagination and come right down to what the evidence shows. I want you to see if I do not state it exactly as it is without going into very great detail. The first that we know of this thing, so far as the testimony is concerned, is this: Boone was put upon the stand by the Government. They cannot contradict what Mr. Boone says. They indorse him, and they must accept his statements as truthful. We have a right to rely upon the testimony of Mr. Boone as produced by them. Now, what does he say? Brother Merrick says that Dorsey was getting up a criminal combination for the purpose of robbing the Government. What are the facts? Why, gentlemen, Stephen W. Dorsey received a letter inform-

ing him that his brother, his brother-in-law, and somebody else were going into this business of contracting for carrying the mail, and they wanted him to get somebody who understood the business to get up the papers and manage the thing for them. Is not that right? That is the first we hear of it. He wanted somebody and he sent for Mr. Boone, or asked Mr. Boone to come and see him, and then Mr. Boone went to work and sent out circulars or letters to postmasters all over the country making inquiries in regard to these various routes upon which they were going to make their bids, and the information came back from these postmasters on that subject. Now, is not that so? Will anybody dispute that? Is there any evidence to show that that was not done just in that way? Not a bit of it. Well, then, what? John W. Dorsey, John R. Miner, John M. Peck, and Mr. Boone made their arrangements with each other, and they put in about a thousand bids for carrying the mail. The papers were prepared by Boone. The proposals were filled up and they made these bids and got about a hundred contracts.

Mr. HENKLE. They made between eleven and twelve hundred bids.

Mr. WILSON. Between eleven and twelve hundred bids. I was speaking in round numbers. Now, here, gentlemen of the jury, was a pure business arrangement. There is not a circumstance connected with it, as I contend, to show that it was other than a simple, straightforward business arrangement, which these parties had a right to enter into. It is nothing unusual, as the testimony shows you, for men to combine together for the purpose of taking mail contracts. Why may not men form themselves into a partnership for the purpose of taking contracts for carrying the mails? The Government invites men to make that their business. It advertises for its citizens to come forward and take contracts to carry the mail. I would like to know why a half a dozen men may not enter into a partnership for the purpose of carrying the mail. It was a straightforward, plain, usual business combination. Well, they got these contracts, about a hundred of them. Their mode of doing this thing was the common mode, as disclosed to you by the testimony where men have thus bid. One bid on this route, and another member of the firm bid on another route, and another on another, so that the bids were put in in the individual names of the several parties, and the contracts were awarded, as a matter of course, to the party who made the proposal, and you find that in this case. Mr. Boone has told you that they bid one, two, three, four; that is to say, Miner would bid on one, Peck on two, Boone on three, and Dorsey on four. So every fourth bid, speaking in round numbers, was of course in the name of each one of these parties. What is there about that mode of doing business that has the indication of fraud? What is there in it now to indicate to any man that there is anything fraudulent about it, or that these parties had anything to do with a conspiracy? Now, what is the next step? Having received these contracts, of course they were required to put on service; but these gentlemen were not expert men in this business. They had not been in the business before. Right there, it would be very remarkable, gentlemen, that these men who were utterly inexperienced and unknown to the department, so far as the testimony is concerned, should have been conspiring with Brady. If Brady had been conspiring it would have been with some other class of men. But they had trouble in putting on the service. The department required the service to be put on, and it was their duty under their contract to put it on. Stephen W. Dorsey undertakes to assist them in putting on that service. My brother Merrick says there is no testimony in this case that

he ever loaned them a dollar. Let us, for the sake of the argument, concede that that is so, and I will leave that out of my statement. It is, however, indisputable that Stephen W. Dorsey indorsed their note in bank to enable them to raise the money to put this service on. There is not any doubt about that, is there? No. Then what? He takes from them these post-office warrants or orders as collateral to secure him against loss on account of those indorsements. That is business, is it not? There is nothing about it that is unusual, unnatural, or indicative of any fraud. They had exhausted all their resources. The money thus derived, admitting that Dorsey did not let them have any money out of his own pocket, which I only admit for the purpose of the argument, was exhausted, and still they were unable to put on this service as the contracts required. You find them, gentlemen, trying to get rid of one of the largest of these contracts for the very obvious reason that it was an expensive contract upon which to place service and they wanted to get rid of it if they could. They found themselves in trouble, and here comes along Mr. Vaile, a man who had been engaged in this business more or less for twenty years. He had large experience. He found Miner in distress over this thing. They had their conferences and their talks about it, and as a matter of good fellowship, as he tells you—I know Mr. Merrick stands here and shakes his fist in Vaile's face and calls him a liar—he went to General Brady and interceded with him to see if he could not get an extension of time for putting on this service.

And now the argument that he uses is the most natural argument that could be used. Why, he said to him, “Mr. Second Assistant, if you declare these men failing contractors, what have you got to do? You have to go up on the list, and give it to the man who bid next highest above. That costs more money. After you have made your contract with him, that man has to get ready to put on this service, and that will make delay, and, therefore, you will get the service sooner by giving these men a little additional time than you will if you give it to the next bidder above, and give the contract to him.”

Now, that is reasonable and logical. There is nothing in it indicating that anybody was going to try to defraud the Government. Now, Mr. Vaile says to him, “Perhaps, if you give them this time, I will unite with them, and assist them in getting this service on.” Now, he says to him, “I will go home and see some of my friends.” Of course, gentlemen, I am not attempting to give you the exact language, but that is the substance of it. If I state it incorrectly, Mr. Vaile will correct me. “I will go home and see some of my friends, and, perhaps, I can assist these gentlemen, or take an interest with these gentlemen in these contracts, and put this service on, and thereby help them and give the Government the service it wants.” That is the substance of it. Well, he says that Brady gave him no particular satisfaction about it. The matter was left somewhat in doubt, but Mr. Vaile went away, and after he went away, on the 20th of August, 1878, General Brady sends him this telegram:

What service of Miner, Peck, Dorsey, and Watts do you expect to put in operation? Postmaster at Dalles, Oregon, says routes from there not carried and mails lying in the office. This cannot be permitted longer.

THOMAS J. BRADY,
Second Assistant Postmaster-General.

This cannot be permitted longer. These parties having failed to put on the service, Mr. Brady wanted to know of Mr. Vaile what of that service he was going to put on. He wanted to know about that thing, and

then notified them that this thing could not be permitted longer. Now does that look like Brady was in any conspiracy with these gentlemen? No, gentlemen, if you give that its true significance you cannot fail to see that Vaile is corroborated by that very telegram; that he had gone to Brady about this thing, and that Brady became impatient as to this delay and notified him that this thing could not be permitted longer. Is there any evidence of conspiracy or bad faith in that telegram? No, gentlemen, on the contrary it shows exactly what I am contending for: that this was a plain, straightforward, natural, usual business operation.

Well, now, gentlemen, there that thing stood. Vaile did go on. Vaile came into it. They made their arrangements. What those arrangements were it is not necessary for me to detail, but you will remember that they were in substance that Vaile was to go in and assist them with money, and so forth, in putting this service on, and the proceeds were to be used in a certain, specific way. Now, what is there about that that is unnatural, unusual, or unbusiness like, or that indicates any fraudulent purpose on the part of these business men or that they have conspired to defraud the United States?

Well, it went along a little while, and then differences arose between them. They fell out by the way, and the result of it all was that in the spring of 1879 these parties came together, and what did they do? They divided up these contracts. They dissolved this business arrangement and at first they appraised these routes among themselves. They were their stock in trade, and they were the assets of this concern, and they appraised these assets. Vaile took 40 per cent., Miner took 30 per cent., and John W. Dorsey and Peck took the other 30 per cent. Now, is not that so? Is there any doubt about that being a fact in this case? Why, none whatever. And why? These gentlemen having divided these assets of their concern up in this way, why are you to infer from that that there was any fraud or purpose to defraud in making that division?

The precise date is not given, but about the 1st of April, 1879, these parties thus separated. Did they ever come together again? Were these interests ever again united? This indictment says that this conspiracy was formed on the 23d day of May, 1879. These parties separated on the 1st of April, 1879. Did they ever bring these interests together again, gentlemen of the jury? No, they never did, and the Government has proven that they never did. Vaile has testified in this case in order, gentlemen of the jury, that you might know just what these business arrangements were, so that this jury could be informed just what these men had been doing, how they came together, how they separated, and what became of the assets of the concern. Mr. Merrick says that he is a robber. Mr. Merrick says that he is a liar. Where is the evidence of it, gentlemen? If ever a man told a plain, straightforward story, that has marks of truth written all over it, it was Harvey M. Vaile in his testimony in this case. I say that so far from their ever having come together, and ever having become mutually interested in these contracts, the Government's own proof shows that it was not true. The Government's own evidence shows that they never did come together, and I will show you how.

They have introduced into this case, gentlemen of the jury, all the payments that have been made on these contracts. In the first place they have shown to you the payments that were made from the beginning of these contracts down to the spring of 1879, have they not? What became of that money? Why, Vaile tells you that he had put large sums of money into these contracts in putting service upon these

various routes. He found it an expensive and a losing business, and he determined that he would protect himself. He took the necessary measures to protect himself by having the money come into his own hands, and he has testified here before you what became of that money. No dollar of that money was ever divided among these other defendants. No dollar of that money ever went to Brady. No dollar of that money ever went to Turner, but every dollar of it is accounted for in other and different ways. It went to pay the expense of putting the service upon these routes.

Now, what became of the money after this division? Why, gentlemen, do you not remember that when they divided there was but one way that they could make that division so that each man would get his own money? Do you not remember that? They could not assign these contracts. Remember, they could not assign these contracts to each other, because the law did not permit it; but the law did permit subcontracts, and the mode of making that division was by the one man giving to the other man a subcontract, entitling him by virtue of that subcontract to receive all the pay.

Now, what happened? After that division was made, gentlemen of the jury, down through to the end, each man drew the pay that he was entitled to by virtue of this subdivision. Vaile and Miner having united their interests, Vaile drew the pay for the Vaile and Miner contracts that they got under this division. Dorsey having come into it by virtue of the agreement of 1879, takes his friend Bosler in to help him out. He furnished the money and managed the finances of his part of it, and you find, gentlemen, right here in this record the evidence that Vaile got the money for his and Miner's contract, and J. W. Bosler got the money for the other. Have you any evidence that any of that money that Vaile got ever went to Dorsey? Not a bit of it, gentlemen. Have you any evidence that the money that Bosler got ever went to any of these other parties? Not a word of it, gentlemen, not a word. And more than this, gentlemen, you find that almost all of these drafts were negotiated or cashed in Middleton's bank and in the Citizens' Bank of this city, and these gentlemen come here to us and say, "Oh, why don't you bring Middleton here; oh, why don't you bring Mr. Cresswell here; oh, why don't you come here and prove your innocence?" They charge us with having received our money for our mutual benefit, and they turn around and show that all this money went in an entirely different direction, and then they want you to infer that there was some rascality in the use of this money. My friend Ker here, who is a frank man, vouches for John W. Bosler. He says he is an honest man and his friend.

Mr. KER. When did you hear me say that?

Mr. WILSON. I heard you say it in your speech.

Mr. KER. I said that is what you called him, I differed with you, though.

Mr. WILSON. You say that *Bosler* is not an honest man?

Mr. KER. Oh, *Bosler*.

Mr. WILSON. Yes, *Bosler*.

Mr. KER. Oh, I say he is a good fellow. I have met him. I do not know anything about his honesty.

Mr. MCSWEENEY. We will take that qualified admission.

Mr. WILSON. Yes, we will take that qualified admission. At any rate, gentlemen—of course memory is a very uncertain thing.

Mr. KER. I may have used the words that he was "a good fellow."

Mr. TOTTEN. He said that he was a good fellow; that he knew him.

Mr. WILSON. I want to correct myself, then. That shows how imperfect human memory is. That occurred only a few days ago, and I think if I had been put on the stand I could have conscientiously sworn that he said he was an honest man. I was mistaken.

The COURT. Is it not a well known fact that those most liable to go astray are the good men?

Mr. WILSON. Now, your honor, what is going to become of you and I on such an announcement as that? Here we are, good and pure men, you and I, and we are likely to go astray. I am afraid that will not do. I do not like that philosophy, and I must protest against it in the interests of his honor. I do not care so much about myself, of course.

But, gentlemen, is there anything here to impeach the integrity of Mr. Bosler? Recollect that they charge that this was for the mutual benefit and gain of all these parties accused in this indictment, and yet they traced this money where you see it is absolutely impossible, at least so far as the testimony in this case goes, that that money should have been used in the way they say; and here you have the remarkable spectacle, according to the theory of this indictment, of these gentlemen going to all this trouble, entering into this conspiracy, defying the law to rob the Treasury, and then never reaping a dollar of the fruits of that crime. Now, is that reasonable? If these men had done all this thing for the purpose of getting money into their pockets, they would have been very likely to have gotten it. They would not have done all this for the fun of it—not a bit of it—so that I say, gentlemen of the jury, that so far from the Government having proved that these men were mutually interested as charged, it is proved absolutely that they were not interested as charged, and I say, moreover, that there is no evidence here that tends to prove what these gentlemen have alleged in this indictment.

Now, up to this time, gentlemen, the only mention of General Brady is the appeal that is made to him by Mr. Vaile and his telegram, which I have just read to you. Where does he appear now? Did he ever meet at Dorsey's house? No; nobody pretends he did. Did he ever meet these parties anywhere else? Nobody pretends that there is any evidence of that kind. Oh, they say, a man can conspire across a continent. I agree they can; but where is the evidence that these men's minds have come together in respect to this thing? Brady's name is not mentioned in the manner in which I have stated. Now, from what do they rely to convince you that Brady conspired with these gentlemen? They say they must prove it by circumstances, and I admit they may prove it by circumstances if they can, and I have already indicated to you what kind of circumstances and what must be the effect of those circumstances and how those circumstances must be proved.

Now, in considering what it is that they are relying upon to show that Brady conspired, you must remember that, according to the very theory upon which this prosecution is proceeding, a part of the duties of the Second Assistant Postmaster-General was to deal with the increase and the expedition of the service. Increase and expedition of service is provided for by law, and it is provided for by the regulations of the department. In every case where increase or expedition is to be made it becomes the duty of the Second Assistant Postmaster-General, as an official act, to decide upon that case. The remarkable feature of this prosecution, gentlemen, is that they ask you to infer that those acts were performed because he criminally conspired to perform them, instead of attributing them to the dictates of duty under the law. Why do they ask you to infer a conspiracy?

Let me review the things they rely upon. Now, remember that they are trying to prove a conspiracy, or that Brady was in a conspiracy by circumstances, and remember that those circumstances are official acts. Now, they say that you ought to believe, or that one of the reasons why you ought to believe he was engaged in a conspiracy, was that there were fraudulent petitions filed, and that he acted upon those fraudulent petitions. That is right, is it not? They say that the contractors procured these petitions, and that it was a part of the conspiracy that they should be procured, or that they entered into the conspiracy and agreed to do this by means of these fraudulent petitions. In other words, they ask you to say that the fact of fraudulent petitions were filed is evidence tending to prove that Brady conspired with the contractors to have those fraudulent petitions filed. Now, is there any logic in that, gentlemen of the jury? I say no.

Now assume, for the sake of the argument, that these petitions were just as fraudulent as has been charged; just as fraudulent as they contend they were. Assume that for the sake of the argument. They are not so, as I think I will show you after awhile. But suppose they are. Now, what syllable of proof had you that Brady had any knowledge of them whatever until they came into his office, brought to him in the regular course of business in these jackets that have been paraded before you? What syllable of proof is there that he knew how they were procured, or that he had any knowledge whatever as to their integrity? Not a single, solitary word, gentlemen of the jury. On the other hand, there was every reason why he should believe in their perfect integrity in every particular. Why, they were brought there to him by Senators and Members of Congress. Many of them were sent to him through the mails by Senators and Members of Congress. They bore upon them the indorsements and recommendations of the most distinguished men in the civil and military service of the Government. They had the approval of governors of Territories, of judges, of district attorneys, and I ask you in all conscience why you should say that he had any reasonable ground to suspect their perfect integrity, when they were vouched for in this way? Not only this, gentlemen, but you find that such men as General Miles was urging in person, and by letter, and by communications through the War Department that he should grant increase and expedition of service, and yet you are expected to say on your oaths that he had conspired with these contractors to have these petitions brought there, as Mr. Merrick says, as a cloak for his crime. But they say these petitions were altered after signature, and he should have known it, and the fact that he did not know it, that he did not discover it, is an indication that he had conspired with these parties. They say that if he had been diligent he would have discovered it, and as he did not discover it, it is such a gross neglect of his duty as to indicate criminality. Now, gentlemen, let us see whether that is fair or reasonable in this case. Here was an executive officer the character of whose duties have heretofore been indicated to you. Many of these petitions, as you remember, came in by mail. They are distributed to their proper places, some went to Turner and some went to Brewer, because Turner held one section and Brewer held another. Now, nobody contends that Turner was in any conspiracy. It is conceded that Turner was not in any conspiracy. In so many words Merrick has admitted that to you. But you remember, gentlemen of the jury, a little further back in this case. These gentlemen told you that it was necessary for Brady to have Turner in this conspiracy. Turner was the man who held the key of this whole position. They must have Turner at an earlier period of this transaction, and these con-

spirators could not get along without him. Now, it turns out that Turner was not in the conspiracy. How are they going to get along without him? Nobody pretends that Brewer was in any conspiracy. These petitions went to these two gentlemen, and they came back in these jackets with a brief of their contents. They say we ought to have held them up to the light just as you were invited to hold them up to the light and see if we could not detect that a word had been scratched here and something written over it, or that schedule "thirteen hours" had been written in the body of the petition in a handwriting somewhat different from the rest of the body of the petition. They say he ought to have gone all through that, and because he did not do it he must have been in a conspiracy with these parties. I say, gentlemen, that that is absolutely preposterous and absurd when you come to consider all the circumstances in this case. They say that he should have known that E. Hall—you recollect that petition—did not sign this petition, when right here before you E. Hall had great difficulty to tell whether he signed his own letters or not. Brady sitting there in that office, that great contract office of the Post-Office Department, ought to have known that that was not Hall's signature. That is the argument. How much logic or reason or sense is there in such a proposition? They say he should have known that certain names that appeared on one petition were not the names of parties living in Oregon but the names of parties living in Utah. Is not that what they have been arguing here before you? That he ought to have known these things, and because he did not know them he must have been conspiring with somebody. Gentlemen, I take that petition as an illustration of the point I am now presenting to you. Here it is [exhibiting petition]. You know it is said of this petition that two or three sheets are pasted to it. Here is the body of the petition [indicating]. On the back of it, as you remember, are the names of signers, a whole sheet of them. Then they say that here are more pasted in, the signers living in Utah.

The FOREMAN. [Mr. Dickson.] Two sheets.

Mr. WILSON. Two sheets. Now, I want to say right here that that petition cuts no figure in this case. Mr. Merrick admitted that there was no order made on the strength of this petition; but it serves nevertheless as an illustration of the point I am contending for. Suppose, Mr. Foreman—I beg your pardon; I ought not to have said that. Evil communications corrupt good manners sometimes. Suppose Mr. Woodward is the Second Assistant Postmaster-General, and he is sitting at his desk every day, and these multitudinous and multifarious duties are pressing upon him, and that petition comes in just in that way. There it is. He opens it and looks at it. Everything is straight and square on the face of it, and he turns it over on the back and reads this:

Having examined the foregoing petition and list of names I find it correct in the statements, except that it affects the middle and southeastern sections of the State; the north and northeastern sections being supplied from Kelton by way of Boise City to The Dalles. The section being supplied by route 44160 is not less important to the section through which it passes than the Kelton route was to the route through which it passes only a few years since. Therefore I recommend the granting of the prayer of this petition.

J. H. SLATER.

Then he looks a little further down and he reads:

I concur in the foregoing.

L. F. GROVER.

Those are the two Senators from the State of Oregon. And then he looks a little further down and he finds written on this same page:

I concur in the above request.

JOHN H. WHITEAKER.

The member of Congress from the State of Oregon. Now, then, Mr. Woodward is sitting there as the Second Assistant Postmaster-General, and has that petition presented to him. I want to know what reasonable and fair-minded man would say that because Mr. Woodward did not discover that there had been two pages of petitioners pasted in there under those circumstances, the inference is to be drawn from it that he was engaged in a conspiracy to rob the Government of the United States? I use this petition, gentlemen of the jury, for the purpose, as I have said, of illustration. It shows how ridiculously absurd is the proposition that these gentlemen are contending for in this case. Every man who has any reason about him knows that Mr. Woodward could not be held to even a breath of a suspicion because of his failure to discover a thing of that sort.

Now, a step further on this subject, gentlemen. Concede, for the sake of the argument, that some of these petitions are suspicious in their character. Concede that for the purposes of this argument. Concede, if you will, that every one of them that they say was altered was, in fact, altered, and concede that it was altered exactly in the way they say it was. Do you not know, gentlemen of the jury, that there are plenty of petitions and other recommendations that were not tainted with any suspicion as to these several routes? Do you not know from the testimony in this case that that is the fact? Here and there they have picked out these petitions, which they say have been tampered with. I have attempted to show to you that it is not unreasonable or a ground of suspicion that General Brady did not detect that they had been tampered with, if they have been. But concede that they were tampered with, just as they say. Then what? You have here piles of petitions. These records are burdened with petitions as to the integrity of which there is no question whatever. Now what authority have you for saying that the false one, conceding it to be false, influenced General Brady to do an act instead of the entreaties and prayers of those that were indisputably genuine? They have charged that false petitions were one of the means used. They must prove that, gentlemen of the jury. But here you have these genuine ones, and how can you say that the act was the result of the false ones? If you cannot say that, then I want to know how you can say that his act is inconsistent with his innocence. There is the test at last. If his act, as I said awhile ago, is consistent with innocence, that is the construction you have got to place upon it. That is the conclusion the law says you shall arrive at. Therefore, when you find half a dozen petitions that are untainted and unsuspected and one petition that has been scratched, how are you going to say that his act is not consistent with innocence? You cannot do it, gentlemen of the jury. On this subject and right at this point I want to read a paragraph from the record. Do you remember that after we had gone a long ways into this case, and after the prosecution had gone on and on reading to you petition after petition, and letter after letter that came to the Second Assistant Postmaster-General urging him to put on this service, the court got tired of it, and after a discussion that had ensued on this subject, the court, at page 979, said:

In the progress of this trial, I have seen piles of petitions from men of the highest standing in the country, official and otherwise, to the Post-Office Department, for increase of service and expedition upon these routes. Now, looking on the face of those papers, I cannot see anything to condemn in the conduct of the Second Assistant Postmaster-General in complying with these petitions. He is not to be supposed to have gone over those routes himself, but he acts upon the petitions before him as a public officer must in all cases. You have not brought home to him any facts, so far as I can remember, to show that in ordering these expeditions on these routes and the

increase of service, he acted from any improper motives, because he is backed by these petitions from gentlemen of the highest position in all quarters of that country, and men presumed to be acquainted with the routes, and with the improvements and industries that are springing up in this new country. If I had seen that there was anything in the evidence to bring home a reasonably strong suspicion of improper motive on the part of the Second Assistant Postmaster-General, I should not hesitate to go further into this and investigate it. But there is no evidence of that kind; the contracts are apparently sustained by petitions, and the petitions justified the Postmaster-General in doing what he did.

Now, that, gentlemen of the jury, is just what I am contending in this case. I say that when he had these petitions before him he was justifiable in accepting them and in acting upon them, and that you cannot ascribe to him improper motives because he acted upon them. But the evidence must go far beyond that. The inference is and the presumption is that his act was a lawful act and was an honest act, and when he had these petitions to back him up in those acts he had a right to infer that those petitions were all honest petitions, and act upon them as honest petitions. You cannot infer a want of integrity upon his part because he did those acts under those circumstances. But they say that the contractors procured these petitions; that they went out and got up these petitions. What of it? Did Brady know anything about it? Who says he did? What testimony has proved to you that Brady knew that these contractors were getting up these petitions? Anybody? Nobody. But suppose the contractors did get up these petitions. Do you remember what the court said about that? Gentlemen, this is business. These men had a right when they took these contracts to take them with all the expectations that were reasonable to be indulged in with reference to them. Right in the contract is this provision:

It is hereby stipulated and agreed by the said contractors and their sureties that the Postmaster-General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing a *pro rata* increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is rendered necessary; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractors, one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the service retained.

That is a stipulation of the contract. Now, these gentlemen were engaged in a lawful and legitimate business, just like any other business. They had a right to look over the field, as the court said, and to take the chances with reference to whether there would be increase and expedition of service or not. That is a part of this business. The Postmaster-General had stipulated in this contract that if any of the service was increased, increase of compensation *pro rata* would be allowed and if expedited, increase of compensation *pro rata* would be allowed. That is a stipulation of the contract. Now, a man makes that contract, and that is one of the elements of it. It is perfectly legitimate, as the court has said during the progress of this case, for Senator Dorsey or any other man who was interested in these contracts to have them expedited or increased. That is a part and parcel of the contract itself. What if they did go out and get these petitions? In some cases they did and in some cases they did not. In the first place, it is nothing against these contractors. I want that understood. But especially, so far as my own client is concerned, there is not a syllable of proof in this case that he ever knew that any contractor had gone abroad and gotten up these petitions. If there is, it has entirely escaped my recollection.

Now, what do they next rely upon? What is the next circumstance

that proves that General Brady was engaged in this conspiracy ? They say that false affidavits were made as to the number of men and horses. It may be profitable, gentlemen, to look a little into the history of this case. What is that history ? Mr. Bliss told you in his opening statement to this jury some three months ago how it was done in the olden time, and up until the time of a regulation made by the Postmaster-General to which I will call your attention in a moment. How was it done ? The contractor went into the office of the Second Assistant Postmaster-General, and he sat down and gave a list of horses and then he told him how many wagons or coaches he would use, how much it would cost for shoeing horses, how much to feed horses, how much per month or per day for the men who carried the mail, and how much it cost to take care of the horses ; and so he went through with a detailed statement of that kind, and upon that they made the calculation as to the additional compensation. That is the way it was done in the olden time. When I say the olden time, I mean prior to the time that a certain regulation was passed which I will presently call your attention to. Now, you see, gentlemen of the jury, that the Second Assistant Postmaster-General, or the Postmaster-General, as the case might be, sat down with the contractor and took his statement, and then they made their calculation and the service was expedited. That is the way it was done then. Then you simply had the statement of the contractor. That was all right, Colonel Bliss said ; nothing wrong about that ; that was business. Now, Postmaster-General Key comes in, and he says, " We will not take the simple statement of the contractor. We won't do it that way any more. We will make this contractor swear to the statement." Therefore, they made this regulation :

When it becomes necessary to increase the speed on any route, the contractor will be required to state under oath the number of men and horses required to perform the service according to contract schedule, and the number required to perform it with the proposed increase of speed.

And that was laid down as the guide in determining this business from that time forward. That is the manner in which from that time forward it has been done.

The COURT. How has it been done in regard to increase of service ?

Mr. WILSON. There is no necessity for any regulation for that purpose.

The COURT. I know ; but in point of fact, what was done in these cases as to the increase of service ?

Mr. WILSON. The number of horses and the number of men in that case have nothing to do with it. Where there is increase of service they just assume that it would take twice as many for two trips as for one. If you are carrying the mail one trip and they double it and make it two they assume it will take twice as many, or if they make it six that it will take six times as many. That problem is very simple and plain, but the difficulty comes in when you increase the speed. That is a very different sort of thing. As I said in the opening statement that I made to you in this case, you may start and walk from here to the Treasury Department with perfect ease and comfort to yourself, and you can do that day in and day out, twice a day for a year, and improve on it every day. It is just a pleasant exercise for you. But suppose you run from here to Ninth street—you couldn't get any further than that before you would have to sit down and rest. That very same principle applies in a matter of this kind. Take these horses that run on the street-cars. Here is a nice, smooth, level street. Trot those horses from Georgetown to the Navy-yard and back twice a day,

and that is all that they can do; yet one of these cart horses will haul a cart load of earth, and walk right straight along from morning till night, out at 6 o'clock in the morning and stopping at 6 in the evening, keeping it up day after day. When my brother Henkle comes to discuss this case I hope he will discuss it from a scientific stand-point. This has been a matter of scientific investigation. Something of this kind probably will turn out to have happened: The English Government built a vessel. They found that at what they call half boiler power that vessel could be propelled through the water at fourteen knots an hour, but when they put it up to its utmost capacity, to its full boiler power, they could not increase that speed but two knots an hour. I am not going into that question in detail; but there is where the difficulty comes in in this problem: that when you increase the speed it is hard to tell just how many horses and how many men you have got to have, especially horses. There is the trouble in the problem. It is one of those things with reference to which men would greatly differ, as you have seen already in the testimony in this case. What you are required to do or asked to do by the prosecution is: If the contractor has stated it too low or too high in his affidavit to infer from that that General Brady was in a conspiracy with him because he acted upon that affidavit. Is not that it? That is it exactly.

Now, gentlemen, in some of these cases the pro rata principle was followed. I have already read to you from the contract the stipulation between the parties. The contractor in every one of these cases was entitled to that pro rata, but he had a right to make a new contract if he was willing to do it, and sometimes—I cannot remember exactly how many times, but in quite a number of instances, and in one very conspicuous instance—General Brady did not comply with the pro rata principle, but required the party to make a new contract and do the service for less than pro rata. Now, take the Bismarck and Tongue River route. There was an affidavit filed for one hundred and fifty men and one hundred and fifty horses. Did he accept it? No. If he had been a conspirator, getting a portion of the money, there was the very case for him to accept the affidavit. Why? Because instead of \$70,000 it would have been \$168,060. If Brady was in a conspiracy with any of these defendants for the purpose of putting money in his pocket, there was a case for him to put in practice that which was to put money in his pocket. But instead of doing that, what does he do? He makes these gentlemen make a special contract that they will perform this service for less than half of what it would have cost if he had acted upon the affidavit filed in that case. Mr. Merrick, you will remember, put at me an arithmetical conundrum. He did it with a good deal of fierceness at the time. He wanted to know how I was going to get at the pro rata, and what were the factors in that problem. I think before he got through he became perfectly satisfied that he did not know what he was talking about. It is very simple, gentlemen. The law and regulations provide just exactly what the problem shall be and what are the factors in the problem. These gentlemen have not shown, nor can they show, that the calculation was ever made on any other basis than the basis named in this regulation and this statute.

Now, gentlemen, what about these affidavits so far as Brady is concerned? My brother McSweeney has already discussed them as to the other defendants, and others who will follow me will probably discuss them further. I presume that my brother Henkle and my brother Ingersoll will give some attention to that subject so far as the other defendants are concerned, therefore I do not propose to weary you by a dis-

cussion as to them, and only deal with the affidavits so far as my client, General Brady, is concerned. They have not charged that that provision of the contract to which I called your attention a few moments ago, was a fraudulent act of General Brady. They have not pretended that these contracts were unlawful. They say they are lawful contracts, as I understand this indictment. You have seen what the Postmaster-General required. He required the affidavits to be made. Now, the claim is, that because General Brady did not go beyond those affidavits and outside of those affidavits and make other investigations than what the Postmaster-General had directed, that is an evidence that he was engaged in a conspiracy with these other defendants. They say that in the affidavit the number of men and horses was incorrectly stated, and because incorrectly stated Brady must have known it, or he ought to have known it. He ought to have inquired further, and because he did not inquire further you are to regard that as evidence that he was in a criminal combination. Have they proved that he knew it? No. Are you going to infer that he knew it? I think not. Why, gentlemen, let us see how this thing would work on the same principle. I presume there is not a gentleman upon that jury who does not know that there are hundreds and hundreds of claims paid every year through the Treasury Department upon *ex parte* affidavits of the claimants, and such parties as they bring to testify by means of affidavits as to the justice of the claim. There is a provision of law which authorizes the department to send out men and take testimony. The department has a right and has the power, conferred by the statute, to send a commission out and take testimony. Suppose they don't do it? Suppose the Secretary of the Treasury did not see fit to avail himself of that provision, but acts upon the affidavits of parties, and it turns out that a claim is a fraudulent claim and is supported by false affidavits? In that case, if the doctrine that is maintained here can be maintained at all, the result will be that the parties who thus conspired and got up false affidavits and brought them to the Secretary of the Treasury, if charged with a conspiracy, would find the Secretary of the Treasury coupled with them in that charge, and these gentlemen would be here glaring in the face of the Secretary of the Treasury and denouncing him as a thief and a robber. Why? Because he did not go beyond the affidavits and avail himself of the statute and take testimony as to whether or not that was a just claim. The same process of reasoning would put in peril the Secretary of the Treasury every day of his life. Take the Pension Bureau, gentlemen. There is a bureau of this Government where the testimony taken is *ex parte* affidavits. A man sends in the affidavit of his colonel or his captain, of his comrade or of his surgeon, and they come up here to this Pension Bureau. We are paying out of the Treasury now a hundred million dollars a year, almost exclusively upon the testimony of *ex parte* affidavits. The Commissioner of Pensions and the Secretary of the Interior have it in their power to go behind and beyond those affidavits. We are told through the reports of the Pension Bureau sent to Congress over and over again that fraudulent claims are passed through that bureau in great number, and thereby money is fraudulently taken from the Treasury of the United States. Upon the principle that these gentlemen are contending for in this case the Secretary of the Interior or more particularly the Commissioner of Pensions might be involved in conspiracy prosecutions every day of his life. If they had a case of that kind here they could with precisely the same propriety stand up and accuse the Commissioner of Pensions of being a thief and a robber just as they glare in the face of my client and say that he is a thief and

a robber because he did not go behind or beyond these affidavits. The same thing applies to Congress. How many things go through Congress every year all on *ex parte* affidavits, when Congress could send every claim to the Court of Claims and have it judicially investigated under a law especially provided for it. And yet who is going to suppose that these men are engaged in criminality, or that these things tend to prove dishonesty? I say, gentlemen, it is preposterous.

Now, gentlemen, are these affidavits false? Let us go into that for a moment. Are they false?

At this point (12 o'clock and 27 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. WILSON. [Resuming.] If the court please, and gentlemen of the jury, I was proceeding to consider the question whether or not these affidavits are false. Of course, the Government has to prove that they were false. Now, how do they prove it; how have they sought to prove that in this case? Because you will remember, gentlemen, that these affidavits, so far as the expedition of service is concerned, are the bases of the computation, they are the chief factors in the matter. The first thing that is to be ascertained under this provision, and under this regulation that was made by the Postmaster-General for guidance in this matter, is to ascertain the number of men and animals that are necessary—that is the language—according to the schedule named in the contract. Now, each one of these contracts contained a provision with reference to this matter of schedule time. The contract itself makes provision on that subject, and the first thing you have to do, therefore, is to ascertain the number of men and animals that are necessary to be used according to that contract schedule time.

Now, what is the next thing you have to do? Why to ascertain how many men and animals are necessary according to the proposed schedule time. Now, by showing how many men and animals some subcontractor used, does that prove it? No, gentlemen, that will not do. He may have used a few more than was necessary, or he may have used fewer than were necessary, and if you say that you are going to be governed by the number of men and animals that a subcontractor used, you make the subcontractor the judge as to what is necessary. That will not do, gentlemen, and it will not do for the reason that I have just stated. It will not do for another reason. What is that? Because the subcontractor may not have used enough to perform the service. You say that the contract requires that they shall perform the service within certain specified hours upon a certain schedule of time. The contract requires that to be done, and when the contract requires that to be done it means that that thing shall be done in that way. Now, what do you find to be the facts all through this case? Why that these subcontractors did not perform the service according to the requirements of the contracts, and hence you find all through this case deductions after deductions being made upon these subcontractors, because they did not perform their contract. What does that prove, gentlemen? It proves simply this that they did not use the men and animals necessary to perform that contract. It will not do to say that it could not be done. That will not do because you know it could be done. All that was necessary was that these contractors or subcontractors should put on suffi-

cient men and animals to do that work, and when, therefore, you prove in one breath that they used only so many, and turn about and in the very same breath prove that they did not perform their contract, you have simply proven that they did not have men and animals necessary to perform the work, and, therefore, I say, gentlemen of the jury, that when this prosecution comes here and proves the number of men and animals used, they have fallen short of what the law requires in this case. They must prove what was necessary, and when they prove that they have used so many and that they have performed the contract then you have proved that they did not use what was necessary.

Now, as to this matter of the increased schedule, gentlemen of the jury, you will see at once that that is a matter of judgment, of opinion. In the very nature of things it cannot be anything else, and you, gentlemen, cannot but see it. They are dealing with a thing in the future. They are dealing with a thing as to which no man can absolutely know. You are starting to run a mail from here to Baltimore, for instance, and they say to you that you must run it in so many hours. You know that in running it in so many hours, upon a schedule as to which you have been running it, you can know how many are necessary, because you have had actual experience with that thing. You know the roads, you know the seasons of the year, you know the climate, you have had actual personal experience in that matter; but, when you come to increase the speed, when you go from four miles an hour to six miles an hour, then you get into the field of speculation and judgment and opinion; and, therefore, whenever a man comes and makes an affidavit as to what would be necessary in the future upon a schedule which has been wholly untried, then whatever he may say in regard to that is a mere matter of opinion, speculation, judgment, with reference to which, different men would entertain different opinions, and come to different conclusions. Therefore, I say, that it is not enough for these gentlemen, in order to brand these affidavits as false, to show that some subcontractor after the service had been expedited, came into court and testified that he used a less number of men and horses than the contractor said would be necessary when he made his affidavit. In other words, gentlemen, a contractor could make such an affidavit with reference to a matter which was wholly in the future necessarily speculative, necessarily matter of opinion, necessarily a matter of judgment, in perfect good faith, and the proof that he made an affidavit that the number of men and horses would be necessary was more than the subcontractor subsequently used, was not sufficient to show that that was a corrupt affidavit.

That is my point. Is there any living man who upon such a state of facts, upon such a state of proof, would say that the affidavit was such a false affidavit, would say that the man knew it was a false affidavit, and would be willing to consign him to prison on account of having made it? It is ridiculous, gentlemen, and that proposition will not stand the test of reason.

Now, gentlemen, suppose they were false. Let us have it just as they want you to have it. Suppose they were false. I do not concede it, mind you, but I suppose it for the purposes of this argument. I am dealing with this now so far as my client, General Brady, is concerned. What of it? Let us be fair, gentlemen. If they were false, does that prove or even tend to prove that General Brady knew that they were false? I say no, and I think you must respond no. Well, the Postmaster-General having made this regulation and Congress having passed this statute, would the fact that General Brady accepted these affidavits as true and acted upon them as being true without any notice

to him of their falsity, without any evidence tending to show to you that they were false; would the fact that he acted upon such affidavits, sitting there and discharging his duties as the Second Assistant Postmaster-General, tend to prove that he was guilty of fraud and corruption in making these orders upon the strength of those affidavits? I say, gentlemen, no, it cannot be so in a case like this.

Now, what is the next thing that they rely upon to show that General Brady was a conspirator, for I am trying as well as I can to remember these speeches, which have been too long for me to do more than listen to; I have not had time to read them carefully through, but I am trying, as far as I have been able to carry them in my mind, to take up point by point the things upon which they rely to convince your minds that General Brady was in this conspiracy—these circumstances, as they call them.

Now, what is the next thing they rely upon. Why, they say that the postmasters and subcontractors wrote letters asking that the schedules be changed, because they were too fast in one or two or three cases, and they say that a lawyer, I believe his name was Beene, who lived up at Ward, a hundred miles away from a certain post-route which is embraced in this indictment, wrote a letter to the Second Assistant saying that "This service is not needed," &c., and they say to you that because he did not adopt the ideas, the judgment of this postmaster, or of this subcontractor, or of this lawyer—they say he is a lawyer; I do not know whether he is or not—and change this schedule according to what they ask, he must be a rogue engaged in a conspiracy to defraud the Government of the United States.

Now, is not that their argument? Let us see how reasonable that is. I believe that they gave one letter, the letter of Anthony Joseph, if I am not mistaken—I do not remember whether he was then a postmaster or subcontractor, but it is wholly immaterial for the purposes of my argument. That was done upon one occasion a week or ten days before the expedition was ordered. Now, they say he did not comply with the suggestions of these postmasters, or of this lawyer, or of this or that subcontractor—Nephi Johnson, for example. Now, how much is there in that? You will remember that these expeditions were very largely petitioned for. You will remember that they were variously urged by men upon whom General Brady had a right to rely. If I could put each one of you jurors in the position of the Second Assistant Postmaster-General, having expedited these routes upon these recommendations, what would you say if some man would come in and insist upon it that you were a rogue, that you were a robber, that you were a thief, that you were a conspirator? Why? Because here was a postmaster who said the schedule time ought to be so much, and here are forty or fifty or a hundred men who say it ought to be different from that, and you relied upon Secretary Teller and General Sherman and General Miles, and all these hosts of men who were petitioning in good faith for this service and insisting upon it, and they would say you were a rogue because you were not governed by the judgment of this little postmaster who was perhaps too lazy to get up in time in the morning to change the mail—you relied upon him instead of relying upon these gentlemen whom I have named. Now, gentlemen, is that evidence of fraud? Does it tend to show that a man is engaged in a conspiracy? Why he had to decide between these gentlemen. He had to decide one way or the other, and here is Mr. Anthony Joseph, who was engaged in carrying the mail as a subcontractor, and he was not carrying it up to the schedule time, which only proves that he had not provided himself

with the necessary men and horses to run according to schedule time. He was getting fines put upon him, deductions made from his pay, and he comes here thus flagrantly derelict in his duty and asks the Postmaster-General or the Second Assistant to be governed by his judgment instead of the judgment of these other gentlemen.

Mr. MCSWEENEY. I do not wish to interrupt you, Mr. Wilson, but I hand you this memorandum, that you may impress this point upon the jury, if you think proper. [Submitting a paper.]

Mr. WILSON. [After referring to the paper.] Yes. Here is a good suggestion. Now, if Brady was guilty of conspiracy, why leave that man Beane's letter on the files? He could have taken it away and nobody would have been the wiser. He could have reduced that letter to ashes in an instant almost. It was not a matter that required to be recorded. Not one of all these papers is required to be recorded upon the records of that office. And yet he goes out of office and leaves the letter of Anthony Joseph, and leaves the letter of Nephi Johnson, leaves all these very important letters upon the files to stand up in his face and confront him and condemn him if they have any force in them whatever. The very fact, gentlemen of the jury, that all these were left upon the files of the department shows that there is no truth in this charge. But here he is. He has got to decide. The law says he must decide in every given case that comes up. He must either grant or he must reject. You have seen these innumerable petitions, these prayers for this service, indorsed by the highest men of the country, and he is governed by their judgment instead of the judgment of some subcontractor who is failing to discharge his duty under the contract; and because he thus decides, just as any court would decide, he is condemned. Why, gentlemen, I submit that question to you as twelve jurors. Suppose the question whether or not this thing should or should not be done was submitted to the judgment of you twelve jurors, and you had Anthony Joseph on one side and all this cloud of witnesses on the other side, which way do you think you would decide it? You would decide it exactly as Thomas J. Brady decided it. And because he thus decided it as an honest jury would be compelled to decide, you are asked to say that that is an indication that he is a rogue, a robber, and a thief who ought to be sent to the penitentiary. Let me take another illustration. My brother Merrick, in the course of his argument, said he would refer on a certain point to two routes as being samples of the whole. Let me refer you now upon the same principle to this Bismarck and Tongue River route, because that has been the raw head and bloody bones of this case from the beginning of this trial three months ago down to this time. It has been rung in your ears in season and out of season. Bismarck and Tongue River. Now, let us see. Don't you remember that they brought here, before this jury, the affidavit of Boone and the letter of Boone just after that contract had been let, asking that the service be discontinued on that route? Why? What were Boone's reasons for doing that? What had he to accomplish by that? He found that he had taken a contract where the route lay right through the wilderness, roads had to be marked out, ranches had to be built, all the appliances for carrying the mail had to be provided for, and the route went through a country that was being traversed day by day by hostile Indians. Now, he wanted to get rid of it, and he wrote a letter to the Second Assistant Postmaster-General asking him to discontinue that route. After awhile he sends in an affidavit setting out the difficulties of carrying the mail through there, and the fact that there were Indians abroad in that land, and he asks the discontinuance of the route. Well, what turned up on the other side? That

goes into the Post-Office Department. That goes, I will say, directly under the eye of General Brady, and he sees it and reads it and studies it and thinks over it. What comes on the other hand? Here come these military officers at Fort Keogh, a host of them. Here is the president of the Northern Pacific Railroad Company. Here are bankers and boards of trade, and here is General Miles coming in person, and Mr. Maginnis, the Delegate from Montana Territory, personally saying to the Second Assistant Postmaster-General, as these petitions say to him, "We need this service and this service we must have. We want not merely one trip a week on a slow schedule, but we want three trips a week on a fast schedule." General Miles goes in person and presses it upon him as a military necessity, as a matter with reference to which the Government has a large interest, and as to which I will speak further hereafter. But here these things are. Mr. Maginnis comes in and says "Mr. Second Assistant, this route from here [indicating] over to here [indicating] is two hundred and fifty miles or three hundred and three miles," as it turned out afterwards to be. "As it is now we have to send our mails away around by the Missouri River. It takes weeks to get them around that way, or they have to come around down here by Saint Paul and Omaha out to Ogden into Helena, Montana, and back, a distance of more than two thousand miles." In order to get into this Territory, where Fort Keogh is, you have got to go from the front door away around and come in at the back door, as Mr. Maginnis stated it here to you. Now, here are these two cases. Here is Boone, a contractor, who thinks he has got in a bad box. He is not able to put that service on. These gentlemen did not have the money to put that service on either. They were borrowing money to put the service on and they never could have put it on but for the fact that Vail came into their combination. These gentlemen are trying to get rid of that contract, and Mr. Boone writes a letter and makes an affidavit. That is one side of this case. On the other side of it here are all these petitions and letters, and these urgings in person upon the Second Assistant Postmaster-General not to discontinue but to increase and expedite that service. He has got to decide. It is his duty to decide. He is put there to decide. He must exercise his best judgment and discretion in regard to this thing. He cannot ignore this duty. He has no right to disregard this question that is brought before him. He is as much bound to decide that one way or the other, either to grant or to refuse, as you are bound to render a verdict in this case if you can possibly agree upon the facts. That is a duty imposed upon him by law. Now, gentlemen of the jury, he decides in favor of that which is asked for by these generals and bankers, and this Delegate in Congress, and all this horde of men who are petitioning and importuning him on that subject. He decides in that way and these gentlemen say to you that that is a badge of fraud; that he must have been corrupt when he made that decision. That is their argument.

Well, gentlemen, what is the next circumstance on which these gentlemen rely? They say he paid too much. How do you know he paid too much? They must prove that. We have not got to prove anything in this case, gentlemen; not a thing. When a man is accused of a crime they tell him in the indictment what he is charged with, and he can walk into this court and fold his arms and sit down and say never a word. He can even stand mute when called upon to plead to the indictment. He need not open his mouth. No, gentlemen, the philosophy of the law, and the reason of the law, and the justice of the law lies in the fact that when a man is accused he must be proven to be guilty. He

can come in here and sit down and say nothing, and unless the Government has proven him guilty the jury must say not guilty. How do you know that he paid too much? How have they proven that he paid too much? Let us see. They have brought here some subcontractors, and they say that they find the subcontractor got so much when the contractor was getting so much. Now, there is a profit accruing to the contractor by reason of the subcontractor that has been made, and therefore that proves that the contractor was getting too much. That is their logic.

Mr. KER. It was not on that route.

Mr. WILSON. I am not talking of that particular route. I am not dealing with routes. I am talking about the principle on which you are arguing this case, and I only occasionally allude to a route for the purpose of illustration. Now, how does that prove that the contractor was getting too much? Does it prove that he was getting too much, or that the subcontractor was getting too little? Which does it prove, gentlemen? In this case it proves that the subcontractor was not getting enough, not that the contractor was getting too much. Gentlemen, take all these routes and go right along over them now. If you go to the Bismarck route you find the contractor was not getting enough. Why? Because it was costing him more than he was getting. Is it not the proof that it was a good deal more than he was getting? There was no subcontract on that route. I say this testimony shows that the subcontractors on the other routes were getting too little and not that the contractor was getting too much. They are to prove that the contractor got too much. Why do I say that? Simply because, gentlemen of the jury, you find the subcontractors losing money in these operations. You find them being subjected to fines and deductions for having failed to carry the mail. If they had been paid more and had put on better service then the contract would have been performed. Therefore I say that instead of what they have here produced, proving that the contractor was getting too much, it only proves that the subcontractor was getting too little.

Well, gentlemen, there is another point that they rely upon. They say that he increased and expedited service in cases before the service under the contract began. That is one of the points that has been very frequently alluded to during the progress of this case. Let us see about that. Here Congress makes a great many post-routes every session. I think I recollect that Colonel Totten stated that it had made over a thousand at one session.

Mr. TOTTEN. They made twenty-four hundred at one session.

Mr. WILSON. I knew it was a very large number. Every year, as fast as this country develops, and in proportion as it develops, Congress is making these new post-routes, and here is a department utterly without experience in regard to them. The testimony in this case is that it has been the practice time out of mind in cases of that kind to put on the lowest schedule and the fewest number of trips. They begin experimenting with it, and they advertise it and let the contract on a small number of trips and a slow schedule. After the contract has been entered into and the contractor is getting ready to put on the service, a Leadville springs up out there somewhere, or something else happens by which the Post Office Department sees that the service that they have advertised for and made a contract for is entirely inadequate. Now, what does the law authorize the Postmaster-General to do? Why, it is framed, gentlemen, for the express purpose of meeting such cases as that. It does not make a bit of difference whether the service has begun or not;

not a particle. The contract has been made and the service is to go on to-morrow or next week or a month hence. Now, Mr. Secretary Teller comes walking into the office and says, "Mr. Postmaster-General, you have made a contract for one trip a week on a schedule of one hundred hours. Since that happened here are a thousand men in a gulch along the line of this route, and they need three trips a week, and they want that mail in quicker time than they are getting it according to the schedule under which you have made your contract." Now, I say the law was made expressly for the purpose of meeting just such cases as that, and therefore it is a common practice, and nobody ever called it in question until this case came up, to increase the trips or to expedite the time, if necessary, and give the contractor notice of that fact, and then he prepares himself and goes on to perform the service according to the new arrangement that the Postmaster-General has made. Right in the contract which he signed with the Postmaster-General is the stipulation that the Postmaster-General may do that thing at his will; so that when they say to you that he increased and expedited before the service went into operation and after the contract had been made, they are saying to you that you are to condemn him, and to brand him as a felon because he did that which the law contemplated he should do. It was his right to do it. It was his duty to do it. He violated no law in doing it, and I want to know how you, as honest men, can say that because he did it it is an indication of fraud and corruption on his part.

Well, but they say he did not declare these parties failing contractors. My brother Merrick says that the law says he *shall* do it; not that he *may* do it, but that he *shall* do it. He says the law is absolutely mandatory upon him, and that if he exercised any judgment or discretion in regard to it he violated the law. That is his proposition. I deny it, gentlemen of the jury. There is nothing better settled in the law than that the word "may" often means "shall," and "shall" often means "may." In this case the word "shall" only means "may." He *may* declare them failing contractors. Why do I say this? I will show you the reason for it. Here is a contract made to perform service. The Government has invited men to compete with each other as bidders for the performance of that service, and one man is lower than all the others, and the law requires the Postmaster-General to let the contract to the lowest bidder. Now, he lets it to the lowest bidder, and the lowest bidder on the 1st day of July, or whatever the date may be, does not happen to put that service on, perhaps as in The Dalles and Baker City case, where you recollect Mrs. Wilson was on the stand, an exceedingly intelligent lady. What did the proof show you in this case? Why, it showed you that these contractors had made their contract with a subcontractor to put the service on that route, and that the subcontractor was at The Dalles up to the very time when that service was to be put upon that route, and these contractors were relying upon him to put the service upon the route, but he disappeared and did not do it. Now, my friend says that the Postmaster-General is compelled by this law to declare that contractor, who had thus acted in good faith and was doing his duty, a failing contractor, that he is compelled to do it. Let us see if that is to be the construction of the law. If he declares him a failing contractor, what is the next thing? The next thing is that he must let that contract to the man who is next above the contractor who was the lowest bidder.

Mr. HENKLE. If he will take it.

Mr. WILSON. If he will take it. What is the result of that? Do you not see that you are, by this iron rule that Mr. Merrick is contending

for, forcing the Postmaster-General to award this contract to a higher bidder and making it cost the Government more money than otherwise it would have cost? Oh, gentlemen, you would have heard a very different story if they could have found a case where General Brady had with an iron hand stricken down the contractor because on the very day that he was to put on his service he did not do it. They would say "This man is trying to perpetrate a fraud by giving a contract for more money to some other man than the man who was the lowest bidder." You see it would force it up and the price would be greater to the Government. It would cost the Government more money, and if the time came when it had to be increased and expedited the cost would be pro rata, so that the result of this doctrine which Mr. Merrick is contending for would be to increase the cost of carrying the mails to the Government of the United States. It is unreasonable and it is not the law. From such a fact as that you cannot infer that when he granted time to a contractor to put on the service he was doing it from improper motives.

While I am speaking of that Dalles and Baker City route, by way of illustration, I may just as well mention another matter. They brought Mrs. Wilson here to prove to you that she had to put on temporary service in consequence of this subcontractor having failed to do his duty, and the contractor not being there, because he supposed that the subcontractor would be there to do his duty, and there was a route without any mail on it. Just such cases as that are provided for by the law. How? It authorizes the postmaster at the head of the route to make a temporary contract for carrying the mail until other provision can be made. In this very Dalles and Baker City route there was a temporary contract made. Did it cost the Government anything? Did it cost the Government a farthing? No, sir. Every dollar of money that was paid out on account of that temporary contract, and of every other temporary contract, as shown by the testimony in this case, was taken from the pay of the contractor. Now, how can you extract from a fact like that, from a circumstance like that, evidence that my client was a conspirator; that my client was doing this in furtherance of a conspiracy which was to put money into his pocket, when every dollar of that money in which they say he was mutually interested with the contractors and those other parties came out of those contractors?

They say, too, that he did not revoke a certain order that was made for increase of trips on the Rawlins and White River route; that he made an order on the 8th day of March for an increase of trips between Rawlins and White River; and Mr. Merrick told you, with his eyes

In fine frenzy rolling,

that he was ordered by the Postmaster-General to revoke that order. Mr. Merrick grew eloquent over this. He told you that Mr. Postmaster General James ordered him to do it and he refused. This was the crowning act disclosing that he was guilty of criminality. Mr. Merrick told you that he could not revoke that order. Why? He said he had been paid by Dorsey for making that order, and therefore he could not revoke it. That is what he said. I will come to it further along. Where is the evidence that Dorsey ever paid him for making that order? Is there any? Not a word of it; not a word of it. Yet Mr. Merrick stands here before this jury and deliberately says to this jury that he had been paid by Dorsey for so doing. He not only said that, but he said in addition that Mr. James ordered him to revoke that order, and he would not do it. Did James make any such order? Gentlemen, the

whole of that thing is simply this: The Postmaster-General called Mr. French's attention to that order, and the next day after that Mr. Brady went into the Postmaster-General's room and asked him the question: "Is economy to be the policy of your administration?" and the Postmaster-General said, "Yes," and right there that conversation ended, and the Postmaster-General never ordered him to revoke it, and never said to him that he wanted it revoked, and gave him no intimation that he wanted it revoked. I have the testimony right here before me:

Q. You have told it all. That conversation is this: Whether your administration was to be economical.

Mr. BLISS. That was not what he said.

Mr. INGERSOLL. I do not want your answer. Let the witness say.

Mr. BLISS. I object to your putting any words into the witness's mouth. If you repeat what he said, then it will be all right.

Q. [Resuming.] What was it that you said he said about economy?—A. The general wanted to know if economy was to be the policy of my administration.

Q. And what did you say?—A. I said it was.

Q. Now, you have told that entire conversation?—A. No, I have not told it; because the general came in and referred to a conversation that I had with Mr. French the evening before.

Q. What did he say in referring to it?—A. He said, "You spoke to French about this order." I said, "Yes." "Well," says he, "is economy to be the policy of your administration?" I said, "Yes." And that ended the conversation.

Q. Did you tell him at that time that you wanted it revoked?—A. I do not remember whether I did or not. I think I have given you the entire conversation.

He never told him to revoke it. Why should he tell him to revoke it? He was the Postmaster-General. The order was on his journal. He had signed that order and he had given it its life and vitality. There was no occasion for telling General Brady to revoke that order, because it was the Postmaster-General's own order, brought into life and being by his own act. It was on his record, and if he wanted it revoked there was no occasion for saying anything to General Brady about it. He could enter upon his own record the order revoking it, where the order had to be entered to make it effective.

Mr. HENKLE. Brady had no power to revoke it.

Mr. WILSON. Brady had no power to revoke it. The truth is, gentlemen of the jury, that Brady had not the power to make a single solitary expedition, and the regulations of the department show that in point of fact and in point of law the Postmaster-General himself is responsible for every one of these orders, because the regulations distributing the powers of the office among the various occupants of the Post-Office Department do not embrace expedition. But I am not going to stand upon any technicalities of that sort in this case.

Again, they say he made a retroactive order, and that retroactive orders are forbidden by positive statute. So they are. Did he make a retroactive order? You have heard a great deal about this. You have heard it in Mr. Bliss's opening statement, and I told you then, gentlemen of the jury, that they never would prove anything of the kind; that what would turn out to be the fact in the case, was this: That an order was made by telegram to increase or expedite the service on the Ojo Caliente route, and that after the service had been performed pursuant to the telegraphic order, the regular formal order was entered up. That was for the reason that they could not adjust the pay until they had procured the data upon which to make the computation. Now, I want to say one thing right here before I forget it, and that is, that this is a Sanderson route. Sanderson was the subcontractor for the full amount of pay, whether on the original contract price or what not, and therefore it cuts no figure in this case, and the charge in the indictment is not true so far as to say that this money was for the benefit of these

men who are named in the indictment, because the whole of the money went to Sanderson, as did the whole of the money in the other little route, twenty-nine or thirty dollars, about which I am not going to occupy your time. Now, about this retroactive order. It turned out, gentlemen, that the telegraphic order covered a certain distance from one point to another, and in making the final order which went upon the records of the department they covered a greater distance than was covered by the telegraphic order. Of course that was a mere inadvertence. It was a mistake, and I will show you that they have furnished the evidence right here in this record that that was never paid for, but it was deducted from the pay of the contractor. He never got that money at all. It was stopped against him by General Brady through the inspection division where, of course, it would be detected. The mistake was detected just as soon as they came to make up the pay of this contractor, and here is the evidence in the record at page 849. You will find that they deducted in that very quarter \$1,463.93 and \$1,958.26. Now, gentlemen; I want this prosecution to be fair in this case. I presume there is nobody in this case who wants to have anything taken as a fact against these defendants that is not a fact. I concede to you here that we ought not to have rested upon that record as it stands when we could have brought something more from the department in regard to it. Now, if I can point out to my learned friends on the other side just exactly where they can get the truth, the whole truth, and nothing but the truth as to this particular thing, if it makes for them or against them, I would like to know whether they are willing to have it come before this jury. If they are, I most respectfully refer them to the files of the inspection division, from which this record is made that they brought here, as showing that not one dollar of that money was ever paid to any contractor or subcontractor. It was a mistake. There is no doubt about it. Gentlemen, it is just like the other mistake we had in this case. If you are going to say that anything is criminal, if you are not going to allow that a man can make a mistake without being a criminal, that is another thing; but it is just like the other mistake that cropped out in this case. Why, do you not recollect the route that we had under examination and what the witness did? They showed where Turner in making an entry upon a jacket had by a most obvious inadvertence put in the wrong figures. Anybody could see it, and it was passed along the line and everybody saw at once that it was a mistake. It was a mistake against the Government of some four or five thousand dollars. We had a witness right here on the stand, an expert from the department, an honest man, who did not intend to do any wrong, and who did not intend to give any testimony untruthfully, either in favor of the Government or in favor of the defendants. He was giving the figures, and he made a calculation standing right here, and made it \$1,100 greater than Turner had made it. It was an obvious mistake.

Mr. KER. It was not \$1,100.

Mr. WILSON. Oh, well, call it a thousand. It was more than a thousand.

Mr. KER. Not at all.

Mr. WILSON. He did not?

Mr. KER. I think you will find you are mistaken in your figures.

Mr. WILSON. The jury all recollect about it. He made a mistake and I called his attention to it, and he admitted that he had made a mistake right there. Nobody thought anything wrong of it. It was a perfectly natural thing; but he made a mistake just as Turner made a mistake, and nobody took any account of it. Why? Because mani-

festly and transparently it was a mistake. When the department after awhile came to deal with that thing, they themselves, as we showed you by the papers that were brought in here, put a statement upon their jackets that that was a clerical error. His honor said that that was obviously a clerical error, and everybody admitted that it was a clerical error. So with the Ojo Caliente route, gentlemen. There was a mistake there. There is no doubt about it. But nobody suffered from the mistake. It was detected and the money was saved.

Gentlemen, in passing along, I want to call your attention to two matters that are worthy of your consideration, it seems to me. My associates Colonel Totten, made the point that these orders were the orders of the Postmaster-General. Mr. Merrick meets that by saying that the order, were not signed for a week, and sometimes for two weeks, and that even then the Postmaster-General did not know what was in them. Is not that their point? They said he could not know what was in it. Why? Because he had so much to do that he could not take time to read them or to have a clerk read them to him. Was not that the way of it? Well, if he did not have time to read the few orders—Colonel Totten had them here before you; they were made in the course of a week or two weeks even—I want to know how you expect General Brady to read all these petitions and to read all these affidavits and to hold all these petitions up to the light and scan them and put them under a magnifying glass to see whether or not something has or has not been changed with reference to them? I want you to think of that, gentlemen of the jury, and I want you to think of another thing, and that is this, that the rule they are asking you to apply to General Brady in this case would convict the Postmaster-General if he had been embraced in this indictment, because these gentlemen could have come right here before you and argued just as they have been arguing before you for days and days, that because he did not read the orders that he signed he must be a rogue. That is their logic. Apply that logic and the result would be that the ex-Postmaster-General, instead of sitting dispensing justice down in Tennessee, would be in the prisoner's dock awaiting a verdict at your hands.

Now, there was another thing that they have urged upon you with great persistency, and that grows out of what is called this deficiency. It was claimed that that was a violation of law. Now, that is not so, gentlemen of the jury. Deficiency appropriation bills are just as common as sessions of Congress. Why? Let us reason together about these things. Why are they so common? Why, before a Congress meets, or after Congress has met perhaps, generally before, the departments make up their estimates of the amount of money that is going to be necessary to carry on the business of that department for the ensuing fiscal year. They make their estimates. Now, very often they make them too low, but they go on just the same as though they had not made them too low, and they do not know whether they are going to be too low or not, but they go on performing their duties, making their contracts for the payment of money, just as though they had all the money that was necessary to do it. Before the year rolls around, and before Congress gets together again, they see they have not estimated for enough—or, if they did estimate for enough, that Congress did not appropriate enough—they have not estimated for enough, and therefore they go to Congress and say, "Here, we asked you for so much; it did not answer the purpose, and we present you this. We want this much more money." And Congress puts it in the shape of a deficiency appro-

priation bill, and that is the origin of all these deficiency appropriation bills that you are hearing about from session to session of Congress.

Why, I could illustrate this in various ways, gentlemen. Take the railway mail service. There is a deficiency this year in that railway mail service of \$1,500,000. Now, why? Mr. Blackburn says they gave them all they estimated for. Why this deficiency in the railway mail service, gentlemen? That has nothing to do with star routes at all. But why this deficiency? Well, it might have been enough when they asked for it, but there have been a thousand miles of railroad built since then, and have you ever heard of a railroad that did not carry the mails and did not carry them at least six times a week? No, sir. And then the weight of the mails is all the time increasing. The amount the railroad companies receive as compensation is constantly increasing, and the result of it is that there turns out to be a deficiency in the amount of money necessary for this railroad transportation, and, therefore, the Postmaster-General sends in his request to Congress to give him a million five hundred thousand dollars more than he asked for, in order that he may keep this railroad service going.

The COURT. I observe that Mr. Merrick said it was two millions. You state it as a million five hundred thousand dollars. I think it is a million seven hundred thousand dollars.

Mr. WILSON. I am speaking to the jury in round numbers. But it is a very usual deficiency. I am calling your attention to this by way of illustration. I am not intending to be accurate about the amount.

The COURT. Neither of you was accurate.

Mr. WILSON. Oh, no. But the amount has nothing to do with it so far as my argument is concerned. The point of my argument is that there is nothing in this thing of a deficiency. Why, gentlemen of the jury, if General Brady had been engaged in a conspiracy to get money by increasing and expediting this service, he would have provided this money in advance, he would have had it already. But he does not do that. He goes on in the discharge of his duty just exactly as everybody else has done, and then when it turns out that there is a deficiency, just as it turns out in this railroad case there was a deficiency, they send in and ask Congress to appropriate the money to meet that deficiency.

Now, gentlemen, the Postmaster-General sent to Congress the report of the Second Assistant Postmaster-General showing exactly what had been done, saying to Congress, "We have increased certain star routes all over this country; we have been giving to this western country more mail facilities, and the result of it is that there is a large deficiency in the appropriation for that special service." They told Congress whose routes had been expedited, whose routes had been increased, what the reasons were for increasing them, and what the reasons were for expediting them, and just what the cost was. That would have been a good time, gentlemen of the jury, if this was all wrong, for Congress to say, "You have given these men too much; you have increased this service where it was not necessary to be increased; you have expedited where you should not have expedited; now we will lop off this service." That would have been a good time, would it not, a first-rate time? Did Congress do anything like that? No, gentlemen, but after the most patient and painstaking and searching investigation, Congress said, "No, this service shall not be reduced, but we will appropriate the money to maintain this service." That was the judgment of Congress as to whether or not this expedition and increased rate of pay was right and proper.

Well, gentlemen, there is another thing. Mr. Merrick has condemned General Brady out of his own mouth. He refers to what is

known as the fifty per cent. law. That fifty per cent. law provided that there should not be any increase; that when there was an expedition of service it should not cost in excess of fifty per cent. of the regular contract price. Now he says General Brady recommended that law, and I say he recommended that law, and I say it was wise to recommend that law, and I say that instead of condemning him out of his own mouth it is a vindication of him. Now why? Gentlemen, the law before was "not exceeding pro rata." There was the regulation that I have spoken of, and it was the stipulation in the contracts that I have talked about. There were these things. Now, gentlemen, Mr. Brady wanted to put this thing in such a way as that whenever a contractor made his contract he made it with the distinct understanding that if the department was called upon to increase or expedite that service that no more than fifty per centum of the contract price should be added to it, thereby making a law by which the contractor would have notice of what he might expect in the future. So far from condemning him it vindicates him.

Well, they say he allowed a month's extra pay. Now, need I argue that, gentlemen, when these contracts, the integrity of which has not been assailed, provide for just that thing, and when the law and the regulations provide for it? And why, gentlemen? Because there is philosophy and reason in these things. Now, what is the reason for this month's extra pay? Why a man takes a contract and puts his stock on the route; he has his buckboards, his coaches, his what-not for the purpose of performing that contract, and here comes along Mr. Vanderbilt, Mr. Gould, and Mr. Dillon and Mr. Palmer, or some of these great railroad magnates, who can command capital to an almost unlimited extent at will, and they see that right along the line of that route is to be the great highway of commerce, and they seize upon it, and they go to work and at the rate of two or three miles a day lay down a railroad, and in a few months after this contractor has made his contract and put his horses, his coaches, his forage, his stations, his stages, his equipments of every character along that line, Mr. Gould or Mr. Vanderbilt, or some of these other great railroad magnates, have laid an iron track right down on the road where he is carrying this mail, and just so soon as the cars are put in motion on that road the mail is taken off the stage, the old lumbering stage that is disappearing and fast becoming one of the mere memories of this country. It is taken off the stage-coach and put on the railroad car. Why, gentlemen? Because it runs swifter, because it runs oftener, because it supplies the wants of this great and energetic American people better, and here is this contractor with his horses and all of his equipments and his occupation is gone.

Now, it is simply because these things are happening in this country that the law provides, and justice demands that there shall be some remuneration to that contractor for the losses to which he is subjected by reason of this state of things, and it is provided therefore, and it is written in all his contracts, gentlemen, that when anything of that kind happens he shall have a month's extra pay. But they say, "Why he has got a month's extra pay where the man had not absolutely got his service on." Well, what of it? The law allows it. It is awarded to him by law because presumptively he has gone to expense and trouble in preparing to put on the service and he ought to have compensation for this trouble and expense, because the Government is not going to keep that contract with him; in other words, the Government is not going to

require him to perform that service. It is written in the contract that if at any time after that contract is entered into any portion of this service is dispensed with pro rata he shall have a month's extra pay. And now, because these things that are stipulated for by the contract, that are provided for by the law have been done by my client, these gentlemen come here and ask you to say that in doing what the law provides he has done that which warrants you in branding him as a felon. That, gentlemen, is of a piece with all this case when you look through it from the beginning to the end.

And now, gentlemen, I come to consider another point upon which immense stress has been laid in the prosecution of this case. They have brought before you, and read it with extreme unction, the difference between the productiveness of a route and the cost of carrying the service upon it, and that they claim is a circumstance tending strongly to show that my client has been guilty of corruption in office, and that he is a conspirator, as charged in the indictment. The law, gentlemen, is this. I read it from the Regulations, page 129:

The Postmaster-General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

If I were to stand here upon rigid technicality, and I might do that in a criminal case, I would make a little criticism or comment upon the phraseology of this regulation.

The Postmaster-General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

Strictly and technically speaking, gentlemen of the jury, that has reference to the frequency of trips. But I shall make no point upon it. The prosecution apply it to expedition, and so let it be for the sake of the argument. The point is that the service cost largely in excess of its returns, and from that you are asked to say that it is evidence that Brady was in a conspiracy to defraud the Government. Mr. Merrick says that the Postmaster-General is required to regard productiveness as the first and the most important consideration. I think I quote his precise language. The law does not so read. That is the argument of counsel. The law does not read that way, gentlemen. The law says, "Productiveness and other circumstances." Now, I say that the proper construction of that law is simply this: That the Postmaster-General is to regard both of these things, and that either one is paramount to the other. Productiveness may be the paramount consideration in one case and the other circumstances may greatly preponderate over productiveness in another case.

Why, gentlemen, this might be illustrated in a great variety of ways. Take a case such as I alluded to a moment ago, where a mine is discovered away off at the end of a route, two hundred miles long, a place like Leadville, or some place of consequence, but of minor note; and the people go in there and they begin to sink shafts, and fix up their hoisting machines, and build smelting works, and all these things that are incident to a matter of that sort. Now the Postmaster-General sees that here is a case where more mail facilities ought to be given. Ores are coming out of the earth amounting to tens or hundreds of thousands a day. Active and enterprising business men are engaged there in developing this mineral wealth. Now, the Postmaster-General says I must give these people more mail facilities, and he looks over it and he says, "Well, there will be a hundred letters a day over that route; what

will the postage be on a hundred letters a day? It will be three hundred cents. Three dollars a day. Well, that won't pay; that does not produce enough according to our friends here. You must not give them those mails. Why, there would be only \$3 a day derived from that mail. There are no intermediate offices like up here at Bismarck and Tongue River. No intermediate post-offices, and these men have discovered a mine away out there two hundred miles off, and they want me to give postal facilities there when the thing would not produce but \$3 a day. I cannot do it. Mr. Merrick has come and told me that I am to regard productiveness as the paramount consideration, and I must be governed by that and by no other circumstances."

Now, in a case like that, gentlemen of the jury, would you say, if you had to determine it, that those people should not have those mails because it would only yield \$3 a day? Oh, no; you would say here are other circumstances that stand mountain high above this little, petty, miserable \$3 a day. It is the circumstance that these energetic and thrifty people are developing the resources of this country in a fabulous way and they must have their mails to enable them to do the business, and it is of infinitely more importance to this country that they have the facilities for doing this business they are engaged in than it is that the Government shall deprive them of those facilities because, forsooth, it does not get money enough out of carrying this mail to pay the expense of carrying it.

Now, gentlemen, is not *there* a case where productiveness would dwindle into absolute insignificance and nothingness compared with "the other circumstances?" And yet these gentlemen say to you that productiveness is the primary and the paramount consideration in the determination of these great questions that have to be determined by the Post-Office Department. It is a question, gentlemen, upon which I feel like apologizing to you for touching upon.

My brother Merrick told me before he began that he would take two hours and a half. He was two days and a half. I said to him that this jury would compliment me on making the best speech that was made in this case, because it would be the shortest, and here I am not done yet. Never mind.

The COURT. Do you want to rest now?

Mr. WILSON. I would just as soon rest now as at any other time.

The COURT. [To the bailiff.] Adjourn the court until to-morrow morning.

At this point (3 o'clock and 1 minute p. m.) the court adjourned until to-morrow morning at 10 o'clock.

WEDNESDAY, AUGUST 30, 1882.

The court met at 10 o'clock and 5 minutes a. m.

Present, the Attorney-General and counsel for the Government and for the defendants.

Mr. WILSON. Gentlemen of the jury, before taking up the thread of the subject I was discussing at the adjournment on yesterday, I beg your indulgence for a very few minutes while I bring to your attention a piece of evidence that I inadvertently omitted to refer to on yesterday, which has direct application and bearing upon the immediate subject which I was then considering. You will remember, gentlemen of the

jury, that Mr. Merrick had a great deal to say about the deficiency appropriation, and I commented upon that during the progress of my remarks yesterday. The report of the Second Assistant Postmaster-General, upon which that appropriation was asked, was transmitted, as you remember, to Congress by the Postmaster-General, and at page 344 of the record we have the communication that was made by the Postmaster-General to Congress on that subject:

POST OFFICE DEPARTMENT,
Washington, D. C., December 8, 1879.

Lest I may forget it when I come to discuss another feature of this case to which I shall presently direct your attention, will you please to bear in mind, gentlemen of the jury, that this communication was dated the 8th day of December, 1879. My brother Merrick, as you will remember, undertook to make a point against Mr. Buell and his testimony because he said that the investigation that was instituted was the result of a resolution which was not introduced until about the 8th day of January, 1880. But this communication from the Postmaster-General calling the attention of Congress to all that had transpired with reference to these matters that you have under consideration, went to Congress, addressed to the Speaker of the House of Representatives on the 8th day of December, 1879. Now here is the communication:

SPEAKER HOUSE OF REPRESENTATIVES:

SIR: I have the honor to transmit herewith a communication from the Second Assistant Postmaster-General calling attention to the insufficiency of the appropriation for inland mail transportation for the present fiscal year, asking that the sum of two million dollars be reappropriated out of the unexpended balances of former appropriations for that purpose—

In other words, prior to this there had been appropriations made that had not been used, and the Second Assistant asked that these unexpended balances be reappropriated for this purpose—

which have been covered into the Treasury, and be made available to meet the necessities of the service and of the country during the current fiscal year. I cordially indorse this recommendation, and take this occasion to suggest that the business interests of the country would be promoted by the prompt and favorable action of Congress.

(Signed)

D. M. KEY,
Postmaster-General.

Now, gentlemen of the jury, these gentlemen have sought to impress upon you in this case that the Postmaster-General had been deceived by General Brady, and they charge in this indictment that General Brady was resorting to these things for the purpose of deceiving the Postmaster-General, do they not? And yet, right in the face of the allegations of this indictment, and right in the face of all that has been said here, comes this communication of the Postmaster-General, in which he says that he cordially indorses what the Second Assistant Postmaster-General is asking to have done, and suggests to Congress that the business interests of the country would be promoted by the prompt and favorable action of Congress. Why, gentlemen of the jury? Because, unless Congress did appropriate this money as asked for in these communications, what would be the result? The result would be that the service would have to be cut down in order that at the end of the fiscal year the expense of the service should square with the amount of the appropriation. Now, the Postmaster-General says that the business interests of the country require that this thing shall be done. What

does Congress do? It follows the suggestion of the Postmaster-General. Congress adopted the idea that it would not be well for the business interests of the country to cut off this service that had thus been created. Now, gentlemen of the jury, as I said, that is just in the line of what I was discussing. It throws light upon the point that I was discussing, that is to say, this question of productiveness. You will remember that at the outset of this case I said there were two theories prevailing in this country on this subject; one that the Post-Office Department ought to pay its own way. A great many honest people think that way. That is their judgment about it. Then, there is the other opinion, that mail facilities should be afforded, although it does not pay, and there are a great many very honest people who believe that way. One man can believe one way and another man can believe the other way, and both men be equally honest. Is not that so? It is a broad, and a deep, and a far-reaching question, gentlemen of the jury, that you now have to consider. One view of this question looks merely to to-day. The other view looks not only to to-day, but contemplates a grander and a greater future for the country. It is in the nature of an investment. You loan out your money to-day, but you get the returns on your investment hereafter. The English Government pays subsidies to ships. They invest the public money in aiding private enterprise. There are a great many people who think that is wrong in principle, honestly think so. There are a great many people who think it is right in principle. The British statesmen think it is right in principle. They think it is wise to do this thing. The money that they give does not ever come back directly to the British treasury—the few hundred thousand pounds—but their ships sail every sea and they gather riches from every clime. While the British treasury directly does not get the money back, yet the increase of prosperity of all that industrious British people more than compensates the treasury for the money that is paid out of it. That is their view of it.

Gentlemen of the jury, statistics show that we, the people of this nation, are paying annually to foreign ships and to foreign ship-owners more than \$150,000,000, for transporting abroad the surplus products of this nation, and there are men who believe and who honestly believe that if this Government of ours would adopt the English policy and would foster our own commerce by aid from our Treasury, that our own citizens would receive this \$150,000,000 per annum and that thereby prosperity would come back to the people of the whole country. There are wise men and honest men who believe that that would be a sound and a wise policy. Some of our very wisest men believe, and they have advocated it not only in the halls of Congress but they have advocated it before the people, that the Government of the United States ought to pay largely for carrying the mails on American ships, to the end that American ships might sail the seas instead of their sails flapping idly at our wharves. There are wise men and honest men who believe that way. Some men think that a tax in the shape of a tariff levied upon products that are imported into this country is a wise thing because it aids the American citizen in developing the resources and the industries of his own country. Other men think differently and honestly think differently. These are vast questions of political economy about which men have differed honestly for more years than either you or I have lived, and will continue to differ through all coming time. The question we are now considering is kindred to this. Some men think, and honestly think, that frequent and speedy mails give large returns in the encouragement to enterprise and to growth of the country and the development of its

resources, although the disparity between the productiveness and the cost may be great. Then there are other men who think that in a military point of view that kind of policy is a wise policy, and that is the theory for which I contend, and the theory upon which this department was conducted, and which finds great strength in the railroad enterprises of the country. The most sagacious and the most far-seeing financial men of this country are pushing railroads into the wildernesses and vast places of the nation, not because there are people there; not at all. The time was when the pioneer with his ax on his shoulder went into the wilderness. Then the sturdy, strong-armed, and stout-hearted man was the pioneer. But it is so no longer. The railroads are the pioneers. They go forward and the people follow after. Why, gentlemen of the jury, you know as a part of the history of this country that when the Union Pacific Railroad was constructed from Omaha across the continent to Ogden, a distance of more than a thousand miles, and the Central Pacific Railroad from that on to the Pacific coast, that there were no settlements and there were no inhabitants through the wilderness and the waste places, and in the construction of the road, while one man wrought with his pick and his spade, another man stood over him with a musket to protect him from the hostile Indians that were occupying that country. How is it now, gentlemen? More than 90 per cent. of the enormous revenue of the Union Pacific Railroad Company, being nearly \$25,000,000 comes from the local business of that corporation. How was that local business developed, gentlemen of the jury? It was by the people, having had the facilities furnished by that corporation, being enabled to go in there and develop the resources that had long lain latent in that region of our common country. Look at the Northern Pacific, running from Duluth across to the Pacific Ocean on a line further north. Who lives along the line of that road? Who went into that country in advance of that road? There are those vast wheat regions, the richest, the most productive, and the most valuable in the known world—the great wheat-growing region of the world. Who could occupy that country but for the enterprise that forced the railroad through there and induced the people to go in and develop these resources? And now another railroad, commencing at Granger and striking out to the northwest to Baker City, runs for more than six hundred miles where no white man treads the earth, and then over one of these very routes—The Dalles and Baker City route—that road is to be constructed; so that another line is pushing through the wilderness for the purpose of affording the people the opportunity to go in there and settle up and occupy this country. These things are illustrative of my proposition, gentlemen of the jury. They illustrate that other circumstances than the mere matter of productiveness are to be taken into consideration, and that oftentimes the other circumstances are of vastly more consequence than the mere question of the amount of postage that is to be derived from carrying the mail. I have referred to these things, gentlemen, for the purpose of showing you that this is no mean question with which you have to deal. So far as I know, you occupy the position of being the first jury that was ever called upon to deal with these vast questions of statesmanship in the trial of a criminal cause, and the very fact that you are compelled to decide questions such as these, it seems to me, condemns this prosecution utterly. This case, gentlemen, is not to be decided upon petty questions as to a few men and horses. It has broader and deeper questions involved in it. I have brought your attention to them because they are in and of and inseparable from this case, to impress upon your mind that men may differ with regard to them

and still be honest. That is my point. If I can satisfy you of that you will see that the fact of the cost of the service on these routes, although greatly exceeding productiveness, proves nothing against my client.

Now, gentlemen, after awhile I am to be followed by the learned Attorney-General. I shall listen to hear whether he thinks men can be honest and act upon the belief that the circumstances of supplying military posts and developing the resources of the country were of more consequence than mere cases of productiveness. My brother Merrick evidently thinks that it cannot be, because he said to you that productiveness was paramount, and because there was no productiveness in this case, he has argued to you that my client is a rascal. My brother Merrick evidently thinks that Secretary Teller is exactly not square and straight. He told this jury that Secretary Teller, in making the recommendations he did, was seeking popularity among his own constituents. I want to see whether the Attorney-General shares that opinion, and I want to know whether he entertains the same opinion of General Sherman and of Mr. Valentine and of Mr. Maginnis. I want to know whether or not he believes that men can entertain these opinions without being rogues and thieves. And in order that neither you nor I nor anybody else may overlook this matter, I want to read you some testimony. I commence at page 2021:

HENRY M. TELLER sworn and examined.

By Mr. INGERSOLL:

Question. Were you a Senator in Congress from the State of Colorado in 1878?—

Answer. I was, sir.

Q. When did you first enter the Senate?—A. December, 1876.

Q. When did you leave the Senate?—A. In April last.

Q. You are now Secretary of the Interior?—A. Yes, sir.

Q. While a Senator, and representing in part the State of Colorado, did you ever call upon Thomas J. Brady, say in the years 1878 and 1879, and urge upon him the increase or expedition of any mail routes in your State; and, if so, will you be kind enough to state to the jury, as near as you can remember, the reason that you urged for such action?—A. I very frequently called on Mr. Brady with reference to the increase of service and expedition of routes. Of course I gave various reasons why it should be done.

Now, you will recollect, gentlemen of the jury, that he is talking about the routes that are in this indictment, because the court confined the testimony to that point.

A reason that perhaps would be given in one case might not be given in another.

Q. I want the general reasons that you gave.

Mr. BLISS. I object to that—

You see we were trying to throw a flood of light on this thing and they were objecting—

inasmuch as he states that the reasons on one route might be different from those on another. The general reasons very obviously are not admissible. They should be confined to what he gave in the particular routes.

The COURT. I understand that this question is directed to the same object to which the other questions were to the other witnesses.

Mr. INGERSOLL. Exactly.

A. I had a general theory as to the duty of the Government with reference to these mail routes in the West, and that I always urged. Then there was undoubtedly—

Q. [Interposing.] What did you urge? What was your theory?—A. My theory was that the Government owed it to the people who went into the western country to give them mail facilities. I think I have repeatedly said in the Senate that every mining camp of twenty people was entitled to daily mail. I gave my reasons in the Senate, and I gave them frequently to the officials, both Mr. Brady and others. I thought that the people who went out to settle up a new country had not lost any rights that they had before they went there. I thought the people who went from New England and New York and other places had a right to have these facilities, and that it was as much to the interest of the people back in New York and elsewhere as it was theirs.

to communicate with them. I never inquired what the cost of it was. When met by them with that objection, as Mr. Valentine said he frequently was, I always averred that in my judgment the Government had not any right to waive the service, and that if the people went there the Government should, irrespective of cost, give them the facilities; that there is no reason why the Post-Office Department should pay, any more than the Army and Navy should pay, their own expenses. That was the policy that I urged in Congress and out of Congress.

Q. Did you at that time have any policy of your own or any view of your own as to the effect that frequent mail communication would have upon the settlement of what is known as the Indian question?

Mr. MERRICK. Wait a moment.

The COURT. That is objectionable.

Q. And did you so express it?

The COURT. It is not what views he had, but what he urged.

Mr. INGERSOLL. Of course.

Q. Did you urge such views upon the Postmaster-General and the Second Assistant, or either?—A. I think I rarely went to the Postmaster-General. I think I did my business almost universally either with the Second Assistant, Mr. Brady, or, in his absence, with the clerk who had charge of it, Mr. Turner, I think. I do not remember whether Mr. Turner was the clerk all the time or not. I occasionally had to go to him when Mr. Brady was not in the office. I think I generally went to General Brady when I could. I urged various reasons why these routes should be established, and I believe in almost every instance I succeeded in getting the increase of service and expedition I asked for. I was very much pressed by my people. People would get into a mining camp at a distance beyond the railroads, and then commence immediately asking for mail facilities, and in our country, Colorado especially, a mining camp would spring up from a very small hamlet to a flourishing town in thirty or sixty days, and I complained that the department did not keep pace with the settlement. I urged all this, and expressed the opinion that the settlement of the Indian question would be somewhat facilitated by the fact that we distributed the people over the country in the vicinity of the Indian reservations, and that the more people we had the more mail we had; and the more people we had and the more mail we had the less difficulty we would have with the Indians. I urged that both in the Senate and out of the Senate. I don't recollect now, without looking over, just what routes I recommended; but I suppose I recommended every one that my constituents asked me to.

You have seen that he did:

I have no doubt about that. I know that when I went home in 1878 and 1879 I wrote quite a number of letters, I think, to Mr. Brady, urgent letters, to have certain mail facilities, principally in the southwestern part of the State, which was very rapidly developing—I think, perhaps, there may be on file some letters of mine concerning the Leadville mail, also. Leadville sprung from a mere hamlet to a large town inside of a very brief period.

Now, that is Secretary Teller's testimony. That is what he says upon this great broad question of statesmanship, for that is what it is. You will find here as distinguished a man as Secretary Teller, a man who needs no encomiums from me or from any other man, telling you that as to all these Colorado routes, for I believe his name appears upon all the petitions or letters—if there is any exception it does not occur to my mind now—he went in person over and over again, and he wrote letters over and over again to the Second Assistant Postmaster-General and thereby urged upon him to do these things, for the doing of which Mr. Merrick shakes his fist in his face and says, "Oh, you are a precious rogue and a robber." If he is such for doing it, Secretary Teller is a rascal for asking him to do it, and they cannot get away from that logic.

Now, let us go a little further, gentlemen. Mr. Valentine was brought upon the stand. Mr. Valentine represents one of the great States of the Northwest. He is the sole Representative from the State of Nebraska. There is a Congressional district that covers the entire State. Naturally Mr. Valentine would want to do not only the best thing for the people who inhabit that State but he would want to do the best thing that he could for the State itself by inducing immigration into

the State, for the more people he could get there the richer his State would become. What did he tell you?

Q. Were you acquainted in 1879, 1880, 1881, and are you acquainted at the present time with Thomas J. Brady, who was at one time the Second Assistant Postmaster-General?—A. Yes, sir.

Q. While you were a member of Congress did you ever call upon Mr. Brady and give your opinion as to the necessity of increasing or expediting any mail service in your State?—A. I did.

Q. How frequently?—A. Almost every day.

Q. For about how long?—A. At least for the first three or four months after I came in I called almost continually, urging increased mail facilities for the northwestern portion of my State.

Q. Do you remember now any of the reasons you laid before him for the purpose of controlling his action?—A. I think I do.

Then Mr. Bliss interposes, and after getting through the objections, it proceeds:

Q. Now, if you remember any of the reasons that you laid before the Second Assistant Postmaster-General and urged upon him for the purpose of having any routes expedited or increased, you will please to state those reasons.—A. Almost immediately upon my entering into Congress I began to receive petitions and letters from the citizens of my State, urging increased mail facilities. I was personally acquainted with a good portion of the State, and knew personally that it did not have such facilities as I thought it ought to have in that direction, and I repeatedly called upon General Brady, who was then the Second Assistant Postmaster-General, and urged increased mail facilities for my State. I remember that when I would mention a specific route or ask for an increase upon a route as to which I would bring the petition saying what the route was, he would send it to Mr. Brewer, who was a clerk in the contract office, I believe, to make up the case, as he called it, and I was met by him with a brief upon the back of my application stating the amount of revenues received at the different post-offices along that route, and he would sometimes say, "I do not think we can afford to do that; there isn't sufficient revenue." I told him that I did not think that that ought to enter into this question; that I believed the people of the western country, the pioneers who were settling it up, ought to have increased mail facilities, or facilities equal to those of the people who lived in New York or Washington; and I also told him that I thought it was one of the best things with which to settle up a country, that I knew of, and I cited to him instances of people who came into my State, looked over the northwestern portion, said it was a handsome State, liked the country who would say, "Where is the post-office? And how often have you your mails?" And when told it was only once a week, they shifted down to the southern portion of the State, where the mail facilities were much greater, and I asked that the policy be changed to a certain extent. During the first year after I went in I will state that I almost invariably went in person to the Second Assistant urging these routes. I do not remember one instance in which I referred a paper to him by mail when I was in the city of Washington.

Q. You went personally?—A. I went personally.

Q. [Submitting the paper marked 4 A. to witness.] What is that?—A. It is a letter from Mr. Seaman, of Kearney, addressed to me, dated April 4, 1879, with reference to a route running between Kearney and Loup City, in my State. My recollection is that I carried that letter personally to General Brady, and recommended the granting of the increase asked for.

That is one of the specific routes in this indictment, gentleman of the jury. Mr. Valentine entertaining these views with regard to the interests of his State, and the interests of the people, went personally to General Brady with reference to that very route and urged upon him the granting of this petition.

Mr. BLISS. Look at the back of it.

The WITNESS. [Turning the paper over.] I see it, sir.

Mr. BLISS. What does that say?

The WITNESS. That says, "Referred to Mr. Valentine, M. C." I think the reference was a personal one, however; if not, I should have had some indorsement on it, either for or against the request. I undoubtedly left that paper in person.

By Mr. INGERSOLL:

Q. [Resuming.] What route is that?—A. From Kearney to Loup City, it says.

Q. Was that one of the routes you endeavored to get the service increased upon?—A. Undoubtedly, sir. I will state that I had it increased to a daily last week.

Mr. Bliss—

Jumping up—

That is not evidence.

And the bailiffs shouted, Silence! Silence!

Now, gentlemen, these are the views that that man entertained, and these are the views he was urging upon General Brady, and these are the influences by which the route from Kearney to Loup City was increased and expedited. Yet these gentlemen say to you that General Brady is a rogue because he did it. If he is a rogue, by the same reasoning Mr. Valentine is a rogue, too.

Let us look a little farther. There is another gentleman who figures as a witness in this case, of whom it is necessary for me to say no more than to mention his name—General Sherman. His name is a household word throughout the length and breadth of all this land. He was brought upon the witness-stand because he had been asking General Brady to do these things. He comes to you on a different stand-point. Here we have one man, Secretary Teller, who was representing a State that, perhaps, is not surpassed in all this world for its mineral wealth. Here is another gentleman who was representing a State famous for its agricultural capabilities. Now comes a man at the head of the Army of the United States, who is, perhaps, more familiar with all that country than any other living man, for he has visited all these military posts, and he knows all about them. He came upon the stand and there was quite a lengthy discussion as to the admissibility of his testimony. These gentlemen who are so anxious to give this jury a flood of light, were exceedingly anxious that the testimony of General Sherman, Mr. Teller, and Mr. Valentine, and that class of witnesses, should not be brought before the jury. Here was something they did not want you to know, but the court said you had a right to know it. Now, allow me to read:

Q. You may state to the jury in your own language the reasons you had for recommending that the service be increased from three trips per week to seven, and state the circumstances that were then in your mind and that existed.

Then follows the discussion over the objection that was interposed by my brother Merrick. Then comes a renewal of the question, and the answer on page 2077:

Q. Now, general, you may state what circumstances there were.—A. The facts which operated upon my mind are well known to the public now, and reached us by telegraph from official sources and by mail—that the agent of the White River Agency was murdered, with several of his employes, and his family were in the hands of the hostile Indians. Troops were ordered from the nearest convenient points to converge there, and a fight occurred between Major Thornburgh and these hostile Indians, in which Thornburgh himself was killed, and several of his officers and men were killed. So, for a time, there was a condition of war between Rawlins Station on the Pacific Railroad and White River Agency, now called Meeker, after the agent who was killed there. During the time the troops were pushed forward down the White River, it was to our interest, and to the national interest, to keep up communication with the rear, that is, Rawlins Station on the Pacific Railroad, by every means under the control of the General Government, including the Post-Office Department. Therefore, I thought it was their share to constitute a daily stage line which would picket and give us information to and from at all times. They responded to it very promptly, and I believe it was one of the many means adopted by the General Government to produce peace, which now prevails there.

Now, these learned gentlemen, when they discuss this case, say, "No, General Sherman; perhaps there would not be half a dozen letters a day between Rawlins and White River. You had some Army officers down there, and you had a few soldiers down there, but there was not anybody else down there, and there would not be very much mail

carried, and the thing would not pay." That is their argument. Now, gentlemen, are there not other circumstances here, prompting, suggesting, persuading, and compelling the putting of this service on, that are of far more consequence to the Government than the few dollars that would be derived from the letters that might be carried? Do you not see, gentlemen, that you are dealing with no mean question? Do you not see that, in the decision of this criminal case, these gentlemen are calling upon you to settle great questions of statesmanship? General Sherman says that it was to the interest of the Government to have this daily stage-line put on there to picket the road, &c. Now, if he had been the Second Assistant Postmaster-General entertaining these views he would have done that, would he not? Let us go on a little further. We got into another row there over the admissibility of this testimony which I do not care to read to the jury. We have had that *ad nauseam* and a good many other things *ad nauseam* in this case, chief of which is my argument before you now:

Q. Now, I want you to state your opinion first, as to the agency or instrumentality to bring about peace or to hasten its coming, and, second, as to the instrumentality for the preservation of peace, of frequent mails.

Mr. MERRICK. Is that question limited to these routes?

The COURT. Yes.

Mr. MERRICK. These two routes that we spoke of.

A. Nothing enables an officer to keep peace in a country confided to his care better than frequent intelligence from all parts of it; so much so that we expend probably one-quarter of our force in doing that work to-day, in keeping our courier lines where there are no mail lines. As a rule we endeavor to get the Post-Office Department to establish as rapid and frequent mails as we can, because in that way they assist us in obtaining quick intelligence, whereby the remedy may be applied before the danger becomes too great. I say that frequent mails are very advantageous and very useful in suppressing Indian outbreaks.

Q. How is it as to preventing them?—A. Anticipating them and thereby preventing them.

Q. About what part of the force has to be used for couriers? I did not quite understand you—about one-fourth?

* * * * *

A. Frequently about one-quarter is necessary to keep up communication.

Then comes another row over the admissibility of the testimony, and that having passed the testimony proceeds:

Q. Will you state now the general circumstances under which you did that, and why you thought it advisable?—

Speaking of the route from Bismarck to Fort Keogh—

A. At that time Bismarck was the terminus of the Northern Pacific Railroad, and all the mails went from that terminus to Fort Keogh in a straight line, now passed over by the Pacific Railroad itself. It was, in anticipation of the construction of that road, shorter by nearly ten days, than around by Fort Buford, which, if you remember the geography of the country, is around northwest about two hundred and fifty miles and southwest three hundred and odd miles; whereas, by going across the bend of the stage line we got the mail in three or four days instead of weeks.

Q. Were there any military reasons?—A. It picketed the country between Bismarck and Fort Keogh, which was the first post on the Yellowstone.

Q. What do you mean by picketing? I want the jury to understand.—A. About every twenty miles the stage company put up a station with two or three men to take care of the horses. The stations were either sod houses or log cabins, and loop-holed, and they would also have a stable, either under ground or above ground, in which to stable the spare horses. These stations would be about every twenty miles, and at the stations two or three men with rifles, which answered the purpose of soldiers. Then every twenty-four or thirty-six hours the stage passed along, and it picketed the road just the same as with soldiers, exactly; in the same manner, and to the same extent.

Q. Did you therefore consider it of importance to the General Government?—A. I knew it was very important. Either they had to do it, or we would have to do it with our troops.

Q. Did that mail route constitute what might be properly called a line of defense?—

A. Yes, sir; a line of defense and a line of communication.

Q. Was that at that time one of the most dangerous parts of the country so far as Indian outbreaks were concerned?—A. It was about the most dangerous part of the country there was to guard between Bismarck and Fort Keogh. Now it is all settled up with good farms.

Now, gentlemen, right there. That single sentence of General Sherman's, composed of a half dozen words, verifies all that I have been contending for in this case upon this branch of it:

It is all settled up now with good farms.

You recollect that Mr. Maginnis, when he was on the stand, told you that when this mail route was first started, in 1878, there were no persons living between Bismarck and Fort Keogh, and no settlements there; but now he says you can travel through there and stop every night at a ranch or at some farm-house. General Sherman says that now it is all settled up with good farms. If the Congress of the United States had never put that mail route across there, and if the enterprising men of this country had never projected the Northern Pacific Railroad through there, half a century hence there would not have been a ranch or a farm-house in all that country. The people could not go there. They could not live there. But it is this spirit of the Government, this aid that the Government gives to the people that enables these vast spaces that are useless and worthless, traversed only by Indians and buffalo, to be made:

To bud and blossom as the rose.

Now, gentlemen, let me continue to read to you from this testimony:

Q. Is that the country in which General Custer was killed?—A. A little west of that, about one hundred and forty miles west by south of Keogh.

Q. What Indians were there at that time engaged there?—A. The Sioux.

Q. Was Sitting Bull one of them?—A. Sitting Bull was the chief one of the band.

Q. Are you acquainted with Captain Albert T. Smith?

The WITNESS. Aide-de-camp to General Terry?

Mr. INGERSOLL. We have it Albert T. Smith, on duty at Camp Thomas.

The WITNESS. That is in Arizona.

Q. Do you know where it is?—A. Certainly; I have been there.

Q. Do you know about Captain Smith being there?—A. I do not.

Q. Was General Wilcox there?—A. He commanded the department in which that fort is. He has headquarters at Fort Whipple, at Prescott.

Q. Do you now remember whether he made any application to you for the use of your influence in getting expedition and increase of mail service through the department?—A. I could not recall that specific case, but he has done so in a hundred cases.

That brought Mr. Merrick to his feet again. Then ensued another long discussion, and finally comes this testimony on page 2081:

A. There are in parts of Arizona about forty-five hundred Apache Indians, of a peculiar character. They have been hostile to the Spanish race since the beginning of history, and to us ever since we have had the country—1846. They are so hostile to-day that we have got them corralled, as we call it, and they break through their corral just like cattle would break through a fence. At this moment we are pursuing some who are fugitives, escaping they know not where. In 1879 they were pretty bad. I have been over the road from Benson by way of Camp Grant and through Thomas. The San Carlos Agency—

Mr. MERRICK. [Interposing.] Is that on this route?

The WITNESS. On this very route. I went in an ambulance with six mules and took only one soldier with me as an escort and went to the agency and stopped at the agency over night and went amongst the Indians and inspected them, and in about three days one hundred and ninety of them broke out and killed about forty people around Clifton. Some were overhauled by our troops and some escaped and got into Mexico. These Apaches have been hostile since the beginning, and probably will remain so until they are all gone.

Q. State whether at that time it was, in your judgment, necessary or good policy to have this mail.

Mr. MERRICK. What time ?

Mr. INGERSOLL. Eighteen hundred and seventy-nine.

The COURT. That is not the question at all.

Mr. INGERSOLL. State the circumstances.

The COURT. He has stated the circumstances.

Then followed another long discussion. Now, gentlemen of the jury, there is the testimony of a man who knows more about this country, and knows more about this Indian question, than any other living man, and that is his view of this subject. He says that he urged these increases and expeditions. He urged them in the interests of the Government, he urged them in the interests of peace, he urged them in the interests of economy. And because the argument that a man like Sherman, or a man like Miles, could bring to bear upon the Second Assistant Postmaster-General prevailed with the Second Assistant Postmaster-General these gentlemen want you to believe that the Second Assistant Postmaster-General is a robber and a thief, for these are the mild words with which they vex his ears as he sits here listening to this trial. Why, gentlemen, Mr. Merrick says that if these farmers out West got a mail now and then—I use his precise words—that is all right, and they are satisfied; they don't want anything more than that. Oh, no; poor innocent souls, they do not need anything more than that out West, you know. Now, take a farmer who lives up here, say about Ellicott's Mills, where it takes two stalks to raise a small nubbin of corn, and where a quart of milk costs that distinguished farmer more than a bottle of champagne, and where every potato that he digs out of the ground costs him at least a quarter, and he pays all these expenses by practicing law, that kind of a farmer ought to have a mail about six times a week, and an agricultural report sent to him in every mail. I happen to come from a State, gentlemen, that in this last harvest just gathered from the fields and into the garner, produced more than 47,000,000 bushels of wheat alone. I would like to see my friend Merrick go out among those farmers who get their mails every day, and get them by steam, and I would like to see my friend, the distinguished Attorney-General, go out among those farmers and say to them, "Oh, good, clever souls, now and then will do for you." They wouldn't make much headway in running for Congress, I can tell you, by talking that way out there.

Now, gentlemen, look at these other men, not less deserving, but a little further away, who are digging millions and millions of the precious metals out of the bowels of the earth where they have been hidden these many centuries, and giving it to the commerce and business of the world. "Now and then" will do for them, but my brother Merrick must have a man go around every morning with a uniform on him and hand him his mail before he gets out of bed, for that letter-carrier rings Mr. Merrick's door-bell before he has been aroused from his slumbers, as sure as you are born. It will not do, gentlemen. That kind of talk won't go down in this country, mark it! They may talk to you in this case; they may send my client to the penitentiary if they will, but when all this excitement that these gentlemen have created in this country shall have passed away these people will say, "Now and then won't do for us."

Now, gentlemen, do you not see that if Secretary Teller had been Second Assistant Postmaster-General he would have done exactly what Brady did? There is no doubt about it, or else he is not honest. He said it in the Senate; he said the people needed it; he thought it was a wise policy; and if he had been there he would have done that.

General Sherman would have done the same thing; Mr. Valentine would have done the same thing; Mr. Maginnis would have done the same thing; and so would Mr. Belford; and so would all these men.

Now, gentlemen, I want you to understand that I am impressing this thing upon you for the purpose, as I said before, of showing you that a man could make these increases and these expeditions in the discharge of a duty imposed upon him by law, and still be honest, and that from the fact that Brady did it you can make no inference as against him. All these circumstances are the separate, independent facts—separate, independent, official acts—acts done within the law, acts done in cases where the man who did them was compelled to decide one way or the other. And what I say now here is this, that these circumstances and these facts are not such as that you can draw an inference of criminality from them, but, as the court has said over and over and over again, they must be presumed to be rightly done, and done from proper motives.

Well, gentlemen, a word or two on this subject I think will make it pretty plain. Look at our Government. It has three what we call equal co-ordinate branches, the executive, the legislative, and judicial departments. Each has its functions to perform. Neither one has the right to interfere with the functions of the other. Congress, for reasons that seem sufficient to Congress, proceeds to pass a law to pay a claim, to establish a post-route, to provide for cleaning out a harbor, and so on, acting within its own sphere as laid down in the Constitution.

And then comes the judicial department, and it has its functions to perform, in the trial of causes, and all that.

And then comes the executive department which has its functions to perform. And in all these great executive departments, in all their divisions and subdivisions, men are constantly called upon to make decisions. They decide upon the lights that are brought before them. They decide upon the best evidence that they have and according to the best judgment that they have.

Why, gentlemen, so distinct are all these departments, one from the other, that this court will not undertake to compel an executive officer of the Government to decide any question in any way. It will sometimes say to him, you must decide, but it always says to him, decide it your own way; we have no power to control that decision. And hence, whenever a *mandamus* proceeding is instituted against an executive officer, every lawyer knows in advance that the court will not undertake to control the decision of that officer. It may compel him to do something, but what he will do is a matter for his own judgment and his own discretion. So that you will see that these executive officers decide these questions for themselves, and I say that it is a monstrous proposition that a jury can sit in judgment upon the question, whether he has decided right or wrong. You cannot do it, gentlemen of the jury. You cannot sit in judgment upon the question whether he was right or wrong in his decision. Whether it was wise to do it or not wise to do it, this jury cannot decide. Every act done by an executive officer, in the nature of the decision of a question that comes before him for decision, is presumed to be right, and it is only, gentlemen, when corruption intervenes that the court can make any inquiry with reference to the act of an executive officer. And even that is disputed by some of the highest and best authorities, but is conceded for the purposes of this case.

Then what? You must presume that every act done within the law was done from a proper motive; that every act within the law must be taken as a lawful act; that you cannot say it was unwise and must be

condemned. You cannot do that ; that is beyond your province, and, therefore, to prove these orders does not advance you one single step towards proving a conspiracy. They cannot prove Brady in a conspiracy by showing acts which you do not think were wise. That will not do.

What, then, must be done? Why, as a matter of course, they must show, independent of his acts, that he combined, and that they cannot show by simply proving his official acts. No, gentlemen, the proof must go away beyond that ; it must be of a different character from that ; and hence the court has often said during the progress of this case that corruption must be shown. And that is really, after all, the pivotal question of this whole controversy, as far as my client is concerned. Corruption must be shown. They have to prove that, gentlemen of the jury. Is there any doubt about it?

They have attempted to prove it. Now, how and by whom? Gentlemen of the jury, going back again now to the 7th day of June—and I am very sorry to have to refer to anything I have ever said myself—you will remember that Mr. Bliss, in making his opening statement to the jury, made use of these words:

We shall place before you, gentlemen of the jury, and I ask you to remember it, the distinct admission of Mr. Brady that he did receive money, not only from these contractors, but from others.

And we shall give you confirmatory evidence upon that subject ; and we hope to convince you, beyond all dispute, that Brady did not do this dirty work which took from the Treasury large sums of money, as I explained to you on Friday, from the mere desire to occupy his idle hands ; but he did it corruptly.

Having read that, I proceeded to say :

I say to you, gentlemen of the jury, that they will never prove any such thing. I am a little in doubt in my own mind how far I can go with reference to this matter. I do not want to transgress the rules of the court or the proprieties of this occasion, but whenever they do introduce any testimony on that subject, if they ever do, we will show to you that that testimony is absolutely and unqualifiedly false in all its particulars. I would go much further than that, gentlemen, if I could do so under the rules of the court.

The COURT. The rules of the court merely prohibit counsel from declaring the facts on his own knowledge, pledging his own character that any statement is not true.

Mr. WILSON. If it is proper for me to say so I say to this jury that my client informs me that that charge is absolutely and unqualifiedly false in all its essence and details and particulars ; and I desire, as far as I may under the rules of the court, to so brand it.

Mr. MERRICK. I suppose you intend to put him on the stand to swear that it was false.

The COURT. He is a competent witness.

Mr. MERRICK. He is a competent witness.

Mr. WILSON. I am not compelled to put him on the stand. I can vindicate him in other ways if I want to.

Mr. MERRICK. But he cannot state what his client tells him about this matter, unless he intends to put him on the stand.

The COURT. I do not know that. The rule merely excluded the counsel from pledging the weight of his own character with the jury as to any fact.

Mr. MERRICK. I am aware of that.

The COURT. He may state what his client tells him he will be able to prove ; because then the jury will not be influenced by the character of that counsel.

Mr. MERRICK. My object was not only to object and to correct as far as might be proper, but to point to the statement he now makes that he is so informed by his client. That is, the witness he is to prove it by, and that is the source of his information.

The COURT. I see no objection to that.

Mr. MERRICK. We stated what we expected to prove by witnesses, and we get the information from the witnesses who will prove it, and have the confirmatory evidence in our possession.

The COURT. He states that he will be able to prove by a competent witness exactly the reverse.

Mr. WILSON. And I state further to the court that I expect whoever that man may be or those men may be—

Mr. MERRICK. [Interposing.] Men.

Mr. WILSON. [Continuing.] — that when they come before this jury to testify to anything like that, before they leave the witness stand, to convince the jury that they have been committing willful and deliberate perjury.

Gentlemen of the jury, that is the way I felt about that thing when this matter was for the first time brought to the attention of this jury, and when for the first time in all the history of this case, either my client or myself or my associates had ever heard there was any such thing dreamed of which was to be brought to light in this controversy. I said then that we expected to show that if any such man did make any such statement before he left the witness-stand we would show that that man by his own testimony was committing a willful and deliberate perjury. And I made that statement to you, gentlemen of the jury, upon the result of my little experience in the profession. It is the rarest thing in the world that a man can come upon the witness-stand with a lie in his mouth and get away from the witness-stand without it being demonstrated that he came with a lie in his mouth. Of course, we knew nothing about what this was going to be. We had no knowledge as to who was to come, or what was to be the theory.

Gentlemen, now, by whom have they sought to prove this corruption? By Mr. John A. Walsh, and by no other witness have they attempted to do it. Mr. Merrick said "meu," but there was only one man came. And if this corruption is not proven by Mr. John A. Walsh it is not proven by anybody; and this case has come down to this, gentlemen of the jury, that you have to believe John A. Walsh's story—you have to be so thoroughly satisfied that that story that he told was the truth that you have no doubt about it, or you cannot find a verdict against my client in this case; it is an utter legal impossibility.

Now, I want to examine Mr. Walsh's testimony and see whether it is such as satisfies your minds that Brady had been corrupt in regard to these matters. Who is John A. Walsh? He gave you his history from the close of the war up to this time. It is not necessary that I shall follow him through that history. He might be called the Perfunctory Affidavit Man; he might be called the Great American Book and Paper Loser. Mr. John A. Walsh, as it appears, as it seems to me, has lost everything except his sense of shame. He was a dealer in liquors down in New Orleans. The law required him to keep his books for a specified length of time, and the law made it a crime for him not to keep his books for that length of time. And yet when called upon they are lost; they are laid away among the rubbish; they have disappeared. He don't know where they are, or anything about them.

Then he comes to Washington, and he is a banker here from 1877 some time until sometime in 1880—some three or four years. And, as a banker, he tells you he kept what might be called a ledger—that is his language. I have not had much experience in commercial affairs, or book-keeping, or anything of the sort, but I do not believe I ever heard before of a ledger without there being a scratch-book, a day-book, or cash-book, or something of the kind from which the entries in the ledger were made. But he kept what might be called a ledger, and that ledger has disappeared; whatever that book was, it has disappeared. What became of it? It was given to a restaurant keeper.

Then he tells this jury that he had a letter or telegram, or both, asking him for a loan of a sum of money that would be a very respectable fortune for you, gentlemen, or for myself, and yet that letter or telegram, or both, is lost. All lost, gentlemen. And it is a significant fact in this case, gentlemen of the jury, that there is not a book nor a scrap of paper of any description that can be produced by Mr. John A. Walsh to sup-

port a single statement that he has made. Not one. Because you will observe, gentlemen, that all of these checks that he produced are checks that he drew payable to himself, and had his own personal indorsement upon them; and if he had had the check of anybody else he could have taken his own checks and made a story as against anybody else, just as he could have told this story as against General Brady. Why, he does not produce a check that corresponds in amount with any check that he has named in connection with General Brady—not one, gentlemen. He has come on the stand three or four times from the beginning, and he has not produced a paper, a book, a scratch of the pen of any character whatever that in the slightest degree sustains the remarkable and extraordinary story that he has told to this jury—not one.

Mr. Walsh is not a frank man. Mr. Merrick had something to say to you, during the course of his argument, in relation to Mr. Buell. He gave you reasons why you should not believe Buell; Buell did not testify glibly; Buell was disposed to withhold things, &c., and he had hard work to get out of Buell that which he finally elicited from him; and he said to you that that was a reason why you should not believe Buell. Is that so? Well, now, if that rule will not apply to Walsh, it is not a good rule at all, because that is a rule that ought not to have exceptions, and if it is good for Buell it is good for Walsh.

Do you recollect how we tried to get him to tell about his interview published in the New York Herald and New York Times? And, gentlemen of the jury, you know, just as well as that you are sitting there, that Mr. Walsh made an arrangement before he went to New York to have that interview, and to have it published in the paper, and you know that he fixed the time and place for both of those interviews before he left this city. And yet you know that it took two or three pages of cross-examination to get him to admit that fact.

Now, there is another thing about it. If you remember the testimony—for I am not going to stop to read it, for I know you will remember it—you recollect how often he said “perhaps;” “I can’t tell this or I can’t tell that;” “perhaps it was thus,” and “perhaps it was otherwise.” How careful he was. Mr. Walsh is not a frank man, gentlemen.

One of the best tests of truth, gentlemen, is the reasonableness of a man’s story; and I want to examine this story of Walsh in the light of its being reasonable or unreasonable. Now, what is it, and I am going to read it to you? You recollect he said he had a purpose in his mind of having a settlement with General Brady, and then, at page 1700, he proceeds:

I remarked to the general that I was not in as good financial condition as I had been, and that my losses had been great, and I suggested to him that there be a settlement between us. He asked me if I had brought the data with me. I told him that I had. I gave him the amounts, and laid the notes of General Brady on the table, and said that the matter was all settled, so far as I understood, as to dates, &c., but that the matter of interest was still open, and that I wished to discuss it with him. I told him that if he would recollect, there was no agreement as to interest, &c., and that I would leave that to him, he being a person engaged in commercial operations of a large character, and that he could, I think, determine it, and that certainly we could between us, so that there would be no room for argument. The general looked at the memoranda that I furnished and seemed silent, and he remarked he thought I was in error, that he did not really think that I thought I owed him.

Q. That you owed him?—A. [Correcting himself.] That he owed me; really did not think that; that he had benefited me very largely; that he had given me a very remunerative contract, and that generally he thought there was no obligation so far as he was concerned. I asked him to explain. He said he thought that I did not need any explanation; that he was of opinion that there had been enough seen by me to in-

indicate what the usual arrangements were. I asked him to explain. He went on to explain without any hesitation. He recited the fact that—

Now, just think of that, gentlemen :

He recited the fact that my route had been expedited, or the service had been increased, whatever the terms are, and that I must not suppose for a moment that it afforded him any special amusement to indulge in those things. I did not know whether it did or not, I responded; that I thought the law in the matter had governed him, the fact being that petitions had come in for an increase on that service, and that generally I did not think he was right in the position assumed. He said there was no use in arguing that matter, and that if I affected ignorance that it was sheer affectation on my part. I asked him to please indicate in figures what the terms were. He told me that as a rule it was 20 per cent. per annum, on the amount of expedition. That is, the sum increased in money was what he conceived to be his pro rata of the enterprise. I asked him to please figure and see what that amount would be. He called my attention to the fact that the increase in round numbers had been in my case from \$74,000 to practically \$135,975. I asked him where he took the amount of \$74,500 from, or in round numbers \$74,000. He said that that amount was the expedition that had been accorded to the contractor, George L. McDonaugh. He reminded me of the fact that McDonaugh's service had been taken up from some twelve or thirteen thousand dollars, to seventy-four thousand and odd dollars, and that he did not conceive that I should pay from the original contract terms of Mr. McDonaugh up to the increase in my own case, for the reason that he was willing to admit that the McDonaugh increase had been paid for—had been paid to S. P. Brown; hence he did not think, inasmuch as I had advanced the money in that case, that I should pay for that, but that the amount over \$74,000—that is, the difference between the amount of \$74,000 and \$135,000—I owed for. That increased the figures in round numbers about \$60,000. Twenty per cent. of \$60,000 per annum, multiplied by three, the period of the contract term, made in his opinion \$36,000. He then reminded me of the fact that I had been requested to pay \$8,000 to what was known as the Congressional corruption fund, a fund which he insisted had been necessary in order to secure the appropriation for the star-route deficiency.

Then there was an interruption, after which he proceeds :

A. [Resuming.] He went on to say that my pro rata of the sum contributed by contractors for that purpose was \$8,000; that I must certainly expect to lose the balance of it. I told him that I did not feel that I was called upon to do anything of the kind; that I had appeared before the Congressional committee, of which Mr. Blackburn was the chairman, or subcommittee, and that I had been very thoroughly examined, and did not feel that I was called upon by anybody for money, and I did not feel generally that I ought to pay it. I wanted to know if there had been disbursements made, who made them. He told me, in fact, that that was no affair of mine. He further reminded me of the fact that he had made remissions in my case.

Mr. MERRICK. Remissions of penalties ?

A. [Continuing.] Remissions of fines and penalties. I think it amounted to somewhere in the neighborhood of \$5,000 or \$6,000. He said that half, 50 per centum, was the part usually agreed upon as belonging to him, and if I were to debit and credit his account I would find that I owed him some money.

Now, gentlemen, you will observe that he says that General Brady stated to him that he (Brady) usually got 20 per cent. of these expeditions, and that he got 50 per cent. of the remissions. Now, that is his statement, is it not ? Now if Walsh knew that that was not true, and knew it of his own personal knowledge, it detracts very much from the probability of any such statement having been made. Gentlemen, you must recollect that he was talking with General Brady, with whom he had had dealings on this very subject. He had had a route expedited, as he tells here, from \$60,000 up to \$135,000. He had had remissions made, had he not ? Yes. Both of those things had happened to him. Now, let us look over a little further in his testimony, because he and Brady had come directly together on this very subject in a practical way. He had a postal route; it had been expedited; he had applied in person to have it expedited, and if General Brady had the usual percentage that he was taking out of these routes and out of remissions Mr. Walsh would have found it out long before this interview that is alleged to have taken place. Now, why do I say that, gentlemen ? Because Mr.

Walsh was called before this investigating committee, of which Mr. Blackburn was the chairman, and this very route of his was the subject-matter of most protracted investigation before that committee. Mr. Walsh was called upon to testify in regard to it. Here is what he says. At page 1718 I put this question to him :

Q. Did you testify to this:

“Q. At the time you took this contract, what arrangement was made with the Second Assistant Postmaster-General for the expedition of the service?—A. None whatever.

“Q. What was said about it, if anything?—A. I went to the Second Assistant Postmaster-General when I offered the service at \$18,500, and asked him whether, if I took it at that rate, I could reasonably look for any expedition, and Mr. Brady was not in a very communicative mood, and just told me I could do as I pleased about it; that I could take the contract or not just as I felt disposed; that he had no suggestions to offer; that he had nothing at all to say on that subject.”

Did you testify to that?—A. Yes, sir.

Q. That was true was it?—A. That is true, sir.

Now, here he has a route expedited; takes a contract for this route, and when he takes that contract he wants the Second Assistant Postmaster-General to indicate whether or not there can be expedition on this route, and the Second Assistant Postmaster-General says to him, “Now, sir, you can just take that contract or not, as you please; do whatever you please about it; I have no communication to make to you on that subject whatever.” That is all that passed between them.

Now, after having that distinct conversation with General Brady, he comes here and says to you that General Brady told him that he had an understanding or arrangement with these contractors—not with these contractors specially named in this indictment, but with contractors—that he was to have 20 per cent. of the moneys derived from the expedition. Now, he talks about remissions, saying that Brady said he was getting 50 per cent. of remissions. Why, gentlemen of the jury, do you not know that Walsh knew that that was not true? You know that he knew it was not true. Why, because when he was a subcontractor upon this very route he failed to carry it properly, and fines and deductions were made upon him, and, in some cases, there were remissions made, and he got those remissions, and not only that, but after he became the contractor there were fines and deductions imposed upon him to the amount, as he says, of several thousand dollars, I do not recollect the precise amount; and to the amount of five or six thousand dollars, there were remissions. Now, he says, after he had had those remissions, that for the first time General Brady comes to him and says to him, “You owe me something on these remissions.” Now I say the thing is inherently improbable.

The circumstances show that that is a wholly and utterly improbable story, and, judging from that stand-point alone, it is condemned. There is a curious thing in connection with this case. I think I can show you, gentlemen of the jury, that this is all an afterthought, and can show it to you right from the indictment in this case. Here is the way they have it in the indictment, and now notice how different the testimony has been from the indictment; either they did not know anything about Walsh's story at the time they drew this indictment, or else Walsh had told it to them one way and told it another way on the stand, and I will show you why this was so. In this indictment they are setting out the means that are to be used, and this is the way it reads:

And by means of the said Thomas J. Brady, then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck,

Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to refuse to make deductions from the pay of the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, for failures of them, the said John W. Dorsey, John R. Miner, and John M. Peck, to perform the said service of carrying and transporting the said mails on and over the said post-routes, in accordance with the said contracts and agreements as aforesaid, and according to the said orders for increased and additional service and increase of expedition so to be made by the said Thomas J. Brady, as aforesaid, and then and there fraudulently to fail and refuse to impose fines upon them, the said John W. Dorsey, John R. Miner, and John M. Peck, for other delinquencies and failures, &c.

As part of the means set forth in the indictment, they are to refuse to make deductions, to refuse to impose fines upon these parties. That is the way they tell it in the indictment. Have they attempted to show that he refused to impose fines and make deductions? Oh, no, gentlemen, that would simply be an impossibility. The thing was very absurd in the very nature of things. Because, do you not see that the fines and deductions are made up in this way? The postmasters at the terminal points of the routes send in their reports every month, in which they give the time that the carrier arrives and when he departs, and so on. Now, if the mail did not come in on time and depart on time it is reported by the postmasters every time to the inspection division.

And you recollect how these papers get to the inspection division. They are brought into the Post-Office Department and assorted in a little room, and those that belong to the inspection division are marked "Inspection division," and are sent there. Now the man who is at the head of this division takes up these reports and makes up the amount of fines and deductions to be imposed upon the party, and that goes to the Second Assistant Postmaster-General, who then for the first time in his life sees it.

You see that for General Brady to refuse to impose fines and to make deductions was simply an impossibility in this case. This averment in the indictment they have not pretended to prove. They could not prove it. On the contrary, the evidence is overwhelming that these fines and deductions were made up in the manner I have just stated. Nobody has ever pretended that there was an omission or a refusal to impose fines and deductions.

Now, what do they want to prove by Walsh? Why, that Brady told him—not anything about refusing to make fines and deductions, but that Brady told him that the remissions that he made were to be divided between him and the contractor, half and half. Well, gentlemen of the jury, in the first place, aside from the absolute absurdity of the story, you have in this case the direct and positive evidence that it was not true, have you not? Is not this record full of fines and remissions? Is not this testimony full and complete that when the fines were removed or remitted the money went straight to the contractor, or to the subcontractor? Because in nearly every one of these cases, excepting the Bismarck and Tongue River route—in most of these cases, at all events, there was a subcontractor. The subcontractor necessarily has to bear the fines and deductions. Why? Because if he did not, if the contractor had to answer for the delinquencies of the subcontractor, he would be absolutely in the power of the subcontractor. The subcontractor could do just as he pleased, and the contractor would have to be responsible for all his delinquencies. Therefore, in all the subcontracts it is provided that the subcontractor has to stand up to and answer for his own delinquencies in the way of fines and penalties that are assessed upon him. Now, what became of these fines and penalties, as shown by the testimony in this case? What became of them? They have found one

place, I believe, where the contractor, the subcontract not being on file, got the remission and did not send it to the subcontractor; there was \$200 or \$300 involved in the case, I believe. Is there such a case as that? It seems to me there was one, but I am not sure whether there was or not. But, with, possibly, that single exception, the testimony shows in this case, gentlemen of the jury, that that statement was not true, even if Brady made it, and I cannot conceive, gentlemen of the jury, why he should make a statement of that kind, utterly damning to him, when there was not any truth in it. It is hard to conceive, it is impossible, almost, to conceive, that a man under the circumstances would make such a statement as that even if it were true. And to make such a statement when we know it was not true, is absolutely preposterous and absurd. And I say we know it, gentlemen, because the record shows that these remissions went straight home to the subcontractors, and there is no pretense here that any subcontractor ever divided with General Brady—none whatever. Now, how can it be true, gentlemen? I say it is impossible.

You will observe, gentlemen of the jury, that it is an effort to prove—not as charged in the indictment, not that—but it is an effort to prove a charge not in the indictment, to wit, an effort to prove that General Brady was bribed. I am not trying to shirk this, gentlemen, on that ground, mark you.

Mr. Vaile reminds me that that case I referred to a moment ago was settled with the contractor by a written agreement, so that my statement might have been as broad as I first made it. It is not of much significance, though, for the purposes of my argument.

I say I do not shirk this on any technical ground that it is not in the indictment. I want you to understand that. I meet it face to face upon the utter improbability of the story.

Now, let me see further in this matter. He told you that he had loaned General Brady large sums of money. I am not going into this testimony in very great detail, gentlemen, because it has been traveled over more fully than I can do it, and I would not have gone into it at all, except that it is necessary to the completion of the train of thought that I am trying to impress upon your minds.

He says to you, in the first place, that he loaned Mr. Brady—I leave off those amounts that he says he paid back in two or three days—\$12,000, and he took his note for it. Then he tells you that that was paid back to him, all except \$2,000, and that he then gave up the note. That is his explanation for not having the note for that amount. I want you to note that, gentlemen. I told you awhile ago that this man was unable to give you a scrap of paper to support his evidence; that he was unable to prove a single circumstance to sustain his testimony. Now, you have him before you, telling you, and expecting you to believe him, that he loaned General Brady \$12,000 and took his note for it, and that when Brady repaid him, and while there was yet \$2,000 due, Walsh gave up the note. Now, what do you say to that? It is so unnatural that a business man—a banker, if you please—could deliver up a note on which there was a balance due of \$2,000 that I cannot conceive how sensible men can believe it. It is incomprehensible to me. And certainly you cannot believe it strongly enough to induce you to brand a man with crime upon the strength of it.

Well, then he says he loaned him another sum of \$10,000. That is what he swore last. Don't you recollect, first he says it was \$10,000, or \$12,000, and he was not sure which? Now, he repeated that over to you half a dozen times. I don't know how it might be with these men

who have these very large amounts of money; possibly Mr. Walsh had so much money that a little matter of a couple of thousand dollars made no impression at all upon his mind, and that although a banker, when he was loaning money in large sums he could not tell whether it was \$10,000 or \$12,000 that he loaned to General Brady, but it was one or the other. Now, gentlemen, it is pretty hard for a man to get along with a lie and not be caught; it is very difficult for him to do it. Now, Mr. Walsh knew what the account against General Brady was, did he not? He had to make that account, had he not? He brought suit on it, recollect. He brought a suit in the District of Columbia—I have the papers right here before me. [Referring to papers.] It was filed on the 21st of June, 1881. He made up that amount and gave it to Mr. Hine for the purpose of bringing that suit. The rules of court in this District are, that when a plaintiff wants to get judgment on account he must swear to it. When he does make oath to it, if the defendant does not make any oath, he can take his judgment. And so Mr. Walsh took the precaution to swear to this amount. You remember, gentlemen of the jury, that I asked him on cross-examination whether he had not brought a suit. "Yes." I said to him, "What were the items of your account?" He said first, \$10,000 or \$12,000, he was not sure which; it was one or the other. Now I said to him, "Was that \$12,000 or \$1,200?" "Twelve thousand dollars," he answered. I showed him this bill of particulars. As soon as he saw it he said, "That is a clerical error; that \$1,200 is a clerical error, it ought to be \$12,000; that is Mr. Hine's mistake." Did he not say that? "Now," said I, "are you sure about that?" "Oh, yes; that is Mr. Hine's mistake." Then I read to him the affidavit where the amount is written in words and not put down in figures, and where he had sworn to it as \$1,200. He says, "It is Hine's mistake," and he stuck to that for two or three days. He was back on the witness-stand and did not correct it. But after two or three days' time he comes back and he says that "In justice to Mr. Hine I must say that he has shown me the account as I gave it to him, and I did give it to him \$1,200." Is not that so? He swore that those were the items due after giving the credit of \$5,000, and when he got upon the witness-stand he swore to \$12,500 of credits. And if you will take his whole story and go through it you will find that if he tells the truth about it Brady was entitled to a credit of \$17,500. And here is this man making up an account amounting to many thousands of dollars and he misses it \$10,800 in one item.

Then he undertook to saddle that off on Mr. Hine as a clerical error, and when Mr. Hine showed him what the facts were he came back here and said that he had given this account to Mr. Hine as \$1,200 instead of \$12,000.

And now, right there, gentlemen, let us stick another pin; let us take another step. He brought suit over in New York. There he swore to it as \$12,000, and how did he do it? That which he seeks to use by way of vindication or explanation I will show to you is his condemnation. If a man is an honest man he does not have to write off to a lawyer two hundred or three hundred miles away to get his account. He made up his account and gave it to Mr. Hine, and when he wanted to use this thing in New York—to get out a writ of attachment there—instead of sitting down like an honest man, having an honest and square account, he writes to his lawyer in Washington to give him a copy of his account, which he himself had made up and given to his lawyer here, and his lawyer here simply writes over to him and gave it to him

as \$12,000, and thereupon he swore to it as \$12,000. Why did he swear to \$12,000? Because he knew it was \$12,000? No, gentlemen, because, as he tells you upon the witness-stand, Mr. Hine had sent him an account which had \$12,000 in it and he swore to it because he got it that way from Mr. Hine, and not because of the fact that he knew Mr. Brady owed him any such sum of money.

Now, gentlemen, let us go a little further. Take the next one. The next item is \$13,500. That is the one where he says Brady wrote him or telegraphed him, or did both—he don't know which—to loan him or to deposit for him with Hatch & Foote \$10,000. Now he did not do it; he admits that he did not do it. He has not the scratch of a pen anywhere to indicate that he ever loaned General Brady that money. He says that although Brady asked him for \$10,000, he gave him \$13,500 in the banking-house of Hatch & Foote, and he fixes on the 12th day of April, 1880, as the time when this thing transpired.

Now, here you have it, gentlemen. The letter is gone, the telegram is gone. He swore once that he let Brady have that on the 8th of April; that is the way he made out his account. He says that Brady only asked him for \$10,000, and he gives you the reason why he did not deposit it with Hatch & Foote as Brady requested, and if he is an honest man, then his excuse is a dishonest one, because if he was loaning General Brady \$10,000, or any other sum, there is no reason on the earth why he should not have walked into Hatch & Foote's, just as he says Brady requested him to do, and made a deposit of that sum; because it would be nonsense for him to say that it would not look well, and that he argued with Brady that it would not look well, and all that. That is all nonsense, gentlemen. I don't think it has come to that pass, gentlemen, in this country, that I could have a dealing with any officer of the Government without it being imputed to him or to me as being for some dishonest purpose. That is all stuff and nonsense, gentlemen of the jury.

Now is there any explanation? He says he only wanted \$10,000, but he says he gave him \$13,500. He swore that he delivered that on the 8th of April. Afterwards he located it on the 12th. Why? Because it seems that on the 12th the check was paid. On the 12th of April Brady had deposited in the banking-house of Hatch & Foote \$10,000. Whether that deposit was cash, or whether it was a check, it is utterly impossible for Hatch & Foote to say now. The manner in which they keep their books makes it impossible for them to know whether the deposit was in the form of a check on that day, or whether it was the proceeds of bonds, or what not. It is impossible to say at this late day. Two years or more have gone by since this thing occurred. But Mr. Merrick says, "Why don't you prove where you got the \$10,000?" That is not our business, gentlemen of the jury. It is their business to prove by reputable testimony that this money was loaned to General Brady.

Now let us go a little further, because here is this item of the 20th July, 1880 (which it seems to me is absolutely beyond the power of any man to wipe out), to brand this man Walsh with being what I said he would be at the opening of this case, if he swore to any such thing as he testified to here as against General Brady. I say this brands him beyond all peradventure. Why? Did he not come right here on this stand and swear to you that in July he loaned to General Brady this last item in Delmonico's in New York—that he took the money out of his pocket and gave it to General Brady in Delmonico's? Did he not swear to that? Of course he did. What did he say he loaned to him

at Delmonico's in New York? He told you it was four or five or six thousand dollars; did he not? Now, think of that. Upon reflection he thought it was between five and six thousand dollars. Do you remember a little circumstance that happened when Mr. Walsh got on the stand? If you ever have occasion to look into this book, of which I presume the Government will give each of you a copy to look upon hereafter, it will perhaps remind you that Walsh said, "If I had that record I could tell you." Well, I had this record and did not intend that Mr. John A. Walsh should see that thing until he had had his say. Now he said it was four or five or six thousand dollars. If he had had this paper in his hand he would have sworn right square up to it—that it was \$5,400; he would not have had any trouble. But his memory was to be tested.

Now, Mr. Walsh is not a millionaire. He was broken in his fortunes before this suit was brought. He had told Brady, according to his own story, that he was not in as good a financial condition as he had been, but he could not state any more accurately than that it was four or five or six thousand dollars that he loaned at Delmonico's, in New York. He took that money right out of his pocket. He could not state whether he got it out of some bank or not. It turned out that he had only one bank here and one bank in New York, but he could not tell whether it was money he got out of the bank somewhere, or whether it was money some one had paid to him, or whether he happened to have it about him. But he did loan that \$5,400 or that sum between five thousand and six thousand dollars, as he finally got it, to Brady in Delmonico's, in the city of New York, taking the money out of his pocket.

Now, gentlemen, after a while he comes back and corrects this testimony. Then what happened. Why, he says he did not loan it to him that way at all. But he says he let him have \$2,000 at one time; but whether he let him have that in the post-office or at Helmus's he does not know. He let him have \$2,000 at another time, and then he let him have the balance of it in Delmonico's away down in the latter part of August, when he had sworn in New York that he had loaned him this \$5,400 on the 20th of July. And now he has divided it into three sums and puts the last of it—\$1,400—away down in the latter part of August.

Now I want to know of you, gentlemen of the jury, in all reason and conscience, if, upon that kind of testimony, you can say that General Brady was corrupt in the discharge of his official duties?

The COURT. We will take a recess.

Thereupon (at 12 o'clock and 26 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. WILSON. [Resuming.] May it please your honor and gentlemen of the jury, the next point in connection with this matter in the testimony of Walsh to which I desire to attract your attention is his attempts at correcting his testimony, which you will probably remember. He came back before you, and, after having read his testimony, said he desired to correct it, and he did correct it in divers particulars. All right. Then he came back the second time and made corrections, and after he had made all the corrections he desired I put this question to him myself: "Do you desire to make any further corrections of your testimony?" "No, sir; none other." Recollect now, he had not made

any correction as to where he had derived additional information showing that he had not testified straight as to what had occurred between him and Mr. Hine. After awhile it was brought out of him that he had been to Mr. Hine and had found out that he had given to Mr. Hine this account exactly as Mr. Hine had stated it in the suit which he brought for Walsh. I put the question to Mr. Walsh, Why did you not correct it? He had said he had no more corrections to make. He had learned that most important and most significant fact that very morning. He had come fresh from Mr. Hine's office to the witness-stand. I asked, "Why did you not correct that, Mr. Walsh, when you found out you were mistaken" (to use a mild phrase)? "Oh," he said, "I thought it was Mr. Hine's duty to correct that." Mr. Hine's duty to correct Walsh's testimony! He had been here twice before to correct his own testimony. Why, he had found within an hour that he had sworn to that which was not a fact; he had sworn that it was Hine's clerical error; he had found that that was not true, and he had said that he had no more corrections to make. Then, on being pressed, he said the reason he did not want to correct that was because he thought that it was the duty of Mr. Hine, when if he knew anything at all he knew perfectly well that Mr. Hine's mouth was sealed by the professional confidence that existed between him and Mr. Walsh.

Now, gentlemen, here is another thing that stands up in this case to condemn this whole story. He says that he had \$25,500 of Brady's notes—one note for \$13,500 and another for \$12,000; that he took those notes and laid them on a table over in that room of Mr. Sheridan's, and that Brady deliberately picked up and carried off \$12,500 of his notes, and that is his excuse for being unable to produce to this jury any evidence that he had ever had any such transaction with General Brady. His excuse is that when he had these notes General Brady picked them up and carried them away. Now, why did he keep silent? What excuse does he give for keeping silent about it? He told nobody; he made no outcry; he communicated it to nobody until, as he says, in the first instance, he communicated it to the grand jury just before he testified in this case, within a week. Although, according to his story, this occurred on the 28th of December, 1880, and from that time up until the month of August, 1882, he never communicated that to any living man, and then for the first time, as he said, to the grand jury. He afterwards came back and corrected it, and said he had communicated it some time before that to Mr. Woodward.

He has brought these two suits—one in June, 1881, and one in the early part of 1882, and did not communicate that to his lawyers—men to whom he could communicate it with the utmost confidence and know that it would be secret and confidential as between him and them. Now, what is the reason; what excuse does he give for it? He "did not want to make a scandal." That is his reason. That was no reason for his not communicating it to his lawyers. Lawyers do not go out and disclose confidential communications of their clients; they do not tell what has transpired in their offices; they do not tell what their clients have communicated to them. Now, where was the danger of scandal if he communicated it to his lawyers? You see, the thing is preposterous—unutterably absurd! Talk about a man's making off with two notes amounting to \$25,500 and saying nothing about it, under all those circumstances, and for no other reason than simply because he "did not want to make a scandal!" It is absurd; preposterous beyond all possibility of belief, it seems to me. I do not see how anybody can come to any other conclusion than that this is a monstrous lie.

Now, recollect that he says that he didn't tell this thing, because he did not want to create scandal. Mr. Merrick saw that would not do. He is too smart for that. He wouldn't swallow that himself, and when he stood here before the jury, he said to you, Gentlemen; this thing needs explanation; it won't do on its face, it must be explained." Well, I want to know now if you are going to convict people upon testimony of that character. Mr. Merrick is not satisfied with Walsh's explanation. Walsh swore to his explanation. Merrick says "That won't do; you can't believe that." "What is the explanation?" says Mr. Merrick. He says, "I know what it is: Brady had Walsh in his power." Walsh did not say anything of that sort. He said, "No, I wanted to avoid scandal." Merrick says, "That is not the reason at all, Walsh; you are mistaken. You have sworn that it was for the purpose of avoiding scandal, but that won't do; you had another reason and a wholly different reason." What was that? My brother Merrick says the reason was that Brady had Walsh in his power. And how did he have him in his power? Why, he could walk right across the street into the office of the Second Assistant Postmaster-General, and with a scratch of the pen he could ruin Walsh by cutting off his service, or declaring him a failing contractor; and, therefore, says Mr. Merrick, he wouldn't say anything about Brady having carried off \$25,500 of his notes. His head was in the lion's mouth, and that was the reason—not the reason Walsh swore to, but that is the reason why Walsh made no outcry or communicated to anybody anything about these things.

Now, let us see. Walsh is a good deal better witness, a more credible witness, a more reasonable and plausible witness on that subject than my brother Merrick, and I will tell you why. You see Merrick's theory won't wash at all, if you will pardon the expression. Why, this thing occurred on the 28th of December, 1880, according to Walsh, did it not? Yes. Now, what does Brady do? Why, in March, 1881, Brady does exactly what Merrick says Walsh was afraid he would do. What is that? Declared him a failing contractor, and he stopped his pay on that contract to the extent of \$25,000. Now, Brady had done this devilment which Merrick says he would do, and which deterred Walsh; he had done it in March, 1881, and Mr. Walsh brought his suit in June, 1881. Was there any reason for withholding it at that time, according to Merrick's theory? Come now, let us look at this as reasonable and sensible men. I am discussing Merrick as a witness now. They were going to have two witnesses. The second one never made his appearance until my brother Merrick came on the stand to testify in the form of a speech in this case. His theory won't work, because Brady had done in March what Merrick says Walsh was afraid of, and yet Walsh never mentioned that subject, although Brady had cut off his service, declared him a failing contractor, and stopped his pay to the tune of \$25,000, and Mr. Walsh brought suit in June, 1881, and did not mention it to anybody in the world, not even to the attorney who filed the suit.

Not only that, gentlemen, but he goes on through months until he brings the suit in New York, in which, as I said a moment ago, he swore to the account that he got from Mr. Hine. There he consults a lawyer and tells him nothing about it. And then he goes on and on through the months until it comes up to August, 1882, when he tells it to the grand jury for the first time, unless you may believe that he told Mr. Woodward some time before that at Chamberlain's in this city. Now, gentlemen, this thing won't do. It is not the kind of testimony to send a man to the penitentiary upon.

Even if this testimony applied to the charges in this indictment, it

would not be sufficient to send any man to the penitentiary; but it does not apply to the charges in this indictment. The charges in this indictment being Brady, Vaile, Miner, Dorsey, and Dorsey and Peck together as the parties who were conspiring and dividing these spoils, and nowhere in this statement of Walsh does he say that any one of these men ever paid General Brady a farthing. He is talking in the air. He is talking generally—"this is the custom of my office; this is what people do with me; this is the rule with me, to have such a percentage paid on increases and expeditions"—talking generally, talking at random, and not bringing it down to the charges that are made in this indictment. You might believe every word of John A. Walsh's testimony and still that does not prove this case.

Mr. Merrick says, "Oh, why didn't you bring Kellogg here? Why didn't you bring Price here? Walsh mentioned them here in his story." In the first place, the court said "That is a thing you cannot do." The court checked that in the first instance. But Walsh did mention Peterson, you recollect, as having given him money to be given to Brady. We brought Peterson for the purpose of showing that no such thing as that had ever happened, but the court said, "That is collateral, and you cannot prove that in this case." Yet, notwithstanding that, these gentlemen come here and they get red in the face and say, "Why don't you bring Kellogg and Price?" when the court had settled the principle after we brought Peterson, and the court had said that would not do.

Mr. CARPENTER. Upon their objection.

Mr. WILSON. Upon their objection, of course it is, as I mentioned in the early part of my argument. They objected to it; Mr. Merrick objected to it; Mr. Bliss objected to it, and the court sustained them. And then when he comes to argue this case, Mr. Merrick backs himself up here, and glares at me, and comes forward and says, "Why don't you bring Kellogg and Price?" That is the kind of stuff that this case is made of, gentlemen of the jury.

Now, I say, gentlemen of the jury, in the first place, that we have contradicted, we have impeached Mr. Walsh by the utter improbability of his story. I say we have impeached him, just as I predicted in the outset we would, upon the cross-examination of the man. And now I say we impeach him by showing what his motives are. What are his motives in this case, gentlemen of the jury? And right here allow me to read from Ram on Facts, page 152:

Motives are a fruitful source of suspicion against a witness; some stronger than others, and attended by corresponding effects. Some may be powerful enough to lead to perjury, although not in its full extent, yet so far as to dilute or color the evidence, to dress it up to suit a particular purpose.

A motive to go so far as direct, unmitigated perjury, may be, that the witness's testimony, if believed, will redound greatly to his own personal advantage, as in the case where, being a party to a suit, he will acquire wholly or mainly, through his own evidence, an estate, money, or other advantage.

Please mark that, and see how aptly it fits on to this case. What is Walsh's position? He has set up here a claim against General Brady, and has a suit on account of that claim. He brought another suit in New York. They are for the same thing, but they differ in amount to the extent of some \$10,000 or \$12,000. But never mind that for the present. He has this suit. General Brady says he does not owe him a dollar, and never borrowed a dollar of Walsh in the world. That case is coming on to be tried, and if Mr. John Ananias Walsh can in this criminal case break down General Brady that is all he wants. And there is his motive, gentlemen. There is the motive that is spurring this man on to tell this monstrous story.

Mr. KER. Where did General Brady say that ?

Mr. WILSON. Right in there. [Handing some papers to Mr. Ker.]

Mr. KER. Right in there ?

Mr. WILSON. In there ; yes, sir.

Other motives in a witness to perjure himself may be—a present bribe or a present promise or expectation of one ; the passions, envy, spite, revenge ; the desire to shift punishment from the witness himself on to another.

There are, besides, motives of a less degenerate kind than others, but which ought, nevertheless, in particular cases, to arouse some suspicion against a witness. These may be called influences—influences arising from the affectionate or friendly relation in which the witness stands to the person for or against whom he is a witness. The relation may be of husband and wife, parent and child, &c.

Now, these are the motives that are influencing this man. He has the strongest conceivable motive—a motive amounting to thousands upon thousands of dollars. If he can break down——

Mr. KER. [Interposing after having examined the papers handed to him by Mr. Wilson.] It won't do.

Mr. WILSON. It will do and do exactly, and I can show how it will do, but I do not care to take up the time of the court and the jury to do it. Your associate counsel have had those papers a good while——

Mr. KER. [Interposing.] This paper is not in evidence.

Mr. WILSON. I know it is not.

Mr. KER. But you want to use it.

Mr. WILSON. Under the rules of this court if the party had not denied that under oath there would have been a judgment months ago. On the very first rule day——

The ATTORNEY-GENERAL. [Interposing.] That paper is not in evidence.

Mr. WILSON. No, sir ; it is not ; I have not said that it was in evidence.

The ATTORNEY-GENERAL. Then you should not allude to it if it is not in evidence.

Mr. WILSON. Does the Attorney-General of the United States want to take advantage of a technical thing of that kind in this case ?

The ATTORNEY-GENERAL. I want this case to be tried by the orderly forms of justice ; that is what I want.

Mr. WILSON. Does the Attorney-General wish to take advantage of a matter of that kind ?

The ATTORNEY-GENERAL. [To the Court.] Do you suffer it ?

The COURT. I do not propose to suffer it. I am surprised that counsel so generally correct and proper in the management of a case should have given occasion for the objection of the Attorney-General in this instance.

Mr. WILSON. I will endeavor not to subject myself to criticism again. I had always thought, if your honor please, that the purpose of a government was never to do injustice, or take advantage of a citizen.

The COURT. There is no chance of injustice being done by not alluding to matters not in evidence, but there is great chance of injustice being done by bringing matters into the discussion before the jury which are not in evidence. Certainly the rules of practice proper in a case forbid allusions to matters outside of the evidence.

Mr. WILSON. If I have transgressed it is because I have been following too closely in the lead of my learned friend who preceded me, I fear. However, I submit to the criticism.

The COURT. I do not wish to impose any restrictions upon any man's imagination in making an address to the jury, except that he must not attempt, in his flights, to bring in facts which are not in evidence. Proceed now in order, Mr. Wilson.

Mr. WILSON. Now, gentlemen of the jury, I say that I have called your attention to what I regard as being the strong motive that Walsh had to tell a falsehood before this jury, and I say that you have a right to take into account that motive, and that I have a right to comment upon it.

How preposterous it is, when you come to look at these things, that General Brady would boldly make such a statement to the man, Walsh, and then turn about and declare him a failing contractor. How preposterous it is! Let us see how he says the alleged interview was brought about. He says he went there, into the Post-Office Department (and you recollect how guardedly he talked about that). He does not say that he saw General Brady sitting at the table—because I want to state his testimony as accurately as I can—he did not say exactly that Brady was sitting at his table surrounded by people; but he said *perhaps* he did that. You recollect he used that *perhaps* a great many times during the progress of his cross-examination. “Perhaps” he did that; and “perhaps,” having seen him sitting there surrounded by persons, he went down to the Sixth Auditor’s Office, in the ante-room, and wrote a note and gave that note to Brady’s page—a little white boy, whom he described. He designated that boy to whom he gave that note as “a little white boy” and “Brady’s page.” Now, the testimony shows that that little white boy, and the only white boy that he ever had as a page, was George Adamson. George Adamson tells you that he left there on the 5th of October, and was not there afterwards. Adamson was here on the witness-stand. It is impossible, therefore, that Walsh could have sent that little white boy, Brady’s page, with that note, except, gentlemen, that he may have sent that note to General Brady on the 28th of December, 1879. It could not have been 1881; there is no doubt about that. He could not have done it on the 28th of December, 1880, because the boy was not there; and it could not have been in 1881, because on the 28th of December, 1881, he had brought this suit against Brady, and that would not do.

The COURT. Brady was not there.

Mr. WILSON. No; Brady was not there in 1881. So that it could not have been in 1880 nor in 1881. If it was at all, it was in 1879. You recollect there is no date to this note, and the writing on the back is with one of those blunt rough pencils—just that kind of writing that no man can identify; no man could state whether he wrote it himself or not. Try it some time yourselves. It might have been in 1879, but it could not have been in 1880, and it could not have been in 1881. Suppose it was in 1879. Let us concede that. Then, what becomes of his story? Why, the story has gone to the winds, because he did not pretend that any of those loans had been made at that time. So that will not do. The 28th of December, 1879, antedates these pretended loans. So that will not do.

But I say, gentlemen of the jury, that we have contradicted him in another way. We have contradicted him by the testimony of Mr. Buell. Mr. Merrick says you cannot believe Buell. Why, what is the reason you cannot believe Buell? He says the reason is because Brady loaned money to Buell to buy The Capital, or to buy the Critic, and that Buell is now working on a salary on a paper, or two papers, in which Brady is interested. That is Mr. Merrick’s version of it. He says Buell has an interest; that he has the motive of friendship, and the motive of an employé of General Brady to induce him to swear falsely in this matter. Is not that Mr. Merrick’s argument? Certainly it is.

Well, if you will not believe Buell because he is influenced by such

motives as these surrounding him, then, upon the same principle, **how** are you going to believe Walsh? If the rule is good against Buell—and Merrick says it is—then does it not wipe Walsh out of the case utterly and forever? Because, as I have already shown a moment ago, Walsh had a motive ten times stronger than any motive that is alleged to actuate Mr. Buell.

Has Mr. Buell withheld anything from this jury? Like a great many other men who came upon the witness-stand he did not testify with the same freedom that a great many others do. Some men come right to the point and some men never come to the point, or it takes a long time to do it. What is the simple story about Buell? The simple story is this: He borrowed money from General Brady to buy a paper, and he gave his notes for that money and he put up collateral for that money. He went on for a while and was not able to pay his notes. Brady took up his notes and took his collateral. That is the business of the thing as between Brady and Buell. And now he is writing for The Capital Company, or for the Critic Company, or both—it does not matter which—on a salary. That is the business between him and General Brady. Mr. Walsh says that \$1,000 of one of these items of ten or twelve thousand dollars, he don't know which, Brady owed to Buell, and that he paid Buell. That is his statement.

Now, Mr. Buell says there is not a word of truth in that. Mr. Buell says General Brady never owed him a dollar in his life. He says he had no business transactions whatever with him of that kind. Mr. Walsh had got into an equity suit here and he wrote articles in his favor in The Capital. That was when Doun Piatt held The Capital. Then came along this contemplated investigation. Mr. Buell is mistaken with reference to the date of it; but on the 8th of December, 1879, the Postmaster-General had sent in this communication asking that this deficiency be supplied by the Congress of the United States, and wanting this deficiency to be supplied. That was on the 8th of December. Now, this investigation was brewing, and Walsh knew it was brewing. Walsh had a contract that amounted to \$135,000 a year, and if that deficiency bill were not passed, then Walsh's service would have to be terminated. He had an interest in the deficiency bill to the extent of \$135,000 a year, or whatever profit he could make out of that contract. This was Walsh's position in regard to the matter. Mr. Walsh tells you that, finding himself in that position, he employed Buell to assist him in the matter of the investigation, and he agreed to pay him \$1,000 for it, and he tells you that he wrote a brief covering that case, and submitted that brief to Mr. Blackburn, the chairman of the committee before which he had to argue the question as to whether that appropriation bill should or should not be passed. Mr. Blackburn was here upon this witness-stand, and if that was not true Mr. Merrick could have proven it not to be true by Mr. Blackburn. I might turn upon him and say, "Why did you not ask Blackburn that question and prove that it was not true?" Mr. Buell swore to you that that was the transaction, that Brady had nothing to do with it, and that at that time he did not even so much as know Brady. He had been introduced to him some four or five years before, I believe, he said, by Senator Morton; but, at all events, he had no personal acquaintance with him whatever, and he had no business relations with him whatever. Brady never agreed to pay him a dollar, and he did not owe him a dollar. Walsh did pay him a thousand dollars on his own account for services rendered by agreement with him (Walsh), and now Walsh says that that thousand dollars is a part of the \$12,000 which he

claims he loaned to Brady. The \$12,000 into which the thousand dollars entered, you will remember, he once swore was \$1,200, so that if you take the Buell money out it would only leave \$200. That is the kind of a story upon which you are asked to find that General Brady was corrupt in office. But I want you now to think of this: Here is a charge in this indictment that these parties conspired with General Brady for the mutual benefit of all of them to do this thing. Is there any testimony in this case from any quarter, including Walsh, to show that any one of these parties ever divided a dollar with General Brady? Not a bit of it, gentlemen. On the contrary, as I said to you awhile ago, the evidence shows exactly the other way. Now, if General Brady is guilty in this case, some one of these defendants has corrupted him. If he has been corrupted in this case, some one of these defendants did it. Who did it, gentlemen? Who is the man? Was it Rerdell? He got none of the money. Was it John R. Miner? He handled none of the money. Was it John W. Dorsey? None of the money ever went into his hands. Was it Stephen W. Dorsey? He did not get any of the money. Who did? Did Turner? Nobody pretends that he got any of it. Who did? That is the question in this case, gentlemen, and that is the charge that we are trying. You know that these men did not get it. Vaile got a considerable portion of that money, as the testimony has shown you, and the testimony shows where it went, and especially it shows that none of it went to General Brady. Bosler got the balance of the money. Has he paid any of it to General Brady? If he has they might have proven it by Bosler, I should think. Bosler is not connected with these parties in any way nor in any way connected with this indictment. He and Stephen W. Dorsey had a business arrangement with each other, and we traced this money outside of this combination altogether and into the hands of Bosler. Now, you see, gentlemen of the jury, that so far from proving that any of these parties paid money to General Brady, or divided with General Brady, either on account of money that was received back through remissions or on account of money paid directly on these contracts—so far from proving that any of them paid anything to him they have proved that nobody paid anything to him. Yet you are asked, gentlemen of the jury, to go out into a wide sea of speculation and suspicion, and on that you are asked to brand a man with having done his official acts, not from honest motives, but for corrupt purposes and by reason of corrupt influences. My brother Merrick lays a great deal of stress on the statements of Rerdell, as disclosed by the testimony of Mr. MacVeagh, and the testimony of Mr. James, and he absolutely argued to this jury for half an hour, that Mr. Rerdell's statement corroborated John A. Walsh. The court told you, gentlemen of the jury, and told the counsel and repeated it, and made it just as impressive as his honor could make it, because his honor did not want you to do injustice to anybody, or to take his evidence against any man that it is not evidence against, and he said over and over again that the statement of Rerdell is good for nothing as against anybody but himself. That is just; that is right. It is preserving as far as the court can preserve those rights which I alluded to in the opening of my argument. It is saying to the jury, "Gentlemen of the jury, no man is bound by the confession of another man." I cannot confess for you. You cannot confess for me. If I could confess for other people I might possibly confess this whole city into the penitentiary. The law tolerates nothing of that kind, therefore the court over and over again said to us that Mr. Rerdell's confession amounts to nothing against anybody but

himself. The court said he might confess himself into a conspiracy. They must find a conspiracy however first, before he can confess himself into it. Now, let us see what Rerdell did say. Whatever he said as against himself I concede you have a right to use against him. Mr. Rerdell is not my client, gentlemen of the jury, but this matter is a part and parcel of this case and I feel it my duty to discuss it. Even though it might have no special relation to the case so far as my client is concerned, I would discuss it for the benefit of Mr. Rerdell, for I do not intend to stand here if I can help it and see injustice done to any man or the law violated as to any citizen whether he is my client or not. Now, let us see what Mr. Rerdell said. I need not trouble you, gentlemen, with reading the testimony of Mr. Clayton, because you will remember that Mr. Clayton did not pretend to give the statement of Mr. Rerdell. What happened between Clayton and Rerdell was the coming of those two together with reference to Rerdell's going before the Attorney-General and the Postmaster-General to make his statement.

I am reminded by my brother McSweeney that they did not call Mr. Walsh back to contradict these specific statements made by Buell. Why did they not do it? Recollect, now, Buell made certain specific statements in reference to his relations with Walsh, and it was perfectly competent for them to bring Mr. Walsh to swear that that was not true. But they did not do it.

Now, after they had gone through and Mr. James had given his statement as to what Rerdell told him, and he had been cross-examined at considerable length, I put this question to him :

Q. Leaving out General Brady, and Mr. Vaile, and Mr. Miner, and Mr. Peck, and everybody else but Rerdell himself, will you tell the jury what Rerdell said he had done in connection with this matter?

That was done for the purpose of separating Rerdell from everybody else, because I wanted to know whether Rerdell had confessed anything against himself upon which this jury could convict him and send him to the penitentiary.

A. As nearly as I possibly can I will endeavor to do it.

Q. Just leave the rest out and let us know what he did.—A. He said he assisted in the preparation of the proposals and bonds partly in blank.

Now, gentlemen, Mr. Boone was on the witness-stand, brought here by the Government. As I told you at the outset, Mr. Boone stated exactly what happened. He told you that Peck, and Dorsey, and Miner, were going into a combination. Mr. Merrick did not state that testimony just as it was, but probably it was an inadvertence. He said that Miner was to go in or somebody who was a friend of Dorsey's. That is not the way the witness put it. Mr. Boone told you that Peck, Miner, John W. Dorsey, and Boone, combined together in a partnership for the purpose of carrying his mail. Now I will read further :

He attended to the lettings, and subsequently to the obtaining of petitions and papers to form the basis of the increase ; that he attended to the various sublettings of the contracts, taking them often in his own name for convenience of receipt and handling of the money ; that he was the general representative and business agent of this combination at the department, and as such was in frequent communication with General Brady as to these expeditions, increases, and remissions of fines ; that when he was to testify he indicated what changes should be made in the book that was to be made, supervised its making, and knew the man who did make it, but did not make it himself.

Now, gentlemen, everything that he says that he did there is entirely consistent with a plain, straightforward, honest, business transaction, and it all has reference and relation to a plain, straightforward, honest, business transaction, as I think I have shown you heretefore.

You may take everything that he says there as being absolutely and unqualifiedly true, and if he stood here indicted for any offense depending upon that testimony as to the fact of his having defrauded the Treasury of the United States, you could not make it out upon that statement. It does not prove anything such as is charged in this indictment as against Rerdell. That is what he said about himself. I do not care what he said about anybody else, because the court has told you that it amounts to nothing as to anybody but himself. That is all he says about himself. There was a good deal said about a book that he said he had made up; that there was a book that contained certain entries, and he made up another book. I have only just a word to say in regard to that, gentlemen of the jury. You recollect that Mr. James and Mr. MacVeagh both told you that when he was before them he had papers, letters, and things of that sort in his hand, which they say he said would reveal a great deal. Yet these distinguished gentlemen did not ask to see anything of them. He had sought these interviews. He had gone there for the purpose of having them, and yet these distinguished gentlemen, one the Attorney-General of the United States and the other the Postmaster-General of the United States, did not even ask him to let them see what it was he had brought there with him. Now, it shows this, gentlemen of the jury, that they themselves had not any faith in him. Do you recollect a little cross-examination of Mr. Clayton, when Colonel Ingersoll asked him whether or not he had not informed the Postmaster-General that Rerdell was fooling him or was a slippery fellow, or something of that kind—I cannot quote the exact language—how Mr. Clayton said, “When?” “Where,” and all that sort of thing. Do you not remember? Now, Clayton had said something undoubtedly to the Postmaster-General and the Attorney-General in regard to the matter. If he had not, these distinguished gentlemen would have been at work there over those papers that contained the damning proof of the guilt of these parties. Let us go to the next witness, Mr. James. When he was on the stand I put exactly the same question to him, as you will remember. I read from page 1836:

Q. I would be glad to have you state to the jury, leaving out the names of Vaile, Miner, and Peck, and the two Dorseys, and Brady, what Rerdell said he had done.

The WITNESS. It does not amount to much, judge.

Mr. WILSON. That is just what I want to get. I want to separate what he has said about other people from what he has said about himself.

A. Mr. Rerdell said that he was the secretary of Mr. Dorsey; that they went into this business of proposals—

Q. No, no. I want to know what he said he did?—A. That he prepared the blanks and sent them out in bulk; that after the proposals were received he looked after the expedition and the petitions; that on their return he attended to the business of the company, of which he was a sort of a book-keeper, and general manager, and clerk.

Q. That is about the substance of all he said about himself?—A. Yes, sir.

That is Rerdell's confession as against himself. That is all there is of it, gentlemen, and you are asked to say that that imports criminality, that that means crime, and is not consistent with any other hypothesis in this case, that that means guilt and is wholly irreconcilable with innocence. That is what they want you to say. You cannot say it, under the rules of the law. That is all it is necessary, as it seems to me, for anybody to say about Rerdell. As to this matter of the petitions and the affidavits and the general management of the business with which he was connected, as he here admits and as nobody has ever denied, my learned friends who come after me, and who can deal with that question much better than I can, will probably have something to say to you. I do not propose to weary you with further discussion with reference to those affidavits. In order to get Rerdell into this mat-

ter they must prove a conspiracy. They want to prove that he confessed himself into a conspiracy. What he said about himself I have already read to you.

Gentlemen, Mr. Merrick, near the close of his argument, told you that my client, although receiving a small salary, had come to be the owner of one of the palaces of this city, that he was reveling in wealth and living in luxury. Where did R. Merrick learn that? Not in this case. That is his testimony. No witness has sworn to it. He never learned that from any evidence in this case, and his standing here and throwing that in the face of this jury only indicates how weak he is on the testimony. Colonel Bliss in the opening of this case told you that they were going to show to you that General Brady had grown from a poor man to a comparatively rich man, or perhaps he stated it from a comparatively poor man to a rich man. That was the general idea. Have they made any offer to show anything of that kind in this case? None whatever. In the opening statement they told you they would prove it.

The COURT. They could not prove it. The court would not allow that inquiry to be gone into.

Mr. WILSON. Then the court ought not to have allowed Mr. Merrick to use that argument before this jury, I submit.

The COURT. The court will not interfere unless counsel object.

Mr. WILSON. The court has just interfered with me without counsel objecting. I beg the pardon of the court. I do not want to say anything improper, but I did not interfere when Mr. Merrick made that point, nor did the court interfere, and I am simply answering Mr. Merrick's argument to this jury, and have not departed from it. If I have transgressed the rules I beg the pardon of the court.

The COURT. No, I think you have not transgressed the rules in regard to what Mr. Merrick said upon this subject, because there was no evidence of it at all, and the court would not have admitted any such evidence.

Mr. WILSON. I agree with that, your honor.

Mr. MCSWEENEY. Query: Would it not?

The COURT. No.

Mr. MCSWEENEY. If a party is found recently in the possession of sudden wealth, and it is attempted to be charged that he got it improperly, I suppose he might show the sudden change of circumstances?

The COURT. I cannot conceive of any such case.

Mr. MCSWEENEY. In their opening argument they said they would show something of that kind.

The COURT. Sometimes larger ground is laid out than the parties are permitted to cover.

Mr. WILSON. But the point, your honor, is simply this: Mr. Bliss in his opening argument said he would prove it, but during the progress of this case they made no offer to prove it. When Mr. Merrick comes to argue the case he says that is a fact, and presents it to the jury. That is what I am answering.

The COURT. I mean what I say to cover the whole ground on both sides, that is, that the opening promise was a promise which the court would not have allowed to be fulfilled, and that Mr. Merrick's remarks upon the subject were without evidence to support them. The reply upon the subject now is fair. I do not interfere for the purpose of arresting what Judge Wilson has said in answer to Mr. Merrick. I think it is entirely proper, because Mr. Merrick could not have had any evidence, and the court would not have allowed them to show whether

General Brady was rich or poor. The jury do not know from the evidence.

Mr. WILSON. I was perhaps not just as courteous to the court as I ought to have been in my response, but I know the court will overlook that.

The COURT. The court is not at all sensitive.

Mr. WILSON. I beg your honor to believe that I did not intend to be discourteous.

The COURT. I will say here that counsel in an opening address are very often led to say what they expect to prove, and sometimes they promise to prove what the court would not allow to be proved, and yet may be perfectly sincere in the statement made in the opening address, because these are questions of law which have to be determined by the court. If there is an offer to prove the truth of what was promised, and the court sees it is not proper evidence in the case, of course the promise fails. Counsel may have been sincere in making the promise, but cannot always get in all the evidence they expect. So it is no disparagement of counsel if occasionally a promise of proof is made which in the course of the trial the counsel finds out or the court decides is a matter that cannot be produced in evidence.

Mr. WILSON. Gentlemen, Mr. Merrick towards the close of his argument said to you that General Brady had been buying newspapers in the city of Washington.

The COURT. There is some proof on that subject.

Mr. WILSON. Yes, sir; and I am going to discuss it. He urged that upon you, gentlemen of the jury, as being evidence of his guilt. How does it prove his guilt? How does it tend to prove his guilt? I will give you the substance of my brother Merrick's argument on that newspaper question. He says that newspapers do not pay, and, therefore, Brady must have invested for some corrupt or nefarious purpose. They don't pay in the city of Washington, and Mr. Merrick knows they do not pay, and therefore his logic is that Brady must have bought these papers to accomplish some wrongful purpose. Now, how did Mr. Merrick learn that newspapers do not pay? Not from the testimony of any witness but himself. Nobody testified on the stand that a newspaper would not pay, but Mr. Merrick himself gets on the stand, and he tells you that he knows that from his own personal experience. Let us be fair. I am going to deal fair with my brother Merrick, because he is not here.

Mr. HENKLE. He appealed to the foreman.

Mr. WILSON. I may be getting on very thin ice, but if I am I will have to stick to the consequences. My brother Merrick's personal experience is what led him to know that newspaper property would not pay in the city of Washington. He had been in the business. He said that he was connected with a paper that had four millions of capital behind it, and yet it sunk out of sight, I believe, in about two years, and they only had \$25 left. That woke up the court. I do not mean by that that your honor was asleep.

The COURT. No; I think you misunderstood him.

Mr. WILSON. Let me state it just as it was. Your honor said, "What? Four millions of capital?" Says he, "No; there was not four millions of capital, but there was four millions behind it. They had a hundred thousand dollars of capital paid up." That is what he said.

The COURT. Yes; and it was all sunk except \$25,000, not \$25.

Mr. WILSON. I beg pardon. I thought he said \$25. I misunderstood him. I think if you will look at the report that it will appear that

he said \$25. However, I am not infallible, gentlemen. Make it \$25,000. Put it that way. He corrected his testimony, that is to say, he corrected the misapprehension which startled the court. He said it was \$100,000 which was subscribed and they lost it or all but \$25,000 which they divided up among themselves. Now, gentlemen, I want to corroborate the testimony of my brother Merrick by producing the history of the times, and I want to show you that he was right when he said that there was \$4,000,000 behind this enterprise, although it failed. I take it for granted now that this history I have here is a veracious history. During the magnificent peroration of my brother Merrick he read an extract from a speech that was made in the Senate of the United States when it was sitting as a high court of impeachment, by a distinguished member of the House of Representatives from Massachusetts, and among other things that were alluded to in that speech were matters that had relation to certain things that had transpired in the city of New York. Thereupon my brother Merrick paused to say with great solemnity to this jury that Tweed was convicted and sent to the penitentiary. Now, the history of this newspaper enterprise of Mr. Merrick, so far as I have been able to gather it, is about this. [Reading from a newspaper:]

In the month of November, 1870, a few patriots and anti-corruptionists of the great Democracy—

You know brother Merrick said it was a Democratic concern, and therefore no one must think I am treading on anybody's toes when I follow him. I am following him very closely as you will observe, and I do not intend to get away from his track nor do I intend to let him get away from me if I can help it—

feeling the importance of establishing at the seat of the Government a national organ, which, by a bold advocacy of the principles of their time-honored party, would wrest the reins of power from the hands of dishonest political foes, concluded after mature deliberation to publish a paper for the accomplishment of these their long cherished purposes. The capital stock of the enterprise was fixed at \$100,000 in shares of \$1,000 each, and the names of the subscribers are herein given that some of them may yet again adorn the pages of a paper in which they have so often been exhibited to the public gaze. In presenting them once more to our readers it will be observed that he with whom they are most familiar heads the list.

Now, here follows a list of the stockholders.

The COURT. I did not hear that. Did Mr. Merrick give it?

Mr. WILSON. No, sir; Mr. Merrick did not. I am giving the history of this matter. I am only supplementing his testimony, your honor.

The COURT. With your testimony?

Mr. WILSON. Yes, sir; with my own testimony. I am reading from history. I rely upon history. Here it comes:

William M. Tweed, the patriot and anti-corruptionist, \$25,000.

Let us go a little further.

R. B. Connolly, Tweed's counterpart on a small scale, \$5,000.

That was the amount of his stock.

Richard Schell, old hunker Democrat, \$5,000.

James T. Souther, banker of New York, \$5,000.

Now I am going to pass over two or three names, but they are not the names of any of this jury. I want that understood. Mr. Merrick referred to Mr. W. W. Corcoran. It seems that his name appears here, or rather the name of another man for the benefit of Mr. Corcoran, \$15,000. Then comes another name that it is not necessary for me to mention, as Mr. Merrick did not mention him, but it does not affect any gentleman of the jury nor any of the counsel in the case. Here comes one now that is particularly interesting:

Richard T. Merrick.

Now the historian made a mistake right here. I am not going to endorse this historian in every particular, because it is obvious that he here made a mistake. He says:

Richard T. Merrick—subscribed, but not paid, \$1,000.

Then it goes on with some other gentlemen who are pretty well known, all of them respectable gentlemen, and leaving \$3,000 unsubscribed. This is the enterprise with which Mr. Merrick says he was connected.

The COURT. Where did you get that piece of history?

Mr. WILSON. Does your honor want to see it? It is one of the papers that has been amusing us so much. You will find a whole lot of very interesting history there. [Submitting a newspaper to the court.]

Mr. TOTTEN. Name the paper.

Mr. WILSON. It is the New York Times. This article was written a long time ago; before this case came up. The same history that I have been referring to corroborates Mr. Merrick in another particular. To use a sort of a nautical commercial phrase, this history says that the concern "went under," and so does Mr. Merrick. They both agree about that. It was shipwrecked; but, gentlemen, there is a conflict of testimony as to why it went under. There is where the trouble comes in. This history from which I have been reading gives one reason why it went under. They are telling out in the street a great many reasons. Certain very veracious gentlemen are telling on the street the reason, and the reason they give outside of this history is that that paper published so many of my brother Merrick's speeches that it broke the thing down. That is the way they tell it outside. I do not know whether it is true or not. I do not believe it myself. I put in my protest against it. I ask you not to believe it. You will not believe it, I think. I insist that you shall not. Now, gentlemen, why do I say you ought not to believe it? It is because you have heard my brother Merrick very often, and you have heard him very long, as you have heard me. He knows the whole gamut of oratory.

From grave to gay, from lively to severe.

He knows all the arts to raise the very stones of Rome. He moves and sways the passions of men. He charms and he terrifies. He has at his command logic and rhetoric, wisdom and wit, poetry and romance (a great deal of romance in this case), philosophy, science, and especially history. I never knew a man who knew more history than my brother Merrick, except one celebrated teacher of history, whose name I believe was Silas Wegg, who had a great deal to say in regard to the rise and fall of an empire, whether it was the Russian Empire or the Roman Empire, never being exactly straight in Silas's mind. He has all these graces at his command and subservient to his will. At one instant he is like the trickling rill and the murmuring brook. At the next the rushing river and the roaring cataract. One instant he is the orchestra of heaven's own cathedral, the next he is as tender as an æolian harp and as gentle as the music of the spheres. Now he is as gentle as a dove cooing for its mate, and again he is as fierce as the eagle rending its prey with beak and claw. He impales Vaile with a flash of his eye. He paralyzes Miner with a shake of his finger. He hurls death-dealing epithets at Brady. He buries S. W. Dorsey under adjectives. He withers John W. Dorsey with sarcasm. He hides Rerdell out of sight forever beneath his contempt. Then he folds his arms and surveys the scene with the calmness of a philosopher and the sadness of a historian.

No, gentlemen, you cannot make me believe that these speeches of my brother Merrick ever broke down that enterprise. You cannot make me believe that my brother Merrick's speeches, finding utterance in that paper, broke it down. You cannot make me believe that that edifice which stood on four millions of money, with Tweed and Connolly and the rest of them for pillars and Merrick playing the part of the dome and the goddess of liberty at the same time, was ever broken down in that way. Not a bit of it. There was some other reason for that enterprise breaking down. I do not believe the man who testifies that that was the reason. I think that man is almost as bad a man as John A. Walsh.

Now, gentlemen, that is my answer to Mr. Merrick's newspaper argument. That is all I have to say on the subject. It is the best answer I can make to it.

I have attempted to follow Mr. Merrick, gentlemen of the jury, in the main through his argument. Of course there are many things that I have not touched upon. I have not exhausted this subject but I feel that I have exhausted your patience, and I know that I have exhausted my own strength. I have discharged my duty to my client imperfectly I know, but I have done the best I could in the presentation of his case. He believes as I believe, that the course he pursued in the office of the Second Assistant Postmaster-General was a course that was conducive to the welfare and prosperity of this country. That was his notion then and it is his notion now. And history and the evidence in this case vindicates that policy and vindicates his acts. In the marvelous march of improvement you find that railroads have been built over a large portion of these routes, demonstrating that frequent and speedy communication in those regions are a necessity.

Now, gentlemen, I beg you to remember that adjectives are not arguments, and that to stand here hour by hour and hurl epithets is not only not a manly warfare but it is not logic, that to stand here and by the day denounce the accused as robbers and thieves until these gentlemen have

Set the wild echoes flying

Proves nothing of this charge. I ask that you will inquire whether the acts done by these defendants are reconcilable with innocence, and that you will determine that from the evidence adduced here before you. I have spoken of this as a lawless prosecution as to some parts of it. It is more than lawless. It is vile. If you were to do what you have been invited to do, it would be an infamy that no language can describe. In his argument, Mr. Ker said:

There is not a hamlet, a city, a town, a county, a State, from one end of this great Union to the other, that does not know of this case, and where the people are not anxiously and eagerly waiting to know what you are going to do and what your verdict is. Their verdict is already made up and they are waiting for yours.

And at the conclusion of his speech, on page 2423, he made use of this language:

As I told you the other day the eyes of the people are fastened upon you. They look to you who have been selected to represent the people of the great United States.

Then Mr. Bliss told you in substance that these defendants were regarded as guilty before a word of testimony was introduced; and Mr. Merrick, at page 2870, said:

My brother complains that the whole press of the country is assailing their client. It is true, as they state. The press is assailing them. Why? Because on the evi-

silence before this jury they are guilty, and in the name of the people of the United States that press is demanding a verdict of guilty. Gentlemen of the jury, you are trying these defendants, but the whole people of the country are trying you and me. This is no ordinary case. This is no common litigation.

It is a case, gentlemen of the jury, to be tried according to the rules of law just as any other case is to be tried, and in no other way. These appeals to you are only so many appeals to draw you from your duty. Are you representing the people in your capacity here as jurors? Whoever heard of a proposition of that kind before? Are you representing the press of this country that have not heard the testimony that you have heard, or the people who have not heard the testimony that you have heard? Are you representing them, or are you representing blind justice, holding the scales in even poise and with steady grasp to hear and weigh the testimony that is brought before you and to decide this case according to the law and the evidence? That is all we want in this case, gentlemen of the jury. We are ready for your verdict upon that principle. We are ready for your verdict if you decide this case according to the law and the evidence. But that is not what these gentlemen want. In various ways they have invited you to disregard this testimony and to be governed by the outside clamor, instead of according to the manner in which, upon your oaths, you said you would be governed.

Gentlemen, I make no appeal to you for mercy. That is not my mission before this jury. My client has not placed me here to ask for mercy at the hands of this jury. My business here for him is to see that the law is not violated. I make no appeal for sympathy; but I do appeal to you to stand by the law and to be guided by the evidence. If you do that, as I am sure you will, I have an abiding faith that your verdict will be, for these defendants, a sure and safe deliverance from this charge.

I thank the court and you, gentlemen of the jury.

At this point (3 o'clock p. m.) the court adjourned until to-morrow morning at 10 o'clock.

THURSDAY, AUGUST 31, 1882.

The court met at 10 o'clock and 10 minutes a. m.

Present, counsel for the Government and for the defendants.

Mr. HENKLE. May it please your honor, before proceeding to address the jury, I propose, as briefly as I can, to call your honor's attention to the scheme of this indictment, and to submit some authorities in support of the views that I take, not with reference to a criticism of the indictment itself at this time, but to the point that the proof has not sustained the scheme of the indictment.

The COURT. I suppose you will cover that point by instructions, will you not?

Mr. HENKLE. I desire to make my argument of the law to the court now, if your honor please. The Government has conceded that the branch of the case which is attributed by the indictment to Mr. Turner has not been sustained by the proof. I shall argue to the court that Mr. Turner and Mr. Turner's performances were a necessary part of the scheme of the indictment, and if the case has failed as to him it has failed as to all. Of course, your honor is familiar with the general run

and frame of this indictment. It is too long for me to attempt to go through, or even digest. The preliminary part of it sets out the organization of the Post-Office Department, its subdivisions, and the duties that attach to different subdivisions so far as they affect this case. I come now to page 4 of this indictment, and I will ask your honor's particular attention to what I shall read :

And the grand jurors aforesaid, upon their oath aforesaid, do further present that then and there, to wit, on the said 23d day of May, in the year of our Lord one thousand eight hundred and seventy-nine, at the county and District aforesaid, and within the jurisdiction of the said court, one Thomas J. Brady was the lawfully appointed Second Assistant Postmaster-General of the United States of America, and was then and there engaged in performing the duties of the said office of Second Assistant Postmaster-General. And that one William H. Turner was then and there a clerk of the said fourth class in the said office of the Second Assistant Postmaster-General, and was then and there employed and engaged in performing the duties of his said office of clerk in the said office of the Second Assistant Postmaster-General; and in obedience to the regulations prescribed by the Postmaster-General it then and there became and was the duty of him, the said William H. Turner, as such clerk as aforesaid, amongst other things to attend to the said business in the said contract division of the said office of the Second Assistant Postmaster-General, relating to the mail service and carrying and transporting the mails of the United States on and over the several post-routes in the States of California, Colorado, Oregon, and Nebraska, and Arizona Territory, Dakota Territory, and Utah Territory, and to mark and indorse upon all papers relating to contracts, allowances, and the said post-routes in the said States and Territories the true date when such paper was filed in the said office of the said Second Assistant Postmaster-General.

Your honor will observe that it was his duty to indorse the date of the filing upon all these contracts, allowances, &c., that appertained to this geographical division.

And whenever petitions, applications, letters, oaths, depositions, statements, and papers were received and filed in the said office relating and pertaining to carrying and transporting the said mails on and over the said post-routes in the said States and Territories, to mark and indorse upon such petitions, applications, letters, oaths, depositions, statements, and papers the true date when each was received and filed; and to wrap and inclose every such petition, application, letter, oath, deposition, statement, and paper in an envelope and cover, commonly called a jacket; and to write and indorse upon the outside of every such envelope, cover, and jacket the true name, kind, and character of the paper so inclosed, with a true, brief statement and description of the nature, subject-matter, and contents of every such paper so inclosed as aforesaid; and to arrange in proper and regular order, in separate packages and bundles, the papers received and filed in the said office relating and pertaining to each of the said post-routes, in the said States and Territories as aforesaid; and to receive, read, write, and prepare answers to the letters and communications relating to the said post-routes in the said States and Territories; and to write and prepare orders for allowances to be made to, and deductions to be made from the pay of contractors engaged and employed in carrying and transporting the said mails on and over the said post-routes in the said States and Territories as aforesaid.

The indictment then proceeds to set out *seriatim* these nineteen several contracts. They are set out with particularity, giving the termini and the intermediate stations of the routes, the name of the contractor, and the pay and all the material *indicia*. It then sets out the conspiracy; that on the 23d of May, all these parties, except Turner and Brady, were mutually interested in these routes. Then, on the fifteenth page, it states that Dorsey, Peck, Vaile, Rerdell, and Miner had their part in the conspiracy. They were to get up false petitions and false affidavits; to write false letters, and to procure false recommendations and file them in the office. That was their part of it. Now, further, it states on the sixteenth page:

And by means of the said William H. Turner, then and there falsely and fraudulently to mark, write, and indorse upon the said fraudulent letters and communications and false and fraudulent petitions and applications, false and untrue dates, as and for the true dates of the filing of the said letters, communications, petitions, and applica-

tions in the said office of the Second Assistant Postmaster-General as aforesaid: and by means of the said William H. Turner, then and there to wrap and inclose letters, communications, petitions, and applications received and filed in the said office of the Second Assistant Postmaster-General relating and pertaining to carrying and transporting the said mails on and over the said post-routes in envelopes, covers, and jackets, as aforesaid, and to write and indorse upon the outside of such envelope, cover, and jacket false and untrue brief statements and descriptions of the subject-matter and contents of such papers so to be inclosed as aforesaid, and to write and indorse upon the outside of such envelopes, covers, and jackets, false and untrue brief statements that the said letters, communications, and applications so to be inclosed as aforesaid, were then and there in favor of and requests for increased and additional service and increase of expedition of the said mails on and over said post-routes as aforesaid.

Your honor will remember the attempt of the Government to sustain these allegations of the indictment by evidence.

And by means of the said William H. Turner then and there fraudulently to write and prepare fraudulently written orders for allowances to be made to the said John W. Dorsey, John R. Miner, and John M. Peck as such contractors for carrying and transporting said mails on and over the said post-routes, the said fraudulently written orders then and there to be approved, made, and signed by the said Thomas J. Brady and to be filed in the said office of the Second Assistant Postmaster-General among the papers relating and pertaining to each of the said post-routes and to be certified to the said Auditor of the Treasury as aforesaid.

Then he proceeds on the twenty-third page to further set out the means:

And by means of the said false and fraudulent petitions and applications for additional service and increase of expedition on and over the said post-routes so to be made, signed, and filed in said office of the Second Assistant Postmaster-General as aforesaid, and the said fraudulent and false oaths and statements of the number of men and animals necessary and required to carry the said mails on and over the said post-routes with increased speed and by a schedule of a less number of hours so to be made, signed, and filed in the said office of the Second Assistant Postmaster-General as aforesaid, and the said false and untrue dates so to be marked upon the said petitions and papers aforesaid and the said false and untrue brief statements and descriptions of the contents and subject-matter of the said papers to be inclosed in the said envelopes, covers, and jackets, and so to be indorsed and written upon the outside of the said envelopes, covers, and jackets as aforesaid, thereby fraudulently to deceive the said Postmaster-General as such head of the Post-Office Department and superintendent of the business of the said Post-Office Department as aforesaid.

Now, I submit to your honor that part of this scheme, as it is claimed by the Government, was an imposition upon the Postmaster-General, who was the head of the department. The Postmaster-General is by law charged with these duties, and in fact these orders are all made in form by him, and he is responsible for them. But the Government did not claim, or did not propose to claim, that the Postmaster-General himself was in any way criminally responsible for these orders, but that by a scheme devised by these conspirators he was made to believe that the facts were other than they really were by the false manipulation of papers which had been falsely filed in the office. Now, then, your honor, to Mr. Turner by this indictment is attributed this branch of the scheme, and solely to him, the imposition upon the Postmaster-General of false statements and false jackets and false representations of the true state of the case, as appears in the papers, and as to which the Postmaster-General should and ought to have been fairly and honestly advised. Now, I say, your honor, that this indictment attributes this part of the device to Mr. Turner, and it is incomplete without this part. If you drop out of it the part that Turner was to perform the scheme itself must collapse, because, without the deception of the Postmaster-General, without this imposition upon him by these false papers, and false jackets, and false statements and entries upon them, he is responsible. The implication of law is that he is responsible for his own act; for of course in form the

orders are all made by him. According to the theory of the Government he is procured to make these orders innocently, because he is imposed upon by the deceit and fraud of one of his subordinates, to-wit, Mr. Turner. Now, I say, your honor, that this is not an immaterial part of the scheme at all, but it belongs to the very essence of it, and without it the scheme itself goes to pieces. I do not say, your honor, but that an indictment might have been constructed so as to leave Mr. Turner out and prepare the scheme in some other way. It might have set out that Brady himself deceived and imposed upon the Postmaster-General by representations that he made to him, or by the confidence that he had inspired in himself and abused as against his superior officer. I suppose a scheme might have been constructed so as to bring these other parties all into the relations of conspirators, and to have left Turner out. But we are not dealing with what might have been. We are dealing to-day with what is, and we are dealing, too, with what is the most particular and precise of all pleadings known to the law—a criminal indictment. I have had the idea that it was the opinion of your honor that it was not necessary in this kind of indictment to set out particularly and specifically the means by which the conspiracy was to be accomplished. I have understood your honor at several points in the discussion at bar during the progress of the case to intimate the opinion that the conspiracy itself was the gravamen of the offense, and that it would be sufficient to set out, perhaps in the language of the statute, that A B, C D, and E F conspired to defraud the United States. I do not know whether I misapprehended your honor or not, but I have the idea that that is the view of the law entertained by your honor.

The COURT. Without going into that question at all at the present time, are you not premature in raising this point? There has been no *nolle pros.* yet entered as to Turner, and the jury have found no verdict as to him. He is still on trial.

Mr. HENKLE. Mr. Merrick discharged him from the case, your honor.

The COURT. No.

Mr. HENKLE. He said what is the equivalent, your honor, as I understand; that is, that he would ask the jury to return no verdict against Mr. Turner.

The COURT. A verdict is Mr. Turner's right. He has been indicted and put upon his trial, and he is entitled to have the verdict of the jury in his case. But that verdict has not yet been rendered. He is still on trial, and for aught that the court can know now judicially the jury may find him guilty.

Mr. HENKLE. Well, your honor, I want to discuss the question a little with reference to the rulings of the court—

The COURT. [Interposing.] Would not the proper time and proper place for that point be on a motion in arrest of judgment, in case it should become necessary? Suppose the jury should acquit Turner and find the others guilty. Then your point would be exactly in time and place.

Mr. HENKLE. Your honor, my object now is to persuade the court to instruct the jury that if they find that Turner is not guilty they must find the others are not guilty also. That is the object of my addressing the court this morning upon this question. My argument is addressed to the court exclusively, and not to the jury, and it is for the purpose of presenting my views of law with regard to the matter that I now address the court.

The COURT. Then Turner is no more than any other of the defendants. Your instructions cover the whole ground; that is, that if the

jury should find any one of the defendants not guilty they are bound to find them all not guilty.

Mr. HENKLE. Not exactly that, your honor; any one of the defendants whose presence in the indictment is essential to the scheme of it. I have been trying to satisfy the court that Mr. Turner is an essential part of the scheme of the indictment, and that without him the indictment cannot be sustained against any of the defendants. It is with that view that I am now addressing your honor.

I now call the attention of the court to the case of the Commonwealth against Shedd, in 7 Cushing, which has been presented to the court before, for the purpose of showing in an indictment, of this kind of conspiracy what are the necessary allegations and what kind of allegations become necessarily descriptive of the offense. I read from page 514:

The defendants were convicted in the court of common pleas for the county of Hampden, upon an indictment which alleged that William C. Shedd and Sarah Clough, wife of one Leonard N. Clough, on the 22d of January, 1851, "at Chicopee, in the county aforesaid, being evil-disposed persons, and wickedly devising and intending, not only to deprive one Joel Church of his good name, fame, credit, and reputation, but also to defraud and prejudice the said Joel Church, then and there, with force and arms, did amongst themselves conspire, combine, confederate, and agree together to cheat and defraud the said Joel Church of divers large sums of money;" and the indictment proceeded to set forth the doing of certain overt acts by the defendants in pursuance of this conspiracy.

There was the general allegation of the conspiracy to defraud Church of divers large sums of money and the overt acts set out. Shedd was convicted, and afterwards moved in arrest of judgment. Says Dewey, judge, in the supreme court:

The gist of the offense in a charge of conspiracy being the act of conspiring together, and not the acts subsequently done in pursuance thereof, the consequence has been the introduction of certain forms of charging this offense, doubtful in their character, and as to which there has not been an entire uniformity of decisions. Under the idea that the conspiracy is alone the substantial crime charged the practice had become somewhat common to charge the offense in the most general terms as that of a conspiracy to the prejudice of the rights of others, overlooking the distinction, whether the object of the conspiracy was a criminal object, or the criminality consisted in accomplishing an object, not in itself a crime, by criminal means.

I ought to have said, perhaps, preliminary to the reading of these authorities, that of course these things that are said to have been conspired to be done are in themselves, as your honor has repeatedly said, innocent, and they only become criminal because of the criminal means by which they are to be accomplished; as for instance, it was innocent to file petitions and to procure petitions for expedition and increase. It was innocent to make indorsements upon the jackets. It was innocent for Brady to prepare the orders and to have them signed.

The recent decisions in this commonwealth have, to a certain extent at least, settled what was before a matter of doubt, and, so far as the principles of those decisions are applicable to this case, they must govern it. 1. It is well settled that a general allegation, that two or more persons conspired to effect an object criminal in itself, as to commit a misdemeanor or felony is quite sufficient, although the indictment omits all charges of the particular means to be used. 2. It is equally well settled that a general charge of a conspiracy to effect an object not criminal, is not sufficient. The charge of such a conspiracy is to be accompanied with the further statement of the means the conspirators concerted and agreed to use to effect the object; and those means must appear to be criminal. 3. The charge of a conspiracy to cheat and defraud A, does not, *ex ri termini*, import a criminal object. Cheating and defrauding are ambiguous terms, and as well applicable to civil contracts as to injuries inflicted wholly by breach of criminal law. A man may cheat and defraud another in the sale of articles of merchandise, and yet the case be one of civil wrong merely.

The court goes on to argue and maintain that because cheating and defrauding another is not necessarily a crime, that, therefore, if a con-

spiracy is devised to cheat or defraud one the indictment must set out particularly and specifically the means by which it is to be accomplished.

I now call your honor's attention to the case of Hartman against the Commonwealth, in 5 Pennsylvania State Reports, page 60. The opinion is by that most distinguished and learned judge, Gibson. The opinion of the court from which I propose to read is on pages 65 and 66 :

The indictment in this case contains five counts, the first and fourth of which are as follows :

1. The grand inquest, &c., do present, that John H. Hartmann, late of said county, yeoman, Granville Hartmann, late of said county, yeoman, William C. Harris, late of said county, yeoman, together with divers others, whose names to the inquest aforesaid are unknown, being evil-disposed persons, and wickedly devising, and intending to defraud and prejudice certain persons hereinafter mentioned, on the 1st day of September, in the year 1846, at the city and county aforesaid, and within the jurisdiction of this court, with force and arms, did, among themselves, conspire, combine, confederate, and agree together, falsely and fraudulently to cheat and defraud Aaron Arnold and James M. Constable, partners in trade, under the name of A. Arnold & Company, and divers other persons, then and there being the creditors of John M. Little and the said John M. Hartmann, trading under the name of Little & Hartmann, the said other persons being by name to the said inquest unknown, by removing and secreting divers goods and merchandises, then and there belonging to the said firm of Little & Hartmann, of great value, to wit, of the value of \$5,000, the description, quantity, and quality of the said goods and merchandises being as yet unknown to the said inquest, and thereby preventing them from being made liable for the payment of the debts due by the said firm of Little & Hartmann to the said Aaron Arnold and James M. Constable, partners in trade, under the name of A. Arnold & Company, and the said other creditors of the said firm of Little & Hartmann, with intent to defraud the said Aaron Arnold and James M. Constable, partners in trade, under the name of A. Arnold & Company, and the said other creditors, to the evil example of others, in the like case offending, and against the peace and dignity of the commonwealth of Pennsylvania.

Then it is varied somewhat in the other counts. Judge Gibson says :

There is one vice in this indictment which runs through every part of it. The conspiracy as charged is not to do an act illegal in itself or by combination of numbers and means in the execution of it, but to do an act thought to be specifically prohibited by statute. It is certainly not criminal by the common law to obtain a false credit by any other means than the use of a false token, or to secrete a debtor's property with a design to keep it from his creditors. But such acts are penal by the statute to abolish imprisonment for debt. Now, to constitute a conspiracy the purpose to be effected by it must be unlawful either in respect of its nature or in respect of the means to be employed for its accomplishment; and the intended act, where it has not a common-law name to import its nature, must, in order to show its illegality be set forth in an indictment of conspiracy with as much certainty as would be necessary in an indictment for the perpetration of it; otherwise it would not be shown to be criminal nor would the confederates be shown to be guilty. The English courts are beginning to regret that laxity of description that has been tolerated in these indictments of conspiracy; and policy requires that the judges here as well as there should begin to retrace their steps.

The old English doctrine was as I have intimated I thought perhaps the court entertained—that it was sufficient to set out the conspiracy without setting out the deed.

The COURT. No. Where the object of the conspiracy is to commit a crime, that is enough.

Mr. HENKLE. But where it is to do a thing which is not criminal in itself, the criminal agencies must be set out and with the same particularity that they would be in an indictment for doing those things themselves.

The counts before us are so uncertain and bald in circumstances, as to have shed scarce a ray of light on the charge which the defendants were required to meet.

Then he goes on :

Now though it may not be necessary in an indictment for conspiracy so minutely to

describe the unlawful act when it has a specific name which indicates its criminality, yet, where the conspiracy has been to do an act prohibited by statute, the object which makes it unlawful can be described only by its particular features; and without doing so it cannot be shown that the confederates had an unlawful purpose.

As in this case the statute makes a conspiracy to defraud the Government of the United States by any means unlawful and punishable, so upon the authority of this case it is necessary to set out with the same particularity of description these criminal means or these fraudulent means, that were to be resorted to to defraud the United States as it would be if they were indicted for doing the act itself.

It may be said that the form of a criminal purpose meditated, but not put in act, can seldom be described, but it can be as readily laid as proved. Precision in the description of the offense is of the last importance to the innocent, for it is that which marks the limits of the accusation and fixes the proof of it. It is the only hold he had on the jurors, judges as they are of the fact and the law, or on an insubordinate judge, who, confiding in his superior wisdom, refuses to conform to any general standard of decision, when his judgment cannot be reached by a writ of error, and whose example, if followed, would introduce into the subordinate courts as many systems of criminal jurisprudence as there are judicial districts in the State; so that an act might be criminal or innocent, according to the law of the place where it was done. The evils of such a state of uncertainty, anarchy, and confusion must be obvious to every one.

I now desire to show your honor that the courts of the United States have repudiated the old English doctrine and have accepted and adopted the doctrine as laid down by Judge Gibson. I cite to your honor the case of the United States against Cook, in 17 Wallace, and I will read your honor from page 174. This was not an indictment for conspiracy, but for embezzling; but states how the offense must be described in the indictment. Says Mr. Justice Clifford:

With rare exceptions, offenses consist of more than one ingredient, and in some cases, of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad and may be quashed on motion, or the judgment may be arrested or be reversed on error.

I call your honor's attention to the case of United States against Cruikshank and others, in 2 Otto.

The COURT. We have had that case.

Mr. HENKLE. Yes, I suppose so, in the preliminary hearing. This, your honor will remember, was an indictment for conspiracy upon the statute, as is this:

The statute provides for the punishment of those who conspire "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular," the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." (Amend. vi.) In *United States vs. Mills*, 7 Pet., 112, this was construed to mean that indictment must set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States vs. Cook*, 17 Wall., 174, that "every ingredient of which the offense is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, it must descend to particulars. (1 Arch. Cr. Pr. and Pl., 291.) The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause;

and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent : and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.

I call the attention of the court now to the case of the United States against Walsh—this is Thomas Walsh—in 5 Dillon, 58. This was a conspiracy on the part of contractors and officers of the United States to defraud the Government :

DILLON, J. We have examined all the cases cited in the arguments of the respective counsel and many others, and we have considered the propositions they have advanced. and now proceed to announce, with much elaboration, the conclusions we have reached.

At common law the offense of conspiracy was complete whenever the unlawful concert and agreement was entered into and concluded, although nothing was done in pursuance thereto, or to carry it into effect. The gist of the offense was the unlawful agreement. The offense of conspiracy at common law being complete without an overt act; it was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit a crime. But such is the settled doctrine of the common law, and hence, in an indictment for conspiracy at common law, it is not necessary to allege any overt act, or to prove it, if it is alleged.

It is a settled doctrine in our jurisprudence that there are no common-law offenses against the Government of the United States. An act or an omission, to be criminally punished in the Federal courts, must be declared to be an offense by an act of Congress. It follows that the act of Congress must constitute the sole basis of the offense of conspiracy, and the section (Rev. Stat., sec. 5440) on which this indictment is founded, changes in material respects the offense of conspiracy as it existed at common law. This section not only makes the unlawful agreement to do the prohibited act essential to a complete offense, but also "that one or more of the parties to such conspiracy shall do some act to effect the object thereof." These considerations are important in determining the weight due to the English cases on the subject of the particularity and certainty necessary in indictments for conspiracy. The English courts have sustained indictments for conspiracy which were framed in the most general manner, and without alleging any overt acts. (*Rex vs. Gill*, 2 Barn. & Ald., 204.) This laxity and departure from principle have been regretted in the more recent cases in that country, and have been sought to be remedied by giving to the defendant, where the count is general and the charge indefinite, the right to call for a "bill of particulars." Examples of this may be found in *Regina vs. Stapylton*, 2 Cox Crim. Cases, 69; *Rex vs. Hamilton*, 7 Carr. & P., 448, and some other cases. We have no such anomalous practice in this country, and the settled doctrine of the American courts is, that an indictment for conspiracy, like all other indictments, "must inform the defendant of the nature and cause of the accusation."

"Every ingredient of which the offense is composed must be accurately and clearly alleged" (*United States vs. Cook*, 17 Wall., 174); and in the recent case of the United States vs. Cruikshank (2 Otto. 542, 557), these principles were applied by the Supreme Court of the United States to the case of an indictment for conspiracy. The judgment of the court in the case last cited was that the indictment was bad for vagueness and generality, and because it lacked the certainty and precision required by the established rules for criminal pleading.

I cite these authorities, your honor, and I will not trouble the court to read any more for the purpose of showing that under this act of the United States upon which this indictment is framed the Government is required to set out with particularity the means by which the conspiracy is to be accomplished, and that it is not sufficient to supplement the charge in the indictment to set them out particularly and specifically in that part of the indictment charging the overt act. The part of the indictment in which the conspiracy is set out must itself contain a particular and accurate description of the criminal means that were intended to be employed by the conspirators in the prosecution of the conspiracy, and that those means must be set out with the same particularity and nicety of description that would be required if the indictment were framed for doing the thing itself, instead of the conspiracy. Now, as I said, I am not proposing to criticise this indictment at this time ; for the pleader seems to have had this in view, and has attempted

to set it out, although not with the nicety and particularity required. He has not described the false petitions or the false affidavits in the body of the count which charges the conspiracy; but generally that there were to be false affidavits, false petitions, and false jackets and false statements; I think it is not sufficiently minute and particular in the description of these, but I will not stop now to criticise the indictment in that particular. If it should become necessary we might take advantage of it before your honor in another form. What I say now is that what it is necessary to aver in the indictment it is necessary to prove upon the trial; and I call your honor's attention to the case of the Commonwealth against Dejardin, 126 Massachusetts, 46. Justice Martin says, on page 44:

The indictment in this case avers that the defendant unlawfully and scandalously did print and publish certain obscene pictures, figures, and descriptions, to wit, pictures, figures, and descriptions of naked girls manifestly tending to the corruption of the morals of youth.

That is against a statute of Massachusetts.

It is not necessary to decide whether this indictment can be held to be sufficient under the statute. If it can be there was a fatal variance between the allegation and the proof. The court admitted evidence that the defendant took photographic pictures of two young girls naked down to the waist; and instructed the jury that, if they found such pictures to be obscene and indecent, and to have been delivered to the girls, they should convict the defendant.

This was erroneous. The allegation that the defendant printed and published pictures and figures of naked girls is not met by proof that he printed and published pictures and figures of girls, for the greater part clothed. The Government, having described the pictures, is bound by the description, and the defendant could not be convicted upon proof that he printed and published pictures substantially different from the description, though the jury might find such pictures to be obscene.

I call the attention of the court now to the case of the Commonwealth against Livermore, 4 Gray, 18. Says Metcalf, judge:

The indictment in each of these cases charges the defendant with being a common seller of spirituous and intoxicating liquors. On the trial of each the jury were instructed that proof of the defendant being a common seller of liquors, which were either spirituous or intoxicating, would warrant them to find him guilty, and if the charge can be legally regarded as a charge that the defendant was a common seller of spirituous liquors, and also of those intoxicating liquors which are not spirituous then the instruction was right. For proof of his being a common seller of either would show him to be guilty of a violation of the statute which prescribes a punishment for being such a seller of either. And it is doubtless enough for a conviction, to prove so much of an indictment as shows that the defendant had committed a substantive offense therein specified, although there be not proof to the full extent of the case against him. But we cannot regard the charge in question as a charge that the defendant was a common seller of both kinds of liquors; that is, of liquors that were spirituous and intoxicating, and also intoxicating liquors which were not spirituous.

The court held that having used the copulative conjunction, and it being necessary that the proof should conform to the allegations in the indictment, although they proved one of them, the defendant must be acquitted.

The COURT. That part of the indictment which charges the crime which has been committed must be specific and the proof must conform to it, otherwise there must be an acquittal. But is that the present case?

Mr. HENKLE. That is what I am trying to maintain, your honor; I do not know with what success, but that is my view of it.

The COURT. The difference, it appears to me, is this: The part of the indictment to which you called the attention of the court a few minutes ago describes the general character of the conspiracy. The object of the conspiracy was to commit a fraud upon the United States by the use of certain means there described. Well, of course, in describing

the conspiracy, the means to be used are in the future. The conspiracy, when it was entered into, might have been a general conspiracy for the use of criminal means of a particular class. The conspiracy, of course, must precede the use of the means. It is impossible in the nature of things for the conspirator to describe exactly what false petitions, what false affidavits, and what other fraudulent means are to be used, because those means are not yet in existence. They are in the future. So that the pleader, when he describes the nature of the conspiracy, necessarily must confine himself to the facts as they occurred at the time of the conspiracy. As none of these false letters were in existence at that time, and none of these false affidavits were in existence at that time, and none of these false indorsements had been made at that time, it would be absurd to say that the conspiracy was formed with a view that on a certain day a certain letter with certain names, describing the letter or the petition, as it afterwards turned out to be, was used; nor would it have been possible in describing the conspiracy to say that at the time of the conspiracy Mr. Turner, the clerk in the department, should make certain indorsements upon certain petitions and certain papers in his office, because those papers were not then in his office. The law is reasonable in all things, and no pleader can commit a fault if he adheres to the truth of the facts. Now, in describing a conspiracy to do a future act, to commit a fraud, for example, upon the Government, as in the case here, by means of certain fraudulent devices afterwards to be gotten up amongst the conspirators, the conspirators, at the time they entered into the conspiracy, of course, could not define exactly what the precise future acts would be any further than that they were generally to be of a certain description. Now, that was the truth, if there is any truth in this charge at all, and that was the nature of the conspiracy; and as these devices by which the fraud was to be carried out were not then before the conspirators, and were not then in actual existence, the conspirators could not have had those deeds before them at the time, because they were of the future and not then in existence. So that the conspiracy, when it merely describes the general nature of the fraudulent acts to be committed, deals in generalities necessarily, and the indictment, when it describes the conspiracy, necessarily must describe it according to the fact at the time. When you come to describe a past deed—an act that was done in pursuance of the conspiracy—that is a different thing. You read a decision of Judge Gibson. He had been chief justice of the State, but at that time, I believe, he was one of the justices of the supreme court. They changed the constitution in Pennsylvania and abolished the old supreme court of the State.

Mr. HENKLE. I think he was chief justice at the time.

The COURT. Perhaps so. They submitted the choice of judges under the new constitution to a vote of the people, and the former chief justice, Gibson, who had become very eminent before the country, one of the most eminent judges that ever presided, was thrown out. He was a candidate for re-election, and was elected, but did not become chief justice. I think the case in 5 Pennsylvania State Reports was a case that was decided after the formation of the new constitution, and the former chief justice, Gibson, was not then chief justice. However that may be, that is a side issue.

Mr. HENKLE. [Referring to the report.] It says here C. J.—chief justice.

The COURT. I was mistaken, then. I supposed that report was under the new constitution of the State. I rather think it is so yet, and that

there is an error in reporting. But in all cases the principle is simply this: That where the act which was done in pursuance of the conspiracy is described in the indictment it must be described with accuracy and completeness, and if there is a variance in the proof it is fatal to the prosecution. But this accuracy is only required when the indictment sets out a past act, a deed done by the conspirators in pursuance of the conspiracy, and not where the conspiracy is described with its object at the time. In regard to this particular point that you are making as to Mr. Turner, it is true that the Government counsel has announced its purpose not to claim a verdict of guilty, and I presume that the jury will not find him guilty in the face of such a request as that. The Government has acknowledged that it has not made out a case of conspiracy against him. Now, it is claimed in your argument that throwing Turner out of the case the conspiracy collapses, because he was as essential to the completeness of the conspiracy as a wheel to the running of a time-piece. But is that true? It appears to me that it is not true. This conspiracy now——

Mr. HENKLE. [Interposing.] Will your honor allow me to interrupt you? I was not quite through. If your honor is going to announce an opinion now I do not want to cavil with the court after the decision is made.

The COURT. Then I will say that I am still open to your argument. I will complete what I was going to say: That the others might have conspired to have Turner do these things, and that would be a complete conspiracy. If that be true, then Turner might be dropped out of the conspiracy, and the others be guilty of it. But I ask your pardon. I supposed you had concluded your remarks.

Mr. HENKLE. I do not want to be obnoxious to the criticism of arguing the question after it is decided.

Mr. HENKLE. In reply to the statement of your honor's views as to what it is necessary to put in an indictment for conspiracy, as to the means, it seems to me this, your honor: That while it is not possible, as the court has said, to describe with accuracy the particular things that are afterwards done, with the dates and *minutia* of description as you might do in charging the overt act after it is an accomplished fact, nevertheless it seems to me, your honor, that all these authorities that I have been reading to the court maintain clearly and distinctly the doctrine that you must set out in your indictment with particularity of description the things that the parties do propose to do in the accomplishment of their conspiracy. This is not a conspiracy to commit a common-law crime; it is a conspiracy to defraud the Government of the United States, and it is criminal only when it is made so by the statute. Of course, I need not suggest to your honor that there are no common-law offenses against the United States and that offenses are only criminal when made so by the statute. Now I submit that all these authorities maintain the proposition that where the conspiracy is to do a thing not in itself criminal but where it is made criminal by the statute, or independently of the statute, where the means, the thing to be done is not criminal, but the means by which it is to be accomplished are criminal, in those cases where it was a statutory offense, or where by the common law it is a conspiracy to do a thing innocent in itself by unlawful means—in all those cases the means by which it is to be done must be specifically and particularly set out. I do not mean, your honor, to say that the overt acts which are done afterwards must be specifically set out in the count charging the conspiracy itself; but it is necessary to set out particularly and specifically

the means which they intended to employ. I do not say that they **must** say that Peck or Miner was to make an affidavit on the 1st of July, 1878, as to men and horses on a certain route; I do not mean that. But the complete scheme of the indictment and the instrumentalities to be used must be particularly and specifically set out in the indictment. As I said in my opening, I am not at this time criticising the indictment itself, but I have read these authorities for the purpose of showing the court that the indictment must do what it has undertaken to do—set out the criminal means by particular description.

And now, I say, if the court please, when they are so dovetailed, connected, and interlaced as to form one common purpose or one common thing, that if you take out of it one part of it that is essential to it the whole of it falls to pieces. Now, I submit to the court that this indictment sets out a purpose to impose upon and deceive the Postmaster-General by means, as the statute says, *and*—using the copulative conjunction, not the disjunctive *or*—“*and by means of Turner*” to make these false indorsements upon the jackets, to write false and untrue statements on these jackets for the purpose and by these means to impose upon and deceive the Postmaster-General into the making of these orders.

Now, I submit to the court that in the scheme of this indictment this is just as essential a feature as any other part of it. Your honor has said repeatedly during the progress of the trial that Brady is the key to the indictment, and I concede that he is the big key. But Turner is also a key to the indictment, and just as necessary to the scheme of this indictment, your honor will observe, as Brady himself.

The COURT. I do not see that.

Mr. HENKLE. I do not say, your honor, that the indictment might not have been framed if my learned friend (Mr. Ker) had not considered Turner in the case, if he had had the light that he now has, knowing that the proof would not sustain that charge, he might have constructed his indictment so as to make the scheme without embracing Turner. But considering when he drafted the indictment that Turner was a part of the scheme—that means by which and through which the Postmaster-General was to be deceived and imposed upon—he very properly incorporated it into and made it an essential part of his scheme, and as such it is descriptive and is necessary to the integrity of the system or the scheme; and I submit to your honor, that when the district attorney or the attorney representing the Government in this case said to Turner, “Exit, Turner,” the law said *exceunt omnes*; and they are all gone.

Before I leave this part of the case I want to call your honor’s attention to what your honor has already said in the case, at page 739:

The COURT. I believe the court has several times given expression to its views on this very question, or questions that are so near to it as to be hardly distinguishable. The last occasion was no longer ago than yesterday.

Now, the Government in this case has undertaken a mighty task. It has combined some seven or eight defendants in one conspiracy, and it has charged that the subjects of the conspiracy were nineteen different contracts and subcontracts, and it has undertaken to make out its case against all these defendants under this combination of contracts and subcontracts, and under charges specially setting forth the overt acts done by the conspirators and through the medium of the Post-Office Department and the Treasury Department, and it is a scheme of the most comprehensive character, and one which it is called to establish. That is all.

Now, I concur entirely with what your honor said at that time. I may have misapprehended what your honor meant, but your honor certainly said just what I am maintaining—that this was a comprehensive scheme. Your honor said that the Government had undertaken “a

mighty task;" it had combined these seven or eight defendants on all these nineteen routes, contracts, and subcontracts, and had undertaken to make out this case against all these defendants under this combination of contracts and subcontracts, and under charges specifically set forth in the overt acts.

The COURT. Well, we have been three months about it and it has been a considerable task.

Mr. HENKLE. Well, your honor, I do not think that was exactly what your honor meant at that time. I think your honor meant that it was a most Herculean undertaking; that the Government had undertaken to combine these seven or eight defendants, and had put into its indictment these nineteen routes, and had set out all these means or instrumentalities connecting them with the copulative conjunction *and*; that it was a completed scheme in itself, and that the Government had undertaken to maintain that scheme; and your honor thought it was "a mighty task."

Now, your honor, let me call your attention to this: Usually, where it is contemplated that there may be a failure of proof as to some part of the description of an offense, the custom, the practice, is to introduce several counts. Now, my friend might have had a count putting in Turner as a part of the scheme; he might have had another count leaving Turner out; he might have had a count charging a conspiracy between Brady and Miner or with Dorsey; and he might have had a count charging a conspiracy with them all together; he might have had a count charging a conspiracy upon one route and then upon another and then upon another.

The COURT. Not in the same indictment.

Mr. HENKLE. Oh, I think so, your honor.

The COURT. No; the case of O'Connell vs. Queen is against that.

Mr. HENKLE. I am not going to stop to cavil with the court about it. But we have the indictment as it is, and I submit that the integrity of the indictment requires the maintenance of the proof as to the whole of it, and if it fails in any one part it fails in all.

The COURT. I think on the other occasion to which you refer I said—and I think if you look further you will see that I said—that I was not to be understood as saying that some of it might not be right.

Mr. HENKLE. I will commence and read from where I left off; I did not read all of it:

But the court in looking at the offer of evidence in any particular case, must regard the evidence in relation to the comprehensiveness of this indictment and of the scheme of the prosecution. It is necessary that there should be a conspiracy. If the conspiracy be established as charged in this indictment, then it comprehends all these nineteen or twenty different contracts, and the service under those contracts. From the relation of the conspiracy those contracts become blended. They are put into the concern as constituting one capital.

I could not have stated it better myself:

The law in regard to the overt act in pursuance of the conspiracy requires one overt act, and one overt act by any one of the conspirators is enough for the purpose of the prosecution. The conspiracy must be made out. A conspiracy is different from a combination, in this, that the conspiracy must have a corrupt character. A combination or a partnership is lawful. If all these parties had entered into a combination, each one to put in his contract or his subcontract as his contribution to the common capital with a view of dividing the profits, that would have been perfectly lawful. There would be nothing wrong in that either morally or in the eye of the law. That would not, of course, be the subject of a criminal prosecution. It was necessary, therefore, not only that there should be a combination, but that there should be an evil combination, that is, a conspiracy with an evil purpose. It is not required that the indictment in charging the evil purpose shall set out the specific act to be proved.

It is necessary that the indictment shall contain some averment to change the lawful combination into an unlawful conspiracy, and that is done when the indictment charges the combination first, and then charges that it was done for the purpose of committing a fraud upon the Government by means of false petitions, false papers, false affidavits, and so on. Without an averment of that kind the indictment would merely charge a lawful combination, and an overt act set out in pursuance of a lawful combination would hardly have made a good indictment. But if the indictment charged in a general way that this was a combination in which these several parties had put their capital and made common stock of it, and that it was an evil combination, because it was done for the purpose of uniting in attempts to defraud the Government by the means generally set out, the means stated constituting the manner in which the evil character is attributed to the combination, that would not be enough, because the statute requires that in pursuance of this evil combination or conspiracy the indictment shall set out some act done in pursuance of that conspiracy. Well, now, it is alleged that here is a particular item which was put into this common fund as a contribution to the capital stock of the parties, consisting of route 441b0, and that in regard to this particular route the indictment contains no specification of an overt act such as it contains in regard to some of the others.

Mr. INGERSOLL. Except in regard to the false petition.

The COURT. [Continuing.] And that therefore nothing can be received in evidence because of the absence of the overt act as applicable to this particular route.

Mr. INGERSOLL. To the absence of the charge.

The COURT. To the absence of a charge. But that theory is based upon this idea: that this particular route is itself an independent subject.

That is Ingersoll's theory.

Now, from the time that this particular route entered into the common combination and became a simple factor along with many others in the common combination, it is immaterial whether the act done was an act done upon this route, or in pursuance of the views of the parties in regard to this route, or in regard to some other route which was its companion in the capital stock of the conspiracy. That is the view that I take of this subject. It is a good deal like a joint tenancy at the common law in a piece of land; the parties are seized *per me et per tu* and *per tu et per me*. You cannot divide it as you can an apple amongst several owners, but each one partakes of the character of the whole of all of the other ingredients of the combination. It is one whole made up of different parts, and all the parties according to the scheme of this indictment, in my view, have a legal interest in the whole and in every part.

Now, your honor, it seems to me that this is a more definite, precise, vigorous, and comprehensive statement of the point than I could possibly have made myself, and I hope your honor will adhere to it.

The COURT. I certainly shall, for I maintain that view now.

Mr. HENKLE. I am not calling upon your honor for an opinion now. I desired simply to submit my views.

The COURT. Oh, then, if you do not want any decision now, I shall not make it.

Mr. HENKLE. I am not asking your honor to decide the question now.

If the court please, there is another legal question that I desire to direct your honor's attention to before I proceed to the jury. That is the question as to the *corpus delicti*. Your honor, in the course of the trial when you removed this question to the jury without having decided yourself that a conspiracy had been established *prima facie*—and I am not undertaking to cavil with your honor's view at all—

The COURT. [Interposing.] If the court used the words *prima facie*, it did so inadvertently. I think no such language was used by me.

Mr. HENKLE. The language is my own. I am not attributing it to the court. I say that when your honor undertook to submit the question to the jury without deciding whether, as we claim that it was the duty of the court to do, the conspiracy had been made out *prima facie*—

The COURT. [Interposing.] I believe those words, "*prima facie*," were employed by Judge McLean in a case reported in the fifth volume of his reports. But in any criminal case the burden of proof is never shifted from the beginning to the close. The authorities upon which I pro-

ceeded on the occasion to which you refer, are to this effect: That when the conspiracy is made out, or when there is evidence sufficient to authorize the court to submit that question to the jury, then the court will receive the admissions of any one or more of the defendants. It was on that topic that those admissions were received. In my view at that time there was evidence enough relating to the charge of conspiracy to authorize the submission of that question to the jury. I did not say what the weight of that evidence was; I did not intimate any opinion on that subject; I merely said it was enough, in the opinion of the court, to authorize the court to submit the question of conspiracy *rel non* to the jury; when that was the case, then the confessions of the defendants, or any of them, were admissible in evidence. That I take to be the doctrine.

Mr. HENKLE. Yes, sir. I did not mean to attribute to your honor anything else than that. I meant to say that the view that had been taken upon our side was, that it was the duty of the court before confessions could be given in evidence, to decide whether *prima facie* the conspiracy had been made out. But your honor took a different view of it, and many learned judges have taken your honor's view, and I am not caviling with that view now. Whatever view we might have entertained, that has passed; your honor has decided the question, and the case is to go to the jury.

The COURT. You made your exception.

Mr. HENKLE. As I want to discuss this question to the jury, I am proposing to read some authorities to the court, so that I may not transcend my license in discussion to the jury.

Your honor said in pronouncing your judgment upon that question, as I understood you, the *corpus delicti* did not necessarily contain in it the element of offense, of crime, but that in a case of conspiracy the *corpus delicti* was the combination, and that when you had shown a combination of the parties you had made out sufficient to submit the case to the jury. Your honor will remember that that question, as I recall it, was not discussed upon authority to the court at all at the time, and the opinion your honor has given was such as any lawyer might make off-hand without examination. And my observation—and I was going to say my experience—is that the most learned lawyers cannot always be relied upon to state what the law is without a present examination of the question.

I understood your honor to say, by way of illustration, that where a party might be on trial, say for murder, it was necessary, in the first place, to find the dead body, and that when it was found, then the defendant might confess that he had killed the person whose body had been found dead, and be convicted of murder upon his own confession; that the foundation, the *corpus delicti*, would have been sufficiently proved by the discovery of the dead body.

The COURT. Yes; I think you state it correctly. What I meant—and what I think I said—was simply this, that the finding of a dead body established no crime against anybody. But that the dead body having been found and identified, the subsequent confession of a man that he had taken that life was admissible in evidence against him.

Mr. HENKLE. And would support a conviction.

The COURT. And sustain a conviction. The confession gives character to the death. The man may have died naturally or from accident. The mere finding of a dead body does not establish anything except that the man is dead; it fastens no criminality anywhere. But that fact being established, then the confession may sustain a conviction.

Mr. HENKLE. I so understood your honor. Now, with all due deference to the court—

The COURT. [Interposing.] And in analogy to the present case, in this case there have been evidences enough of a combination between these parties to go to the jury. And that combination itself was a lawful thing, just as there was no harm in a man's dying; it fastens no criminality anywhere. The mere combination may be lawful in itself, but the combination being established, it was like the *corpus delicti* in the case of death, and with the subsequent confession of the parties to that combination might convert that combination into a crime.

Mr. HENKLE. I so understood your honor. Now, if the court please, with all becoming deference, I submit that another element is necessary: that it is not only necessary—to take the case most frequently used in illustrating the *corpus delicti*, that of murder—that it is not only necessary to find the dead body, but it is necessary to find it under such circumstances or accompanied by such facts as indicated that it came to its death unlawfully or by unlawful means; that that is as necessary as the finding of the dead body; that is an element of the *corpus delicti*; that the finding of the body and the facts or the accompanying circumstances that show that it came to its death unlawfully; those two together constitute the *corpus delicti*; and that the offense is not completed without both.

I call your honor's attention to the case of *The People vs. William Porter*, 2 Parker's Criminal Reports, 14:

The prisoner was indicted for blasphemy in speaking the following words:

I will not repeat the horrid words.

The public prosecutor to establish the speaking of the words called Alfred White, and offered to prove by him that in a conversation with the prisoner he admitted to the witness that at a whortleberrying party he had made use of the expressions charged in the indictment.

WALWORTH, Circuit Judge. This is not legal evidence to prove the offense. A person can never be convicted of a crime on his own confession, made out of court, without first proving a crime committed, or giving some testimony in addition to the confession, from which the court and jury can legally infer that the offense has been committed by some one. In this case, if any person heard the words spoken, his testimony should be adduced. If they were not heard by any person, no crime could have been committed, and the prisoner might as well be convicted if he had merely confessed he once thought so.

But even if this were legal evidence to prove a crime committed, the confession does not go far enough, as the prisoner did not admit that the words were spoken within the time of limitation, or even that they were spoken within this county or State.

I call the court's attention next to the case of *The People vs. Bennett*, 49 New York. I will read from page 143, in the opinion of Church, C. J.:

It is, however, strenuously insisted by the learned counsel for the prisoner that this is a case of defective proof; that there was a failure to prove the complete *corpus delicti*, and that it falls within the principle of the *Ruloff* case (*supra*), and this was sustained by the supreme court. I feel constrained to differ from this view of the case. The *corpus delicti* has two components, viz, death as the result, and the criminal agency of another as the means, and all that the court decided in the *Ruloff* case was that there must be direct proof of one or the other. The court adopted the rule of Lord Hale, who said: "I would never convict any person of murder or manslaughter unless the fact was proved to be done, or at least the body found dead." The court reviews numerous authorities to sustain the decision, which is, unquestionably, a just and sound rule. The point of the decision is that, as to one or the other of the component parts of the *corpus delicti*, there must be direct evidence; that both cannot be established by mere circumstantial evidence; but the court affirms the rule that when one is proved by direct evidence the other may be by circumstances. In that case the basis of the *corpus delicti*, that the person alleged to be murdered was not found dead, was wanting. The death, as well as the criminal agency, was attempted to be proved by circumstances. Here the body was found dead and fully identified, and it was

undisputed that death was produced by the wound inflicted in the vagina; and the remaining material question was whether the prisoner feloniously inflicted it. It was competent to prove that fact by circumstantial evidence.

Burrill, in his work on circumstantial evidence, page 682, lays down the correct rule. He says, "A dead body, or its remains having been discovered and identified as that of the person charged to have been slain, and the basis of the *corpus delicti* being thus fully established, the next step in the process, and the one which seems to complete the proof of that indispensable preliminary fact, is to show that the death has been occasioned by the principal act of *another person*. This may always be done by means of circumstantial evidence, including that of the presumptive kind; and for this purpose a much wider range of inquiry is allowed than in regard to the fundamental fact of death, and all the circumstances of the case, including the facts of conduct on the part of the accused, may be taken into consideration."

There, your honor, is the doctrine laid down by this distinguished court, that the *corpus delicti* is composed of two elements: death, and the circumstances which indicate that it came to its death by foul means.

The COURT. I do not understand it that way. I understand the court to decide there that after the death had been established, then the criminal means by which the death was caused may be established by circumstantial evidence.

Mr. HENKLE. It was claimed that the *corpus delicti* must be proved by positive evidence, but the court held that the *corpus delicti* is composed of two elements: death and the criminal agency of another; that there must be positive evidence as to either one or the other of them.

The COURT. This was a trial before a jury, and it was necessary to prove the death. After that was proved, then the court had decided that the crime might be made out by circumstantial evidence against the party charged. That is exactly what is done in this case in the question submitted to the jury.

Mr. HENKLE. What I am trying to maintain is——

The COURT. [Interposing.] Suppose it to be the case of a person drowned, the body having been washed on shore. The body would give no evidence of violence at all. It might have been an accident. Supposing a party should be arrested and charged with having thrown the person off a boat crossing the river. The *corpus delicti* would not contain any evidence at all that he had done the deed, but if he confesses that he threw the person overboard, I think that confession would be admissible in evidence against him.

Mr. HENKLE. Well, your honor, it seems to me that that would not be an authority. Let me read again what Burrill says:

A dead body or its remains having been discovered and identified as that of the person charged to have been slain, and the basis of the *corpus delicti* being thus fully established, the next step in the process, and the one which seems to complete the proof of that indispensable preliminary fact, is to show that the death has been occasioned by the criminal act of *another person*.

Not by the defendant, but that it was done by the criminal act of another. When you have established that, then the party on trial may confess that he is the party who did it and he may be convicted.

The COURT. Then it would just amount to this: that in a case of conspiracy the *corpus delicti* consists in proving the conspiracy in full. If that is done you do not need any confession; the case is made out without confession.

Mr. HENKLE. True, your honor; that is so.

The COURT. And if the conspiracy is not proved, the confession is not admissible. So that in cases of conspiracy confessions are never possible.

Mr. TOTTEN. A man might confess himself a member of a conspiracy, as in the Whisky Ring cases in Saint Louis; that was the case there.

The COURT. Every man in a trial for conspiracy stands upon his own legs.

Mr. HENKLE. The practical point—and I apprehend from what your honor has said that it is no longer a matter of any consequence—the practical point I desire to argue to the jury is that they must find the *corpus delicti*, which I claim is the criminal conspiracy, before they can consider the confessions.

The COURT. And then the confession is unnecessary.

Mr. HENKLE. Very well. It may be in this case unnecessary; it would be in this case unnecessary. But, your honor, a conspiracy might be proved without proving the persons who composed it.

The COURT. I am afraid you will find the court incorrigible on this point, and have to go to the jury upon the facts.

Mr. HENKLE. Well, sir.

[To the jury.] Gentlemen of the jury, I now come to the discharge of my duty in presenting my views of this case to you for your consideration, and I do it under many embarrassments. First, because I know that you must be wearied almost to death with this interminable case, and the seemingly interminable discussion of the case, and, secondly, because the case has been so thoroughly, so masterly, and so exhaustively discussed by my brethren who have preceded me that I will necessarily be compelled to weary and perhaps to tire and bore you by repeating much that has already been said. The great epic poet said:

There is nothing so wearying as a twice-told tale.

Now, gentlemen, you all remember, perhaps, when I came into this case, you had been impaneled for perhaps two or three weeks, or a week or ten days at all events. You had been listening to the testimony, the testimony as to the course of business, the usages pertaining to the Post-Office Department. When I came into the case you were just about taking up the first of the routes, from Kearney to Kent. Well, I had no acquaintance with any of these parties defendant—no personal acquaintance with any of them. I had, of course, read the newspapers. I had read much about the case in the newspapers, and I had conceived the opinion, believing in newspapers, that it was a monstrous conspiracy; and I had supposed that these defendants now on trial had entered into a conspiracy, foul and damning in its character, to rob the Treasury of the United States. I had supposed that these gentlemen representing our branch of the case were a sort of respectable freebooters, as ready to crack Uncle Sam's crib as are the road agents in the far West to despoil the mail coaches there. I of course knew who General Brady was; that he had been Second Assistant Postmaster-General, but never having had occasion to have any business with him in that capacity, I had no acquaintance with him. I knew who Senator Dorsey was; I knew that he had been a Senator of the United States, and I knew, or supposed I knew, that he had been very largely instrumental in conducting to success the Presidential campaign which had carried Garfield into the executive chair. But with my clients I had no acquaintance, and I had no idea as to who they were. And my learned friends on the other side have seemed to be very curious, especially has my learned friend who opened the case [Mr. Ker], been very curious to know who they were. He asked, "Who is Harvey M. Vaile?" He said he had been a lawyer, and that he was a mail contractor, but that was all we knew about it.

Now, gentlemen of the jury, from an intimate connection and close

association with Mr. Vaile for the past two months, I am able to tell you a little more about him if you want to know it, and I know my friend does want to know it. He seemed to be anxious to know, and his anxiety was manifestly an honest anxiety. Mr. Vaile not only said that he was a lawyer, but I say that he was a lawyer of distinction, practicing his profession in one of the States on the border, when our national trouble began. He took the side of the Union. He believed in maintaining the integrity of the Constitution and the Union. His neighbors differed from him. I am not raking up the embers of the old strife, nor saying who was right or who was wrong. I have not and I never have had any bitter hostility against the men who took the other view of the subject. I think it is quite likely that if I had lived on the other side I might have adopted the views of my surroundings and my State; I do not know whether I would or not. But I have no hostility towards the men who took up arms against my view. That issue has passed and gone, and I hope it is buried out of sight forever, and I hope we are all brethren again.

But Mr. Vaile took the side of the Union and it became impossible for him, in the bitterness of the strife, to pursue his ordinary avocation at his old home, and so he came to Washington looking for some means by which to earn his bread or to carry on a business for a livelihood; and chance threw him into mail-contracting. Now, gentlemen, I want to say to you—for I have a right to say it to you, because I shall claim that there is nothing in the evidence that contradicts it—that Harvey M. Vaile is a man of the highest character for integrity. My excellent brother Merrick called him a robber, a thief, a speculator, and a plunderer, and applied to him all manner of abusive epithets, exhausted the vocabulary of epithets in finding terms with which to abuse him and my friend Miner and the other defendants in this case. Now, I say, that there was no justification for that; the evidence does not justify it; there is not a single scintilla of evidence in this case that will indicate that Harvey M. Vaile is a dishonest man, much less a robber or a plunderer. And I say to you, gentlemen—meaning no disrespect for my friend Merrick, for no man holds him in higher estimation than I do—that Vaile is the peer of Mr. Merrick or of any man in this presence for integrity and honor. And, if I were going to call upon a man to do a generous act or deed for me, there is no man in this presence whom I would so readily call upon as this same Harvey M. Vaile. He has a big body, and he has a correspondingly big heart, as much as my brother ridicules him; but it does respond to appeals for human sympathy, and it has its side of generosity that may be evoked, that may be utilized in doing generous and kind deeds without reward or the hope thereof.

Now, who is my friend Miner? My friend Ker, in alluding to Mr. Miner, paid me a very high compliment. He said that I would not be mistaken for a thief in a crowd. I regard that as a compliment, brother Ker, and I thank you for it. But he meant to imply that Mr. Miner would, and I believe he said that he would or might. Now, I do not know whether brother Miner might be regarded as a very handsome man or not, but if there are in the lineaments of his face any indications that would mark him as a thief or a dishonest man, I have not learned to read the human countenance. But I have learned Mr. Miner, and I know that he is not a thief; I know that he is not a perjurer; I know that he is not a dishonest man, or——

Mr. KER. Wait a moment. If your honor please, I do not like to interrupt my friend, but I would like now to have the ruling of the

court upon this matter, as to whether the counsel has the right to set up a character for the defendants or not. Character has been decided to be one of the elements to be proved in the case, and they have not proved it in the case. Therefore, I do not think my friend Henkle ought to assert his personal knowledge in this case and what he has failed to prove.

The COURT. One of the first rules to be observed by counsel in addressing the jury is never to put his own words in evidence upon any subject before the jury. He addresses the jury upon the evidence and the law is given to the jury by the court. Counsel are not witnesses and they ought not to throw the weight of their character into the jury-box when there is no evidence to sustain it. I know that in the heat of discussion, and sometimes under provocation from the opposite side, counsel depart from the rule; but when the departure is called to the attention of the court, the court is obliged to take notice of it.

Mr. HENKLE. May it please your honor—

Mr. TOTTEN. [Interposing.] It comes with a very bad grace from brother Ker.

The COURT. I am not deciding questions of grace here.

Mr. HENKLE. May it please your honor, I want to say, in my own justification at all events, that I am but following in the line marked out and traveled by each one of the counsel that addressed the jury on the part of the Government.

The COURT. I think you have gone a little beyond that. The counsel on behalf of the Government were pretty free in epithets undoubtedly; but they had a right to claim that their opinions were justified by the evidence in the case. Their denunciation of the defendants professed to be founded on evidence in the case as they viewed it. And in this instance, of course, the court recognizes the right of counsel to take the other side of that question, and to laud their clients as much as they please upon the facts of the case.

Mr. HENKLE. That is all I intended to do, your honor.

The COURT. But it is not right for counsel to state to the jury what he knows himself about his clients or about the other parties. Now, if you will confine yourself to the facts in the case you may compliment your clients as much as you please.

Mr. HENKLE. It is pretty late to draw the lines, your honor, but still, if the court says so, of course I will keep within them, or try to.

I was sorry, gentlemen, to hear my friend Merrick indulge in the violent and vituperative language that he did, as applied to my client. I was sorry because I love him; more sorry to hear him say it than I was with reference to my amiable friend, brother Ker, or brother Bliss, because my acquaintance has not been so long or so intimate with either of them as it has been with Mr. Merrick. And it was so unusual for brother Merrick. Why, ordinarily he is the very soul of courtesy and urbanity. Ordinarily he uses no abusive epithets against any one, unless they are manifestly and palpably deserved. And if I had to be tried for a criminal offense and had the selection of a counsel to prosecute me, I do not know of any man, at this bar or elsewhere, whom I would choose more readily to conduct the prosecution against me than my friend, brother Merrick, because I would have supposed from his past history and my knowledge of him that no unfair advantage would be taken of me; that he would be generous and kind; that he would deal with my faults gently; that he would have for me sympathy; and above all that he would bear himself chivalrously towards me; that he would not abuse and take advantage of the posi-

tion that he occupied, when I could not resent it, to vilify and traduce me. I say, it surprised and hurt me to see my eminent friend depart from the examples, the uniform examples of his own life in doing this thing. If he abused these men on the street, if he had come up to Mr. Vaile and called him a thief and a robber on the street when he was not under this indictment, then they would have been on equal terms. Mr. Vaile would have had the right and privilege to resent it, and could have done it, and undoubtedly would have done it. But here in this presence, under this terrible cloud, a brave man—if I am not transgressing, I may assume—

The COURT. [Interposing.] I want to read a rule which I find in the Appendix to Ram on Facts, under the heading of "Fifty resolutions in regard to professional deportment, by adherence to which the lawyer may reasonably hope to attain eminence in his profession."

Mr. HENKLE. I do not hope that, your honor, but it is a very good rule, and ought not to be departed from.

The COURT. I read the 16th of those rules, page 378 :

Whatever personal influence I may be so fortunate as to possess shall be used by me only as the most valuable of my possessions, and not be cheapened or rendered questionable by a too frequent appeal to its influence. There is nothing more fatal to *weight of character* than its common use, and especially that unworthy one often indulged in by eminent counsel—

Not meaning you, general—

of solemn assurances to eke out a sickly and doubtful cause.

Mr. HENKLE. That does not mean me, your honor.

The COURT. That may not mean you.

If the case be a good one, it needs no such appliance; and if bad, the artifice ought to be too shallow to mislead any one. Whether one or the other, such *personal pledges* should be *very sparingly* used, and only on occasions which obviously demand them, for if more liberally resorted to they beget doubts where none may have existed or strengthen those which before were only feebly felt.

Now, I believe in that rule.

Mr. HENKLE. Well, your honor, I did not intend to transgress the rule, and I will try to keep within it.

But I was remarking about my friend abusing these parties upon trial. I say that it is ungenerous and unfair. I do not know what my brother Ker's usage has been, for I have not had the pleasure of meeting him before, nor brother Bliss. But I say it is most unusual and most extraordinary in brother Merrick, and it hurt and annoyed me. It hurt me especially because he was taking advantage of his position where his offense could not be resented.

It reminded me of one of Æsop's fables of the wolf and the lamb. The lamb had gotten upon the roof of the house, and the wolf passed along. The lamb, being secure, began to curse and vilify the wolf. The wolf looked up and saw where it came from, and said to the lamb: "*Non tu sed tectum mihi maledixit*"—not you, but the roof abuses me. And so my clients can say to my distinguished friend, "*Non tu sed tectum mihi maledixit.*" You are taking advantage of your position to abuse us where we have no power of resentment or retaliation. And I say, brother Ker, that a brave man ought never to do it. I do not say that you are not a brave man, nor brother Merrick, nor brother Bliss. You have illustrated your valor upon the field of battle, and I know you are a brave man, and I hope that this is exceptional in your case, as I know it is in brother Merrick's.

Mr. KER. You drew it out; I couldn't help it.

Mr. HENKLE. I accept your apology.

Mr. KER. I do not make any apology. I simply say you drew it out.

Mr. HENKLE. I will tell you, gentlemen, there is a solution to it. There is a reason for it. If my brother Ker and my brother Merrick had believed in their souls that they had made a case, if they had believed that my client here had been proven guilty of the charge for which he was on trial, they would never have used these offensive epithets. Their large hearts would have gone out in sympathy for him. They would have said, "Poor fellow, I am but discharging a painful duty, and it wrings my heart to do it. But the facts establish your guilt; and unpleasant and hard as it is, I am obliged to ask a verdict against you from the jury." That is what they would have done if they believed that they had a case. Is it not? Did you ever hear of a soldier after he had disarmed his adversary prodding him with his poniard, impaling him with his bayonet, thrusting him through with his sword? No, brother Ker, you never have done that. When you captured your adversary, or your foe, you treated him with kindness, with sympathy, with commiseration.

Mr. KER. I never apologized for shooting at him, either.

Mr. HENKLE. No. While he stood up and had a gun in his hand to shoot back at you, you need not apologize, for then you were on equal terms. You shoot at me and I will shoot at you, and it is all right. But you would not have shot at a man when he said to you, "You see I am disarmed; I have no weapons; I am in your power." You would not have drawn your musket or your sword and smitten him down. Nay, verily, brother Ker, you would have despised yourself if you had suspected that you could be guilty of so cowardly and unnatural a thing.

The fact about it is, gentlemen, that my brothers have indulged in this sort of display, the display of their anger, because their victims are escaping them; because they had filled the world with proclamations of what they were going to do. They have had the newspapers from one end of the land to the other proclaiming that this was a vile conspiracy; that they were going to send the conspirators to the penitentiary; and it was necessary to go through the forms of a trial, but so soon as that was accomplished they would all be immured in the walls of the penitentiary. They felt that their reputations were involved in it; they could not afford to be foiled; and in the prospect of certain defeat they rage and roar and denounce my clients, as though they really believed them guilty of all the things with which they charged them.

At this point (12 o'clock and 33 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. HENKLE. Your first duty, gentlemen, in this case, as I understand it, will be to ascertain whether there was any conspiracy or not. It does not make any difference to you whether my client or the other defendants in this case are guilty of any other crimes or offenses. So far as this case is concerned they might be steeped to the very eyebrows in all manner of crimes and offenses. They might have committed murder, perjury, arson, burglary, and every crime known to the criminal law, but that you would have nothing to do with. It would not concern you at all. Your verdict will be based upon the facts as you find them developed in the evidence in this case, and this is a case of criminal conspiracy; that is all. Gentlemen, you are to find that ver-

dict from the evidence in the case. Now, I need hardly tell you, twelve intelligent gentlemen, what legal evidence is. I need not tell you that it is to be found in the documents and papers which have been so voluminously emptied into this court from the Post-Office Department, and the sworn testimony of the witnesses who have delivered their statements from this stand. That is all the testimony there is in the case, and that is the evidence upon which you are to base your verdict. Beyond that you have not a right to go one jot or one tittle. You have been told by my colleagues who have preceded me the degree of evidence which you are to find in order to justify a verdict against the defendants. You will excuse me for repeating what you have heard so often that the law presumes every man to be innocent. It is a humane and a wise presumption based upon human experience. As a rule men are not guilty of crime. They may commit little excesses and little irregularities, the result of passion or impulse; but ordinarily men do not commit crime. There are very few people in our community that are guilty of crimes. Hence the law presumes that every man who is charged with a crime is innocent, and before you can find him guilty you have got to overcome that presumption with which you start. You take this case with the presumption that these men are all innocent, and then you have got to have evidence enough to overcome that presumption. The law does not say how much testimony it will take to do that but you have got to have enough to overcome that presumption. And still that is not enough. It has got not only to overcome the presumption but to be so strong as to leave upon your minds no trace of reasonable doubt. If the facts that you have heard are reconcilable upon any reasonable theory that you can yourselves devise with the innocence of the parties, if it is possible that this thing shall be so, as a fact and yet the defendants not be guilty of the crime of conspiracy, then whatever you might think about it, whether you might think that they were probably guilty it is not material. You must think and be persuaded of it so strongly as that it admits of no explanation, and that you cannot yourselves devise any explanation that will account for the fact consistently with the innocence of the defendants. When you reach that degree of conviction then it is your duty to find the defendants guilty. Until you reach that degree of conviction or certainty it is your duty to find the defendants not guilty.

Now, after this reference to this trite legal proposition, let me invite your attention to a consideration of the facts in this case to see if you can find a conspiracy such as is charged in the indictment. Gentlemen, if I am not very much mistaken, the court will tell you that you must start out on this investigation, not only with the presumption of innocence that I have spoken of, but with your minds disabused of any impressions that you may have received on account of the testimony that you have heard with regard to the confessions of Rerdell and Brady. The court will tell you, gentlemen, that you cannot consider these at all until you have first found the existence of the conspiracy from other testimony. Now, then, while you are examining this question as to whether there is a conspiracy or not, you will, if possible, eliminate these so-called confessions from your mind entirely, and treat them as though you had never heard of such things, or there had never been such things. Up to the time that his honor admitted the testimony of Mr. Walsh, what was the condition of proof with regard to these defendants and this conspiracy? I suppose I am not permitted to refer to what the outside world thought about it, and yet we have heard in all the eloquent speeches from the prosecution, what the newspapers were

saying about it, and what the people from one end of the country to the other were saying about it. But I will not transgress the rule. I will ask you what opinion prevailed in this court within your hearing and within your presence with regard to this conspiracy the day before Walsh delivered his testimony.

The COURT. Oh, no; that will not do. .

Mr. HENKLE. Well, your honor, then I will try to come back again. What was your opinion, gentlemen, of this so-called conspiracy up to the time that Walsh took the stand and told his story? Have you heard a word from the mouth of any living witness, have you seen a line or sentence from any printed paper or document that proved or tended to prove in the remotest degree against these defendants the conspiracy charged in this indictment? You heard a Mr. French from the far West on the Kearney and Kent route spit out his little spite because he thought the contractor had gouged him and he had not got as much pay for doing the service as he thought he ought to have. You heard that Fisk, the driver, had been overtaken in a snow storm way out in the far West and that he failed to get in on time. He was, I believe, twelve hours behind time. Upon the cross-examination he was asked why, and he said that the snow storm overtook him or a snow storm had preceded him and for five miles the snow was seven feet deep and he could not make good running time through seven feet of solid snow, and hence he was twelve hours behind. When he delivered that testimony do you not remember to have seen

That smile which was childlike and bland,

playing upon the face of my brother Bliss as he looked up to his colleague brother Merrick and then to the jury, as much as to say, "We've got 'em now. What a damning piece of evidence this is of this conspiracy. Here is a fellow twelve hours behind time and his mail did not connect with the through mail and had to lie over until the next day." The other driver got tired of waiting for him, or his time would not permit him to wait, and he had to go on. They actually brought him here and ransacked the records of the department to show that the postmaster at the point where the mail was tardy had failed to report it, and the record showed that Fisk was not deducted or fined for that failure to make time through seven feet of solid snow. Now, was not that a damning fact? Yet, gentlemen, the great Government of the United States and these gifted and eminent lawyers who have been specially retained to prosecute this case, solemnly delivered to you such miserable twaddle as that as evidence of guilt. Did Brady know it? No. Why? The postmaster out there had not reported it. It was his duty to be sure, under the regulations of the department, to report every delinquency. But he had failed to report this delinquency, and the contractor had escaped the fine. But it was not Brady's fault. Indeed the Government proved itself that the records of the department did not show that this man failed to connect on that occasion. The delinquent officer or party was the postmaster, and he had undoubtedly failed to perform his duty in reporting this driver, probably on account of sympathy with him because it was physically impossible with him to have made his time. Now, you have heard a number of such things; but have you heard anything looking to the establishment of the conspiracy charged in this indictment? My friend says yes. What is it? Why, you had evidence that routes had been increased and expedited unnecessarily perhaps, as it was claimed by the Government; but you heard from no witness that Brady was paid any money for doing it. Did any man say so? Nobody. Then what was the evidence? Why,

nothing but presumption that this was an extravagant and unnecessary thing, and it is your duty to presume that it would not have been done if it had not been paid for. That will not answer your purposes, gentlemen. It does not make a bit of difference what is your opinion or mine or even the court's as to whether the orders were wise or unwise. That is not our business. That does not belong to our domain at all. But, as the court has said repeatedly during the progress of this trial, the question is whether it was corruptly done. That is to say, whether these defendants conspired with Brady to do it, and as a consideration for it paid him money. That you must find from the evidence. Now, I say up to this time, gentlemen, there was not a scintilla of evidence proving or tending to prove this corrupt conspiracy between Brady and these defendants. The scheme of this indictment is, as I was arguing to the court awhile ago, a pretty large one. You heard what I read as falling from the lips of the court. The court said that the evidence must prove the conspiracy, the scheme, and the plan as it was charged in the indictment, that it comprehended nineteen routes, that it comprehended all these defendants, that they had entered into a bargain, a contract, and an agreement by which they were mutually interested in these nineteen routes, and they were to divide with Brady the spoils of these unjust and wicked orders. Now, gentlemen, they were to furnish, according to the scheme of this indictment, false affidavits and forged petitions. They were to write forged letters and procure forged recommendations, and then Mr. Turner was to manipulate them in the office. He was to make false indorsements upon the jackets, and he was to write false histories and false statements so that the Postmaster-General might be deceived when these orders came from Brady, and might sign them without understanding what the real facts were. Was there any evidence of that? Not a shadow of testimony. The Government itself, after all these weary weeks of the delivery of testimony, has at last, through its authorized counsel, told you that they do not claim at your hands a verdict against Mr. Turner. Why? Because the evidence would not justify it. That drops Mr. Turner out of this case, if you choose to follow in the line of recommendation of the counsel for the Government; and I say, gentlemen, as you have heard me argue to the court, that dropping out Turner, supposing there is evidence against the other defendants, destroys the integrity of the scheme, and the scheme of the indictment has collapsed. As you have learned from hearing these law books read, if you have not learned it before, what it is necessary to aver in an indictment it is equally necessary to prove; and if it was necessary to make this averment then it was an essential part of the scheme, and the Government has failed to prove that part of the scheme, and the scheme itself fails and falls to the ground, and you must necessarily render a verdict of not guilty.

Now, gentlemen, it is not unlawful for mail contractors to get up petitions, nor to make oaths, nor to write letters, nor to seek expedition, nor increase of service. That your own good sense tells you. This is a mere matter of business, like any other business. When a man goes into mail contracting he does not lose his common sense; he does not lose his common rights that pertain to every other business. Of course, it is his duty to conduct it fairly and honorably, but the presumption is that he runs this business as a builder or a carpenter, or a lawyer runs his business; that he does it for the purpose of making money. Men do not pursue business in this world for fun or amusement; they do it as a means of livelihood, and it is perfectly legitimate, honest, and fair for a man to make as good a bargain as he can, provided it does not transcend the bounds of honesty.

My brother Merrick severely criticises my brother Chandler's proposition, which was really nothing but this: That a man had a right to make as good a bargain as he could, provided he did it in such a way as to take no advantage of the ignorance of the party with whom he dealt. Is not that so? Is it not so in all the vocations of life? Am I to be blamed if you come into my office and say to me, "I want to employ you to conduct a suit; how much will you charge me?" and if I charge you \$500 and you say you will pay it there is no harm in that, although some other lawyer might say, "I would have done it for \$250, and I think Henkle's charge of \$500 is grossly excessive." You would not say there is any harm in me saying, "I think my service is worth \$500, and I am not going to give it to you for any less than that." It does not make any difference if Mr. Jones or Mr. Smith would have been willing to render the same service for \$250, does it? I am not a thief, nor a robber, nor a villain because I charged you \$500 and you agreed to pay it, am I? Well, now, men carry the mails, and the business of mail contracting has got to be a business like any other business. There are men scattered over the country who make this a business and nothing else. It requires the employment of large capital, and to be prudently, wisely, and successfully done requires much experience and knowledge of several subjects that you and I, perhaps, did not have when we entered upon this case. And they have a right to deal in this business just as men deal in other businesses; and there is, gentlemen, no rule of morality, no rule of business, and no rule of law that applies to the Government contractor which does not apply to the ordinary avocations and affairs of life. You will deal with these gentlemen just as you would if this question had not arisen with reference to mail contracts, but had arisen with reference to carpenters, or house builders, or lawyers.

Nor was it criminal for Turner to make indorsements on the jackets, nor to write statements of their contents. That was his business; that is what he was put there for; that is what the Government paid him for doing. Nor was it criminal or unlawful for the Second Assistant Postmaster General, when he thought it wise to do so, or when he chose to do so, to make orders expediting routes, or increasing the number of trips. He had a right to do it. It was his business to do it in proper cases.

These things only become criminal when they are done for a criminal purpose. I concede, of course, if you establish that these defendants procured false petitions and filed false affidavits upon an understanding with Brady that they were to do that thing, that they were to be a pretext for him upon which to base his orders, and that he would not do it without that, and that he knew that these petitions and letters and recommendations were false and forged, and that those affidavits were false, and he knew it all—knew that that was a part of the scheme, and he based his action upon those false papers, and Turner manipulated them so as to impose upon and deceive the Postmaster-General—why, then, I would admit that you had made out your case, and you might render your verdict against the defendants.

But all those things you must find, gentlemen. You must find them, too, not from conjecture, not from doubtful inference or deduction, but you must find them from the solid and substantial facts proven in the case.

Now, there has been some criticism on the part of the counsel for the prosecution on account of the arguments of my brethren who have proceeded me claiming the benefit of technicality. I do not think we

need to interpose any technicality whatever, gentlemen. I would not be half so earnest nor half so confident of a verdict of acquittal as I am if I thought it was necessary to interpose any technicality. But an indictment is the most technical of all papers or instruments known in pleading. Pleading, you understand, is not the argument or talk which I am now making. But pleadings are the written papers in which a party sets out his case, and which he files in the clerk's office. There is no pleading, then, so technical, in which such nicety and precision are required, as in a criminal indictment. It is part of the law, well understood and recognized in every law book and in every court, and everywhere. And it is for that reason that my brethren have referred to it. A criminal proceeding is a technical proceeding, as I have already said, and as you have heard a hundred times. Not only is the indictment a technical proceeding, but the proof is technical. All these technicalities that enter into and become descriptive of the evidence in the indictment, whether necessary to the scheme of it or not, if they are placed there in such a way as to become descriptive of it, are required to be proved as laid, and if not proved as charged in the indictment the verdict of the jury must be that of acquittal.

Now, gentlemen, this is our system; it is the common-law system. It is founded upon the experience of courts, judges, and juries for centuries, and it is said to be the perfection of human wisdom. It is in the interest of liberty. My brother McSweeney told you what the difference was between a criminal proceeding and a civil proceeding, as to the amount or *quantum* of evidence that was necessary to sustain the verdict of the jury. These technicalities are in favor of the liberty of the citizen. It does not make much difference in a dispute between A and B as to whether one owed the other \$100 or not a cent. The public is not concerned about that. Hence, when they come and try the question before a jury, the jury is allowed to make its own deductions from the testimony, to weigh the probabilities, to say upon the whole evidence in the case, "I believe the plaintiff is entitled to recover his \$100," and you base your verdict upon it, and it is right.

But the law does not allow you to do so in a criminal case. Why? Because human liberty is the most priceless of jewels. Liberty! Liberty! Who can estimate the value in dollars and cents, or in any other way, of human liberty? What would you take now, my friend, to allow yourself to be shut up in the penitentiary for two years? Would any money in this world compensate you for that? Would you, Mr. Foreman, take a deed in fee-simple for the whole District of Columbia or for any one of the States of this Union to allow yourself to be branded as a villain and sent to the penitentiary for two years? No! No! Not the whole worth of this round ball would induce you as a matter of bargain to take it. And that is why the law makes this distinction between civil and criminal trials in the *quantum* of testimony or in the degree of certainty of conviction in the minds of the jury when they are determining whether a man is guilty of a crime which isolates him from society, which brands him with infamy, which puts a blot and stain upon his descendants to the last generation. That is why the wisdom of the age has made it necessary for a jury to find with almost absolute certainty—moral certainty as nearly as it can be approximated—before it will allow a citizen to be disgraced and degraded and torn from his family and business and shut up in the penitentiary. And are we to be taunted because we speak to you of these time-honored, these glorious bulwarks of liberty?

As I said, gentlemen, we do not need them, I think. Unless I am be-

reft of my reason and judgment, we need no technicalities to protect us. Because, gentlemen, there has been no proof that we are guilty of the offense with which we are charged, and because, back of that, the fact never existed.

My friends on the other side will pardon me if I follow mostly Mr. Merrick's argument, for it was the last I heard. That of my brother Ker is so far now in the background that really I have not retained the drift of his argument, and so with that of brother Bliss. But Mr. Merrick's argument is fresh in my mind, and I therefore follow it particularly.

Mr. Merrick said to you that Brady was a trustee—a trustee for the public Treasury; that it was his duty to lock and bolt the door against plunderers and robbers; that a trustee could not deal with a public trust or a private trust so as to permit anybody to approach or divert it except by the legitimate channels through which the law provides it shall flow. Well, now, that is all true. Nobody denies that. So far as Brady had any control over it at all of course his position was that of a public trustee, and if he has abused his trust he ought to be punished for it. But brother Merrick, realizing the weakness and infirmity of his evidence and his total inability to make out a case on the criminal side of the law, complains that these technicalities should be interposed, and he tells you that in equity this trustee would be responsible for the abuse of his trust. Well, now, it is true that in equity a trustee who mismanages his trust, even if he unwisely manages his trust, although he does not do it criminally, but merely imprudently, is liable to the *cestui que trust*, the party beneficially interested, and equity will hold him to account for it. And my brother Merrick wants to transfer this case from the criminal side of the court to the equity side, and he complains that we do not tell him how it is. He says, "Why don't you tell us? If we had you in equity we would hold you liable as dealing with a trust."

I do not know whether any of you are lawyers or not, and perhaps it is assuming a little too much to suppose that a gentleman who is not educated as a lawyer understands precisely the difference between equity and law. In equity the plaintiff can file a bill (as he calls his first plea) in place of an indictment, and he can call upon the defendant to answer and say under oath whether these things with which he charges him are true or not. In equity, lawyers call that a discovery. The plaintiff in his bill asks discovery when he wants more proof. Of course, if a lawyer has all the evidence within his own control to make out his case, he does not want any discovery from his adversary. In that case he files his bill, charging him with so and so, and asks a decree of the court. Thereupon he takes his testimony and submits his case to his honor for a decree. But where he does not have any proof or where his proof is infirm and insufficient, he incorporates in his bill a prayer for discovery. He calls upon the defendant to answer under oath whether these things with which he charges him are true or not. Then, if the defendant answers and says they are true, after the proof of a *corpus delicti*, his honor will render a decree upon it.

Now, brother Merrick says: "We will just consider you in equity. It is true that we have not proved our case according to the criminal standards. We have not proved it beyond a reasonable doubt; we have not proved it beyond a doubt at all; we have not proved it so that anybody who has heard the testimony would doubt that the defendants were not guilty. But yet I have a suspicion that, notwithstanding this, you are in fact guilty. And now, why don't you, like generous men,

come out and say that you are guilty? I am going to try you now upon principles of equity, and I want you to make discovery." And he is mad and infuriated because we will not make discovery. "It is evidently the policy of the defendants to keep us in the dark. Darkness is manifestly their policy. Why don't you turn on the light and let us see all? Have we not been imploring you to do so? Like children sitting in a market, we have piped to you and you have not danced. We have mourned to you and you have not lamented. Why don't you come and tell us? Why did you leave us in this ridiculous position? Don't you know that we have been laughed at all over the world?" Brother Ker has told you that the whole civilized world; and I don't know but that Afric's sunny clime and India's coral strand——

The COURT. "Greenland's icy mountains."

Mr. HENKLE. I stand corrected :

From Greenland's icy mountains,
And India's coral strand.

"They are standing about the telegraph offices on tiptoe waiting to know what you are going to do, waiting for the verdict, and we are in full tilt, going down, down the ages in history. We cannot afford to be defeated after the fuss that we have made, the proclamations which we have issued to the world that these defendants were guilty, and we were going to prove it. Now, why don't you come and help us? Oh, you robbers, you thieves, you burglars, you speculators, why don't you come and say that you are guilty, and save us this disgrace, this humiliation? We will try you in equity. Equity! Why don't you make discovery? Why don't you answer under oath and tell us how these things are? Then we could make a case against you."

My brother says, "Bother on your reasonable doubt. Bother on your technicalities. Why do you put them up? Why do you assert them here? You know we cannot make a case if we are required to do it over the established and recognized rules of criminal proceeding, and why do you require us to do it? It is unreasonable. It is unjust. It is unfair. And if you don't help us we will call you all manner of vile names and make you wish that you were dead."

Now, gentlemen of the jury, if Brady has violated his trust, the Government has its remedy against him in a civil action. It has totally failed in this form of action—totally; I cannot be mistaken. Unless I am absolutely insane—and I do not think I am—the Government has absolutely, fatally, and finally failed in this case. But if Brady has abused his trust, the Government has its remedy against him in a civil action. It can go into the courts and sue him either by my learned friend's favorite proceeding (a bill in equity), where they may make him discover, or, on the law side of the court, where they may try him before the jury and recover upon the preponderance of evidence.

And my friend Merrick says—and that was not exactly in the evidence your honor—that Brady is a man of immense wealth, rolling in luxury, surrounding himself with all the trappings and paraphernalia of large wealth. Now, then, if this be so—and my brother Merrick is my authority for it——

Mr. MERRICK. [Interposing.] Allow me a single moment. I noticed in the papers this morning that on yesterday Mr. Wilson made the same kind of a remark, and stated that there was no evidence upon that point. It is due to myself, as well as to the case probably, that I should say that I came to that conclusion from Mr. Brady's having an interest in two newspapers, besides having other evidences of the possession of wealth, and all gained at a salary of \$2,500 a year.

The COURT. That was perfectly legitimate.

Mr. MERRICK. Perfectly legitimate.

The COURT. But the remark made by the court that evidence was not admissible upon that subject was——

Mr. MERRICK. [Interposing.] I only speak of the remarks made by Mr. Wilson yesterday.

The COURT. As a matter of evidence in itself, the court would not allow any such proof.

Mr. MERRICK. I so stated and so understood the law to be.

Mr. HENKLE. I am not objecting to it, brother Merrick. I am rather thankful to you for it. I was taking advantage of it in my argument to the jury.

Mr. MERRICK. I was only calling attention to it.

Mr. HENKLE. Now, I say that the Government can recover back from Brady, either on the law side of the court or on the equity side of the court, if he has abused his trust, the proceeding to be determined by the propriety of the case whether it belongs to the one or the other of those forums. They tell you that Mr. Vaile has defrauded the Treasury; that he has got large sums belonging to the Government that he ought not to have. Now, gentlemen, if they think that is so, I invite them to bring suit in this court, on the civil side of it, and we are ready to try that question. And I say this to them for their consolation, and it is based upon the testimony of Mr. Vaile in the case, so that I am not transgressing the rules, that any judgment you will recover against him will be responded to in dollars to the last farthing. And I invite you—nay, challenge you—to the issue. There, there was a case where you could try your issue on the probabilities, and if you introduce testimony enough to make a jury believe that it is probable that he has got money from the Government that he ought not to have, you can get your verdict. Now, try it.

But, gentlemen, we are still after our conspiracy. That is the business we are engaged in. I am willing to help you find it if I can, but it is your duty to pursue it and find it if you can. I think, however, you will find it like the *mirage* of the desert. You know the travelers tell us that in some conditions of the atmosphere, by the reflection and refraction of the rays of light on the desert, and sometimes on the sea, very distant objects are reproduced in the air. The traveler upon the desert sees bubbling fountains, green-spreading palms, and he urges on his jaded camel to reach this place, where he may slake his thirst and rest from the heat of the desert sun. As he reaches the place it recedes, and still recedes, and still recedes, and it is forever receding, and he never can overtake it. So with this conspiracy. It is like the will-'o-the-wisp as it dances over the morass. You pursue it, and pursue it, but it is ever receding, and you never can catch it. So it is with this conspiracy. If you pursue it from now until the crack of doom, upon the evidence that you have had in this case, you can never find it.

Now, my brother Ker—whom I like very much indeed, and against whom I would not say a word of unkindness for the world—my brother Ker stood here where I stand, for three mortal days, and discussed the questions involved in this case, from his stand-point, and he did not even tell you anything about the conspiracy. My brother McSweeny said that the word “conspiracy” occurred but once in Mr. Ker’s speech. At all events, he told you nothing about it. He did not pretend to weave the web. Our brother Bliss succeeded him on the part of the Government, in a three days’ argument to you, and I heard no fabrication of the scheme out of this testimony. I did not see that this piece of tes-

timony was taken up here and that piece there, and the other there, and that they were brought together at a common center. My brother Merrick was a little more successful in his three days' argument, he did make some sort of scheme or web. But, gentlemen, unfortunately for him, it was made of the material that dreams are, and you can blow it away as a child blows a feather in the air, with a breath of your mouth.

Now, some writer has said that a conspiracy is the most difficult of all crimes to prove, but that when you have once proved it, it stands out the clearest, the most palpable, and undeniable of all crimes. And it must be so. When you see a man here and another there and another yonder, doing one thing and another, and the things all coming in at a common center and joined together like bricks laid one upon another, then you see it is palpable; then you know what this act meant and what that act meant, and you see them here in their fruition at a common center.

The process may be likened to that glorious monument, erected to the memory of the Father of his Country, which has been so long delayed and which we are all now rejoiced and proud to see advancing towards completion. You remember that when it started, each of the States furnished a block of marble to go into the monument. There was Tennessee quarrying its block of marble. Here was Ohio quarrying its block of marble. There was Louisiana quarrying its block, and so with Maine, and Massachusetts, and Virginia, and all the States.

If you were down in Tennessee you would not know what they were going to do with that marble. But when you see them bringing it here and see the mechanics take it and place it on the pile, then you see the block that came from Maine placed on top of the block from Tennessee, and so on, and you see the monument rise, and then you understand what they were all about. It is all palpable enough that they were all intended for this monument; that that was the purpose for which they were hewn out of the rock here and there and yonder. Here they are finding their common destination in this common monument. Now, if those States had been engaged in this thing and that thing with a criminal design you would have had palpable and irrefutable evidence of the conspiracy, because you would see what that man in Tennessee had done, and what the man in Massachusetts had done, and you would find that their work all concentrated here in a common monument. It was most difficult to prove what this man in Tennessee was quarrying his marble for, and what the Maine man was quarrying his for; and it was difficult to prove the conspiracy. But when you found them all here, and you have proved it, it is the clearest and most demonstrable proposition in the world that this was a conspiracy. But our conspiracy does not pan out that way. We have spent many weeks of valuable time. The Government has expended thousands and thousands, and I do not know but hundreds of thousands of dollars for the purpose of proving this conspiracy.

Nay, more than that, gentlemen. The ordinary instrumentalities of the law have been set aside. The district attorney, whose business it is and who is paid a salary by the United States of \$6,000 or \$8,000 a year, to prosecute crimes and offenses, is set aside, for what reason I do not know; and my distinguished friend from Philadelphia is employed, another eminent lawyer from New York is employed, and another distinguished lawyer from the city of Washington is employed, and the district attorney has gone a fishing. Now, these high-priced lawyers cost money—thousands, probably tens of thousands of dollars.

I hope it is tens of thousands of dollars, brother Ker, for if the Government of the United States is fool enough to embark on such a wild-goose chase as this, I don't care what it costs.

They have brought witnesses here; they have scraped the western wilds from the Sierras of the Pacific slope, through the gulches and cañons of the West, over the broad savannas and prairies and forests: they have scoured them all in the pursuit of witnesses, and they have brought every driver, every subcontractor, every postmaster that is disgruntled or mad with the contractors on account of some private difference, to detail to this jury his petty grievance. And all this, gentlemen, has cost thousands, if not hundreds of thousands of dollars.

Now, my brother Ker said that those facts that they had been giving in evidence to you might look innocent, harmless, and inoffensive in themselves. Why, it would not look to be criminal to ask to have a route expedited, nor to file an affidavit as to the number of men and horses necessary to carry the mail on a given route when the rules of the department absolutely made you do it and you could not get rid of it. That would not look like it was very criminal. Now, it looked innocent, and my brother Ker said, using the most graphic language that he could possibly have employed to express the idea, "They are innocent as sleeping babes when they are taken separately, and yet when they are brought together they make crime." Now, did you ever hear, gentlemen, that when you took a whole nursery full of sleeping babes that would constitute a criminal conspiracy? Are not a hundred sleeping babes just as innocent as one?

Mr. KER. It depends upon where they are.

Mr. HENKLE. My brother says it depends upon where they are. They usually sleep in the nursery, or in their little trundle-beds. You may collect a thousand of them and yet you do not approximate guilt. The Savior said, "Suffer little children to come unto me, and forbid them not, for of such is the kingdom of heaven." And you and I, brother Ker, want to go there. You said that Peck had gone there, or you hoped so. and you believed he had. I would not wonder if he had. If he has, he went where some people that are concerned in this prosecution can never follow him. He is safe there.

Well, gentlemen, these sleeping babes, when they are brought together, do not make guilt. You may put Kearney to Kent, together with Pioche, Ojo Caliente, Saguache, and what else?

Mr. KER. Toquerville.

Mr. HENKLE. Toquerville. Put all these sleeping babes together in one bed, and are they not innocent still?

Well, your honor, it is now nearly 3 o'clock and I feel somewhat exhausted. I was going to take up another proposition, but if the court would now adjourn I would be obliged.

The COURT. [To the bailiff.] Adjourn the court.

Thereupon (at 2 o'clock and 53 minutes p. m.) the court adjourned.

FRIDAY, SEPTEMBER 1, 1882.

The court met at 10 o'clock and 5 minutes a. m.

Present, counsel for the Government and for the defendants.

Mr. HENKLE. Gentlemen of the jury, again we have to resume our weary round. I am sorry for you, and I am sorry for myself. I have

no doubt you believe me when I say that I would not do it if I could help it. But we are getting where we can see the end and upon that I congratulate you and felicitate myself and my brethren.

Now, gentlemen, I propose to take up the testimony in this case so far as it affects or seems to affect my clients. I do not think I need trouble myself very much about the other defendants in this case. They are so well and so ably and so eloquently represented that perhaps it would be impertinent on my part to attempt to vindicate them, and I shall do it only so far as they are involved necessarily with my own clients. I ought to have said yesterday when I began that my excellent friend, brother Hine, with whom I started in this case, was called away by an imperious necessity to the far West, and was compelled to leave his part of the case to my poor care; but I am striving to take care of brother Hine's interest as well as I possibly can.

Now, gentlemen, I concede that a conspiracy must be proved by the acts of the parties. Let us look into the acts of the parties as they are shown by the evidence and see whether we can find this conspiracy. My excellent friend, brother Merrick, raised up the curtain at the interview between Senator Dorsey and Mr. Boone. You remember, gentlemen, what transpired in that interview, and I will not weary you to repeat it in detail. Mr. Dorsey told Boone, according to Boone's statement, that some of his friends were going to engage in bidding for mail contracts, and he mentioned his brother and his brother-in-law Peck, and probably Mr. Miner, a friend of his, from Sandusky, Ohio. He wanted the benefit of Mr. Boone's experience and acquaintance with this business, he having been a contractor himself and having been prior to that in the contract office of the Post-Office Department, or rather in the Sixth Auditor's office, and familiar with the routine of the business. He wanted the benefit of his experience and acquaintance with the methods of the business to enable his friends to start in such a way as would be likely to make the business a success to them. You remember that afterwards he says that Mr. Miner came here and John W. Dorsey came here and they engaged in preparing proposals. Senator Dorsey assisted them or was, perhaps, chiefly instrumental in procuring sureties upon the bonds which they were required to give to accompany their proposals. Now, they prepared these bids. During the course of the preparation of them Mr. Boone, who was a notary public and took the affidavits to these proposals, tells you that he had not seen Mr. Peck, but that he received a letter from Mr. Miner from Sandusky City, telling him that Mr. Peck would call upon him, and he said that a gentleman purporting to be Peck did call upon him and he administered to him the oaths to his proposals, and that he learned subsequently that this was not Peck.

Now, he says that this man, whoever he was, brought a letter from Mr. Miner. It is not exactly clear from the testimony whether he means the original letter that Miner wrote him from Sandusky, or whether he means to intimate that he had another letter. Perhaps I am not at liberty to infer anything from it. I do not know what the fact is from the testimony, and I am not permitted to give you my view of it any further than the testimony will justify. You remember, however, that in the conversation between Mr. Dorsey and Mr. Boone, Boone says that Dorsey read to him a letter from Peck in which Peck wanted him to get persons to go with him into this business; so that so far as the testimony develops it, the enterprise was conceived by Peck. It was his enterprise. Now, what agency Mr. Peck had in sending somebody to personate him before Boone and to make these affidavits for him, I do not know, nor do you know. It may have been that he had the idea that Walsh

had, that these affidavits were perfunctory like the affidavit to an attachment, as brother Walsh says; perfunctory, a mere matter of form; and while the form was gone through with it did not make any difference whether the real person was present or not. Now, I say I do not know how that is; but if Mr. Miner did it—I mean if he did give a letter to some person other than Peck, representing him to be Peck, I should be very greatly surprised and disappointed. I do not believe he did it. Nobody says he did it but Mr. Boone. Now, Mr. Boone was introduced as a witness upon the part of the Government. They vouch for his credibility by his production; but we are not bound to assume that his statement is absolutely infallible. We are at liberty to make from it such reasonable deductions as we fairly can. There is this little circumstance connected with Mr. Boone—I suppose I am not at liberty to say what the newspapers have published about him since he was on the stand; but he himself testified that the records of this court would show, when asked if he was under indictment. I believe they do show, as he referred to the records, that there are some six or seven indictments pending against him for frauds upon the Treasury of the United States, and two of them for subornation of perjury, that is, for procuring other people to swear falsely. Now, I do not say that you are to infer from these indictments that he is guilty. I say that an indictment does not even raise the presumption of guilt. But the fact that a man is indicted for subornation of perjury does not exactly commend him as a veracious witness. He may be, but it does not help his credit any. That is all I have to say about that.

Perhaps I ought to say in passing, right at this point, lest I may otherwise forget it, that brother Merrick commended Mr. Boone, eulogized him, and spoke of his being reluctant to testify against these defendants; that they were his friends. Now, gentlemen, I did not so understand that. It seemed to me that with considerable gusto he threw into his testimony insinuations and said little mean things that did not pertain to the case, for the purpose of prejudicing these defendants. For instance, he said that they kept no books, that they did their business upon grave-yard principles. What a morsal of comfort that was to brother Merrick. Grave-yard principles!

Dead men tell no tales.

That was the principle, Mr. Boone tells you, upon which they did their business. It was not necessary for him to say that, for nobody had asked him. That shows the friendly animus he had towards the defendants, the desire of his heart to aid him, and the reluctance with which this testimony was wrung from him. Upon grave-yard principles! Dead men tell no tales! Now, let us see right here. Mr. Boone said that before this combination went into effect, after they had got their contracts, but before they had done any business, he was frozen out. They had not done a thing, gentlemen, in the prosecution of their business, when he was frozen out. The business had not been started at all. What occasion was there for having books, and why does Mr. Boone tell you that they did their business upon grave-yard principles? Why, but for the purpose of making a stab at these defendants and going out of his way, malignantly, to do it. Now, Mr. Rerdell, as you have heard—and Mr. Merrick held up the testimony of these two veracious witnesses to show how completely they dove-tailed and corroborated each other—Mr. Rerdell, who was the clerk of the combination as he says originally, said they did keep a book. But I refer to that simply in passing, for the purpose of attracting your attention

to the animus of the witness. Now, then, what did they do? Why they got up these proposals and they filed them in the due course and process of business, and when the bids were opened they got some contracts. Mr. Peck, whether he was falsely personated or not, or whether he had any agency in it or not, undoubtedly recognized what had been done by his friends; for immediately after the contracts were in Mr. Peck appeared and took his position, and went to work with his copartners in the active operation of this business, so that at all events no imposition was practiced upon Mr. Peck, for he approved and accepted everything that had been done in his name and for him. Still, my friend Merrick finds in this little circumstance great oceans of conspiracy. If it were true that my client Miner did as Boone wants you to believe he did, bring to him a letter representing a person to be Peck who was not Peck, it would be, as I said before, what I would not expect of Mr. Miner, and what I trust and believe he did not do. But conceding that he did it, how does that prove the conspiracy? It would certainly prove, gentlemen, that Mr. Miner was not quite as scrupulous and careful as he ought to have been, and that he had the same views about this perfunctory oath that Walsh had—which I do not believe he had. But supposing it to be so, does that tend to prove the conspiracy? What could have been the purpose of it? Simply, if Peck was absent, as he probably was, to facilitate their business. They regarded this as a mere matter of form. It was helping Peck and saving him from coming here. Is there in that any purpose to impose upon the Government or to commit a fraud upon the Government? None. I am not justifying the act at all, if it was committed, but I say that in it there was no purpose to defraud the Government, and much less there was any evidence of conspiracy in it. Now, my brother Merrick in the opening of his speech said that this conspiracy was conceived in the brain of Senator Dorsey, and that he looked about for tools that he could manipulate; that he did not want strong men, but he wanted men who would be as plastic as wax in his hands, whom he could manipulate and conform to his own views; that this was a project for his own benefit, which he intended to take possession of and control as soon as he left the Senate of the United States.

Subsequently, on the last day of his speech, he abandoned the theory that the conspiracy was conceived at that time, and said that it was probably an honest partnership, formed for honest and legitimate purposes at that time, but that it grew like all things grow, and ripened into a conspiracy subsequently. Just at that point I want to ask you whether it is reasonable, taking my friend's first view of it (for I propose to trace it along step by step to see, if I can, where this conspiracy began), to suppose that this was Dorsey's bantling, gotten up for his own purposes, and whether the conspiracy was conceived by him at that time. He said all the way through that Dorsey was the head center of it—the very Lucifer of this conspiracy. Let us see. When they came to divide the body of this conspiracy in April, 1879, how did they divide? Why, Mr. Vaile took 40 per cent. and Mr. Miner took 30 per cent., making 70 per cent., and Dorsey took for himself and Peck and his brother 30 per cent., so that here were Vaile and Miner taking 70 per cent. for themselves alone, and Dorsey for himself, Peck, and John W. Dorsey, all three, taking but 30 per cent. Yet he says the great head center, the arch fiend for whose benefit this scheme was devised, was Stephen W. Dorsey, and these other men were but his supple tools. As I said, he admitted subsequently that the conspiracy was not conceived at that time, and that at that time the combination had an honest and legiti-

mate purpose. But, gentlemen, I want to pursue this to the end while I am at it. If it was conceived at that time, as the court has said repeatedly in your hearing that Brady was the key to the conspiracy. Brady must have been connected with it. My brother in the first part of his argument intimated that Brady and Dorsey were connected with it, and that Dorsey was acting upon the promptings and with the connivance of Brady in getting up the scheme. What evidence is there anywhere that Brady even knew that these parties were meeting together, or even knew any of them? It is probable, of course, that he knew Dorsey, but what evidence is there that he knew that there was in existence upon this terrestrial ball such a man as John R. Miner, or John M. Peck, or John W. Dorsey. Not the slightest; nor is there any fact or circumstance which will justify you in the deduction that he knew either of these men.

But, again, gentlemen, the indictment charges a conspiracy as to these nineteen routes that are set out in it. You have got to find that conspiracy as it is laid in the indictment. The indictment charges that these men owned these routes, and that they conspired as to them, having a joint interest in them. How can you find from the evidence that these men conspired as to these nineteen routes before the bidding had taken place? It is true their bidding covered it; but the bids had not been opened, and the contracts had not been awarded. I want to know how they could have conspired with regard to these nineteen routes before the letting took place. That you have to find, for that is the scheme of the indictment, and that you must find in order to find that the conspiracy took place at that time. But that is not all. The Government is estopped, prevented, from setting up that the conspiracy took place at that time. The indictment itself, on pages 6 and 7—I want to read just as little as I can, but you have heard the indictment read so much that you must be quite familiar with it—charges that these men, on the 23d day of May, 1879, had contracts for all these routes and owned them in common. Now, it is nowhere intimated that there was anything wrong about these contracts. An indictment, as you have learned, is a most technical and particular paper of pleading. It is a rule or principle of law that all pleadings in a court must be construed most strictly against the pleader, so that, as they have not charged in the indictment that these contracts were wrong, or that they were illegal, or that they were fraudulent, they are concluded by the averments of the indictment, and you are bound to accept the theory of the indictment that they were legitimate, honest, and free from all fraud.

But they say that these gentlemen bid upon routes that were infrequent in time, one, two, and three times a week, I think the proposals show. They say that this shows that they were picking out routes which had not already been expedited, where the trips were not advertised to be frequent, so that they might have them expedited and have frequent trips placed upon them. And this you are invited to infer was a part of the scheme connecting them with Brady. They were selecting these infrequent routes, so that Brady could expedite them and increase the service upon them, and thereby swell their gain. Now, gentlemen, the facts show you that these defendants were not men of wealth. I have a right to assume from the testimony in the case that the men who put in these bids were all poor men, and that they had to borrow the money or deposit some sort of collateral to get the certified checks that the rules and usages of the department required should accompany their bids. They were poor men. The subsequent fact that they were unable to stock the route until Vaile came in and helped them demonstrates

that they were poor men. Now, these poor men, who had to deposit certified checks—

Mr. KER. [Interposing.] Wait a moment. There is no evidence of that at all. On the contrary the evidence is that Stephen Dorsey furnished the security, and therefore they did not want a check.

Mr. HENKLE. Security for what?

Mr. KER. Security for the bids and the contracts both. There is no evidence about certified checks.

Mr. HENKLE. Yes, there is. There is evidence that they required certified checks to be deposited with the bids.

Mr. TOTTEN. The statute required it.

Mr. HENKLE. The statute required them to give security when they put in their proposals, and that was the only security they gave. They did not give security accompanying their contracts, but they were required with their bids to deposit the certified checks.

Mr. KER. That is only where the bid is over \$5,000, and none of these bids were over that amount. I object to the counsel stating that this is a matter of evidence when it is not.

Mr. HENKLE. My friend says that it is required where the bid exceeds \$5,000 that they shall deposit a certified check. I do not remember how that is.

Mr. WILSON. They file bonds with their proposals, and file a certified check where the amount is in excess of \$5,000.

Mr. HENKLE. I will accept that as a fact.

The COURT. There is no instance in these nineteen contracts of any bid being above \$5,000, I think.

Mr. HENKLE. I thought, your honor, that the testimony showed, but I am not able, I confess, to turn to the place, that Mr. Miner had deposited the checks of some gentleman up in Connecticut.

The COURT. I think there is no evidence in the cause of any check having been deposited by anybody.

Mr. WILSON. The way of it, your honor, is this: I think your honor is right in saying that there was no one of these particular routes where a check was necessary to be deposited.

Mr. TOTTEN. There was one check for \$8,800.

Mr. HENKLE. Yes, there was.

Mr. WILSON. Yes; that is so. They put in bids to the number of a thousand or more, and in putting in their bids they put in between thirty and forty thousand dollars' worth of certified checks.

Mr. MINER. Twenty-seven thousand dollars.

Mr. KER. I say there is no evidence of it.

The COURT. That might have been in connection with other bids.

Mr. HENKLE. In one case there was a check of about \$8,000.

Mr. WILSON. I think you are right about that. In the aggregate of their bids they made deposits of twenty-seven or thirty thousand dollars in certified checks.

Mr. HENKLE. I do not lay any particular stress upon that, gentlemen. I think you must be satisfied from the fact that brother Merrick told you what the testimony had disclosed before that when the 1st of July came around these men had not been able to put on service, and Brady was about to declare them failing contractors—that they were poor men. Now, is not that a very good reason why they should not have bid upon routes that required large sums of money and the deposit of certified checks for large amounts? Take some of these big routes where the service was daily, and where they probably would have had to deposit a certified check for hundreds of thousands of dollars.

You do not believe from what you have learned from this testimony that these gentlemen were prepared to do that sort of thing, I know. The testimony shows that they were just starting out in this business. They were virgins in it. They had had no experience in it. Of course, they would select such routes as they thought they could manage and as they thought they could raise the means to carry on. But, again, gentlemen, suppose that was not so. Suppose they had been millionaires and had an abundance of money to stock any routes that they might bid on, or to make any deposits upon any route upon which they might wish to bid, the largest and most expensive of them. Must a man exercise his judgment in taking the largest and most expensive of these routes? Would he not have the same right to exercise his judgment in that as he would in any other matter of business? Would not you or I pick out routes that we thought would be most likely to make money if we were going into the business? Is there anything immoral or illegal or wrong in that? Does it occur to you that there is any conspiracy in that? If you or I had formed a combination (and if we did some of you gentlemen would have to furnish the certified check for me, I know) to bid upon mail routes, would not we be likely to get together? Would not I, for instance, say, "Here, brother Dixon, you have got more sense than I have about these matters. You are a practical business man. Now, you select out such routes as you think we can carry with our limited means, and such as you think we will be most likely to make money on, for we are not going into this business for fun. That is not the purpose of it. If we go into this business we want to make money. We confess that we are not such patriots that we will do it for the benefit of Uncle Sam. We love the people out in these Territories very much, but we will let them go a long time without any mail service before we will do it for nothing for them. We want such routes as we can make money on; and what is more than that we have learned that routes are increased and expedited. Let us take some routes that have not frequent service so that we can have a chance of getting them run up and get more service and quicker time, and allowances for both." Now is there anything wrong in that? Would you, Mr. Cox, [a juror] think you were a criminal for doing that kind of thing? Is there any conspiracy in it? They may have conspired among themselves to do the best that they could for themselves, just as you or I or any other man would do in embarking in a common purpose. If there is anything wrong in that then here is a higher standard of morality for Government contracts than applies to the ordinary circumstances of life. I do not know of any man of business who is so fastidiously moral that he does not when he makes a business transaction consult first his own interests. He says, "Will it pay?" And if he thinks it will not pay, unless he is moved to it by some other motive, he will not embark in it. Now, the Government invites these proposals. They say to the world, "We want you to come in." This case has been treated as though these men were greedy cormorants, rushing in and grasping these contracts from the Government. That is not the fact at all. The Government has these routes. They want to put the service on them on the best terms that they can and they advertise to the world, "Ho, everybody, come ye and bid; and he who conforms to the regulations and makes the lowest bid shall have the service." Of course the Government expects every man who bids to select his routes and to select them upon business principles, as every man of good sense and business ability does in the transaction of his own private business.

I intended to refer to a point, but have the wrong reference, where the

court said that it was legitimate to make their selections upon business principles, or something of that kind. Now, gentlemen, as to these bids and as to the morality and the fairness of the bidding. They put in, all told, nearly twelve hundred bids and they got one hundred and twenty-six contracts. Of course upon those contracts they were the lowest bidders or they could not have gotten them; so they took no advantage of the Government. Brady did not give them any advantage. They got the contracts because they were the lowest bidders and that is all there is of it. But, gentlemen, it appears that they got more than they could manage; perhaps more than they expected. I do not know whether the percentage of contracts was larger in this case to the number of bids than usual, but at all events, they in all human probability got more than they expected to get. Then they went out, not having the money to stock them. Mr. Dorsey went into the Northwest and Mr. Miner went in another direction, and Mr. Peck in another direction, visiting the scenes of these routes and trying to sublet them. They did succeed in subletting some of them, but some of them they were not able to find men willing to take, because probably they could not carry on the service at the price at which they had taken the contracts. I believe the testimony shows that in one or two instances they sublet them at an actual loss. At all events they had not been able to let all of their routes, and the 1st of July, the time when the service was to go into effect, under the laws was rapidly coming on. Now they were in a sad plight. They had not money to stock the routes. They could not get other men to take them off their hands, and as Mr. Merrick truthfully said to you, Brady was threatening to declare them failing contractors. If they were declared failing contractors upon any of their routes it applied to them all. So that they were in danger of being ruined. Mr. Merrick said that, did he not? The 1st of July was coming on, and Brady was threatening to declare them failing contractors. The evidence shows it. Now, at that point Mr. Vaile tells you that he met Mr. Miner about the department, that Mr. Miner was looking as though he had lost all his friends, disconsolate, hard, desperate, as he would very naturally look, or as any one of us would very naturally look under similar circumstances, his little all embarked with the early prospect of utter ruin staring him in the face. Mr. Vaile was a large Government contractor. His business took him frequently to the department and there he met Mr. Miner. He asked Miner what was the matter with him and Miner told him ingenuously, as he would, his troubles. Mr. Vaile undertook to intercede with Mr. Brady to get him to extend the time so that he might look further for persons to take these contracts off his hands or to assist him with means to put on the service. Well, now, brother Merrick says, is not that a most wonderful thing? You remember how savagely he went at Mr. Vaile when upon the stand to know how or why it was that he should have taken up with this stranger, "Love at first sight," he tells you. "How is it, Mr. Vaile, that you should fall in with this stranger and that you should volunteer to go and see Brady for him?" "No, it was not that," says Mr. Merrick, "but it was the ring of the prospective Government gold in your pocket that moved you." Is that so, gentlemen? Is it so that there are no men who are moved by any motives except gold? Is there no such human impulse as generosity? Oh, I will not believe it, gentlemen. I do not want to utterly and entirely lose all my faith in human nature. I believe that most men have generous impulses and may do generous deeds for the reward that the good deeds bring in themselves, more valuable than silver or gold or precious

jewels. I wonder if my brother has never read of that man who went down from Jerusalem to Jericho and fell among thieves. A priest came along and a Levite, and they looked at him and passed by on the other side. But a good Samaritan, we will imagine that it was the shepherd from the Grampian hills of Missouri, came along. He made no pretensions. He was a plain mail contractor. He carried the mail, perhaps on that route, from Jerusalem to Jericho. He was not a priest. He did not minister in holy things. He was not a Levite belonging to the order of the priesthood, or to the family of the priesthood. He was a plain, practical business man; a Samaritan, those with whom the Jews have no dealings, and this man, who had been overtaken and abused by the thieves was a Jew. Yet the Samaritan bound up his wounds and set him on his own ass and carried him to an inn, and when he departed in the morning he paid the landlord for his bill and told him that whatever more was required he would pay. I wonder if my brother ever read this beautiful story. You have read it, brother Ker, I know, for you look as if you had been a Sunday-school boy. Now I will have to imagine that brother Merrick was the priest and brother Bliss was the Levite; but I know brother Ker would not have passed by on the other side. [To Mr. Ker.] You would have got down and set him upon the ass and taken him to the inn, and you would have given the landlord the last penny you had, and if you had not money enough to pay the bill you would have taken off your coat and pledged it.

Mr. WILSON. Or given his note.

Mr. HENKLE. Or given a note, as my brother suggests. Is it so wonderful, then, that Mr. Vaile, this shepherd from the Grampian hills of Missouri, where he

Feeds his flocks, a frugal swain,

should do a generous thing? Oh, wonderful! Wonderful! Oceans of conspiracy in that! Don't you see it? How could a man do such a thing as that? Volunteer to go and see Brady for a stranger! Mr. Merrick never heard of such a thing. Now, I will venture to say, gentlemen, that Mr. Merrick is the very man to do such a thing himself. He would have subscribed to the landlord—if he had forgotten to pay his subscription. I believe that I would do it; ay, gentlemen, I know that I would do it, and I do not claim to have any very extra quantity of generosity in my composition either. But if I should meet a man looking disconsolate and disheartened, with the prospect of ruin staring him in the face, and I thought by possibility I might exercise influence with a man where influence was needed to save him, I would volunteer to do it; and I know there is not a man upon that jury who would not do it. And yet, gentlemen, this is one of the most damning evidences of conspiracy. I admit that Mr. Vaile did not have very good success. He went to Brady, and the story does not make Brady quite as generous as he was, I am sorry to say; but Brady was the trustee, you know. He was guarding the public Treasury, and he had to be over-nice and particular about it. Vaile went to Brady and told Miner's story and asked him if he could not show him some leniency, and he reasoned with him. He said to him, "Now, it is true you may declare these men failing contractors. You may open it up and let the next lowest bidder take it, and, if he will not take it, then the next, and so on down until the work will cost the Government two or three times as much as at present. Moreover, it is probable now that he can get service on before any new contractor can get it on, and I think it is wise and a prudent business transaction that you should let Mr. Miner and these other

parties have a little more time to see whether they can save their contract. It will be humane. Their all is embarked in it, and they will be ruined unless they can save these contracts." Well, now, says Mr. Merrick, what did Brady say? He doubtless expected to find that Brady said to him, "Well, now, Vaile, I will tell you what I will do. If you will say that this service shall be put on, and if you will agree to pay me 20 per cent. out of all the money you get, then I will put it on." But Mr. Vaile being a man of truth did not say that. "Why," says he, "he grunted." I believe he did ask Vaile if he would not see it put on himself. Perhaps not.

Mr. WILSON. Vaile suggested to Brady that he put it on himself.

Mr. HENKLE. Vaile made the suggestion to Brady that possibly he might put it on himself. Thereupon, Mr. Brady not saying that he would do it, simply gave him, in response to his request, a grunt, and Mr. Vaile left his office and went out to his orchard and to the Grampian hills of Missouri. Subsequently, on the 20th of August, the service not having been put on, and Mr. Brady being prodded by postmasters and people that were interested in this service, was threatening them decidedly with the forfeiture of their contracts or to declare them failing contractors. But he thought he would try and see whether Vaile would help out. Now, Brady, although he grunted, and although he was a little uncivil in his manner, had under it all a kind heart, and he did not mean to do anything more than his duty required him to do. That was all. He did not want to make any pledge or promise, and yet he had, in fact, waited to see whether they would put on the service. But the time was coming when he must know, when the obligations of his office and his duties required him to see that the service was put on. He could not delay much longer, and hence he telegraphed to Vaile to know whether he was going to put on the service. Vaile responded that he would put on the service on the routes of John W. Dorsey, Miner, and Peck. I want to show you right here, gentlemen, what connection my clients had with this matter, frankly and ingenuously, so that you may judge. On page 2206 Mr. Vaile says:

I was away at Independence; that is, I left here about the middle of August for Independence. I did not get back here until October. * * * *

On or about the 20th of August, 1878, at Independence, I received a dispatch—it is in your books here—from General Brady, asking how many of the Miner, Peck, Dorsey, and Watts routes I would see started. I waited two or three days for consultation. I answered the department back—and I presume you have that—that I would see started all of Miner, Peck, and Dorsey's routes, not Watts's. Prior to my going home I said to General Brady possibly—to go back a little further. I went to General Brady, as a friendly act for Miner, to get an extension of the time, and to put on this service from the 15th or 16th of August until the 1st day of September. Mr. Brady was not inclined to extend it further.

You remember, gentlemen, the telegram that Brady sent him. This is the telegram which Brady sent to Vaile, page 2277:

AUGUST 27, 1878.

H. M. VAILE, *Independence, Missouri*:

What service of Miner, Peck, Dorsey, and Watts do you expect to put in operation? Postmaster at Dalles, Oregon, says routes from there not carried, and mails lying in office. This cannot be permitted longer.

THOMAS J. BRADY,
Second Assistant P. M. General.

Gentlemen, I had intended to read several passages from the testimony of Mr. Vaile, showing what passed between him and Brady, and what he did. But, really, after the long time that I have consumed, I am ashamed to transgress upon your time by the reading of the testimony, and so I will assume that you have not forgotten it. The result

of it was that Mr. Vaile came back. He sent his right bower, Mr. Williamson, out into the northwest, to put service on the routes there, or to dispose of it as rapidly as possible. He came here himself, and, like a good general, he set to work to organize them, and as soon as possible he had them all either under contract or service upon them, and was running them himself.

Now, gentlemen, I want to call your attention to this stage in the history of the case, and see whether you can find any conspiracy in that. Is there anything on the face of Mr. Brady's telegram to Mr. Vaile that looks suspicious? Is there anything that indicates that there is an understanding between them, a corrupt understanding? "You intimated immediately before you left here that you might put service on the routes of these contractors whom I am afraid I shall have to declare failing contractors, and I want to know whether you are going to do it, and upon what routes you are going to put the service. If you do not do it I cannot extend the time any longer. I shall have to declare them failing contractors." Now, is there anything in that that savors of conspiracy? Why, gentlemen, if Brady had been a partner with these men, what would he have wanted of the shepherd from the Grampian hills? Miner was in the last extremity of desperation. If Brady had been disposed, and Miner had been disposed, he might have made a good contract with him to divide. But we are assuming that they had already conspired. Why did not Brady himself say to Miner, "You go out there and put service on these routes; here is the money; I have got millions of money; I have got 20 per cent. out of all these nine thousand star routes. Don't you see I am rolling in wealth? I have abundance of cash; I will put it on; here is the money; cheer up. Don't go about here looking like you were attending a funeral; go out there and put the service on." Now, was he not a pretty partner, as my brother McSweeney says? He was a beautiful partner, wasn't he, prodding these poor men in their extremity, and threatening to ruin them unless they got the service on, and that pretty quickly?

Mr. KER. Where did you find that telegram?

Mr. HENKLE. At page 2277.

Now, gentlemen, on the contrary, Mr. Brady's telegram shows that he was exercising the discretion and the functions of his office as kindly and leniently as he could, and yet was determined to do his duty to the public; and the fact that he telegraphed to Mr. Vaile shows that he wanted to get somebody that would put this service into immediate or as early operation as it could be done to save these men and subserve the public interests.

Mr. KER. Show me that telegram.

Mr. HENKLE. I haven't the original.

Mr. KER. I want to see that it is read right.

Mr. HENKLE. Here it is, and I will read it again:

Washington, D. C., August 20, 1878.

To H. M. VAILE,
Independence, Mo.:

What service of Miner, Peck, Dorsey, and Watts do you expect to put in operation? Postmaster at Dalles, Oreg., says routes from there not carried, and mails lying in office. This cannot be permitted longer.

THOMAS J. BRADY,
Second Assistant Postmaster-General.

Mr. KER. Yes, that is right.

Mr. HENKLE. What is the matter with it?

Mr. KER. It was only the concluding part that I objected to—what you said.

Mr. HENKLE. What I say is, my brother, that that telegram, instead of showing the purpose, or intent, or the spirit of a conspirator, shows that this man was conducting himself as a faithful public officer, trying to subserve the public interest, and to discharge conscientiously his duty, and yet to do it as leniently and kindly as he could; and in order to help these contractors, and at the same time to get the service earlier and cheaper than he could by subletting it, he pursues Mr. Vaile with this telegram to Missouri to get him to do this work that these men cannot do. He knows very well—for Mr. Vaile is a large contractor—that what Mr. Vaile undertakes is sure to be done.

Now, Mr. Vaile comes here and starts to work; sends out Mr. Williamson, his faithful friend and business manager. Now, gentlemen, I think I have a right to assume from what you have seen as to what passed between Brady and Vaile, that there was no evidence of conspiracy between them. Now, I call your attention to the contract that was entered into by Vaile with these other parties, and I shall invite you to determine whether there is any evidence of conspiracy in that:

This agreement, dated the 16th of August, 1878, by and between H. M. Vaile, of Independence, Missouri; John R. Miner, of Sandusky, Ohio; John M. Peck, of Colfax County, New Mexico; and John W. Dorsey, of Middlebury, Vermont, witnesseth as follows:

1st. A copartnership is hereby formed by and between the above-mentioned parties, for the purpose of managing certain mail routes in the Western States and Territories. Said routes are all those which have been awarded to said Miner, Peck, and Dorsey, for the contract term from July 1st, 1878, to June 30, 1882.

2nd. Said H. M. Vaile is hereby made treasurer of said copartnership, and the other parties hereby agree, by suitable powers of attorney or drafts on the Auditor of the Treasury for the Post-Office Department, to authorize the said Vaile to demand and receive all mail pay on said routes, and with said mail pay to pay first all subcontractors the amounts due them; 2nd, the expenses necessary and incident to the proper doing of the business; 3rd, to divide the profits remaining among the parties hereto each quarter, as hereinafter specified.

3rd. Said J. R. Miner is hereby made secretary of the said copartnership, and shall keep an accurate record of the receipts and expenses of the company, and of correspondence with subcontractors and others.

4th. The profits accruing from the business shall be divided as follows: From routes in Indian Territory, Kansas, Nebraska, and Dakota, to H. M. Vaile one-third, to John R. Miner one-sixth, to John M. Peck one-sixth, and to John W. Dorsey one-third.

From routes in Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Washington, Oregon, Nevada, and California to H. M. Vaile one-third, to John R. Miner one-third, to John M. Peck one-third.

Fifth. Before any division of profits is made, the sums which have heretofore been or may hereafter be advanced by the parties hereto shall be paid to the parties so advancing such sums, and if the profits are not sufficient to repay the entire sums so advanced, at the end of the first quarter then a pro rata per cent. shall be paid each quarter until the sums so advanced have been fully discharged.

Sixth. The subcontracts heretofore made between John R. Miner and H. M. Vaile on routes 32020 and 32021 are *bona fide*, and this copartnership have no interest in said routes. The subcontract made to H. M. Vaile on route 32018, giving said Vaile ninety per cent. of the award and ninety per cent. of the increase to six times a week, and sixty-seven per cent. of the increase to seven times a week, and eighty per cent. of the expedition is to stand. The subcontracts on 35051, 35053, 44155, and the extra subcontract made on 32018 and filed were made to protect the company and enable them to discharge their obligations to subcontractors for the quarter ending September 30th, 1878.

In witness whereof we, the parties hereto, have subscribed our names this 16th day of August, 1878.

H. M. VAILE.	[SEAL.]
JOHN R. MINER.	[SEAL.]
JNO. M. PECK.	[SEAL.]
J. W. DORSEY.	[SEAL.]

Now, gentlemen, I want to know whether that does not look like an ordinary fair and square transaction, and whether there are any features of fraud or conspiracy in it. Mr. Vaile becomes the treasurer of this

partnership, and why? Because he advanced the money. He alone, of all of them, is the man of credit and responsibility. He is responsible for this service, and he very prudently provides that all the payments that are to accrue for this service shall come into his hands, and then the contract provides how he shall disburse them, and the testimony shows you that every dollar of the money was disbursed strictly and literally according to that contract, and that Mr. Brady never got one dollar of it.

And right here, they complain that none of the others have told their stories and told what connection they had with Brady. Up to that time they had received no money except for contracts that they had sold. I believe the testimony shows that they had sold one contract for \$500 to Mr. Sanderson. But with the exception of that, so far as the evidence shows, they had not received a single dollar from this business. Now, up to that time, not a single dollar had they received except the \$500 that they got from Sanderson, so far as you know from the evidence in this case. From that time Vaile receives all the money: every dollar of it comes into the hands of Vaile; and Mr. Vaile has told you where every dollar of it went; and he has told you that not one farthing of it went to Brady.

Now I submit to you, gentlemen, that this conspiracy lies here in a very narrow compass. Miner had no money to pay. John W. Dorsey had no money to pay. Peck had no money to pay, and they were all parties to this contract. Senator Dorsey is not known in it. They had no money to pay Brady for doing anything, nor to pay anybody else for any services rendered to them in connection with this business. If anybody corrupted Brady or paid him, it was Vaile. Nobody else had any money to do it with. Now, Mr. Vaile says he did not. Who says he did? Echo answers who? You are invited to find, by that degree of evidence which produces a moral certainty, that he did, and you are invited to find it from this evidence—the only place where you can find it. Now who says he did? What witness upon this stand has said he did? What line of the documentary evidence that you have had read to you by the day, week, and month, says so? Not one, not one. Mr. Vaile says he did not. Mr. Vaile, although he is under the shadow of this most iniquitous indictment, has not been discredited by the testimony, and he is not discredited by this indictment because the law presumes him to be innocent, and you know that he is.

Now, I say that up to that time there is no conspiracy; none between these parties and Brady, because they are not in a condition to conspire with him; none between Vaile and Brady, because Vaile says there was not, and nobody contradicts him. And, moreover, the contract shows just where all the money was to go. There is no margin in that of 20 per cent. or any other per cent. for Brady or for anybody else.

Now, then, gentlemen, I pass along as hurriedly as I can to the separation. Before they separated actually Mr. Senator Dorsey began to take some interest in it. And why? Because he had loaned his brother and his brother-in-law money, and they had given him orders, or an order, to receive pay upon some route in consideration of money advanced, or for his liability. I will not undertake to be particular or precise in the statement of the testimony, for I cannot do it without reading it, and I must not weary you with doing that. But your recollection will be sufficiently definite to enable you to understand what I am talking about. There was a large debt of \$11,500 in the German-American Bank that Miner, Dorsey & Co., or Dorsey & Co., had contracted. They

had given to this bank orders upon their pay, or the pay that was to accrue to them subsequently on these routes—a most wild and extraordinary thing for a bank to do. It was not surprising that the bank should have failed doing business in that way. They had accepted orders as collateral security for this large sum of money upon the Post-Office Department when the service had not even been put on yet, and when the testimony shows that there was evident danger of it never being put on by these parties.

Now, Mr. Vaile, when he went into this arrangement, took subcontracts for all these routes. Why did he do that? Because he wanted to have and it was absolutely necessary that he should be able to control them. He had but a slight acquaintance with Miner, as the testimony shows, and that is uncontradicted. I believe he said he had no acquaintance up to that time with John W. Dorsey at all. He had never seen Peck at all. These men were strangers to him, and as a prudent business man, as he is, when he undertook to help them, and to do it in a matter of business, of course he expected to make it profitable to himself ultimately. Of course, when he was advancing his capital and his credit, he wanted to be secured, and hence he took from them subcontracts upon all these routes, in order to enable him to control and manage them.

Now, my friend Merrick asked him if he put them on file. He says he did. "Did you examine the files before you took these subcontracts to see if there were other subcontracts that had been given—if there were other parties who had subcontracts antedating yours?" "No, sir, I did not." "Did you put them on file to cut off any contracts that there might be?" "Yes," said Vaile, "I did." And the court said, "An honest answer." And Mr. Merrick said, "To a dishonest transaction." Now, I want to ask you whether that has the semblance of dishonesty? I am not now talking about conspiracy, for conspiracy has nothing to do with it, but I want to show you from this record if I can, and as I think I can, that Mr. Vaile's history in this case is as pure and as uncontaminated as that of any man in any business transaction whatever.

Now, then, why did he put them on file? To cheat these men who had taken subcontracts, my brother Merrick would have you believe; to cheat the men that were running the routes, feeding their horses, spending their time and their money in prosecuting this business for the benefit of these other men. Was that so, gentlemen? Does not the testimony of Mr. Keyser, the receiver of the German-American National Bank, clear up and explain the purpose? As he said, they had taken these orders upon this fund, whatever it might be—the prospective fund for the result of this service. Now, Mr. Vaile would become responsible to the subcontractors. He has entered into this arrangement and it is his interest and his necessity to have the service carried on, and to have these subcontractors to do the service. It could not have been done to cheat the subcontractors. It was in the very interest of the subcontractors. He wanted to preserve a fund out of which he might pay the subcontractors. But he wanted the subcontractors to be paid first. He wanted the subcontractors to be paid before the debt in the German-American National Bank was paid out of this fund, and was not that right? This bank had loaned this money upon this intangible and improbable security, because it was not then probable that it would ever amount to anything in the shape of security at all. Before the service was put on they had taken this order as collateral security. Now, Mr. Vaile wanted to see that these subcontractors were paid. Of course he did not want

to pay them out of his own pocket. It was necessary, in his view, and it was necessary in fact, and you will remember the row between him and Senator Dorsey because he put these subcontracts on file and thereby prevented him from drawing the money on an order that he had.

Now I say, gentlemen, that this has not the semblance of dishonesty. On the contrary, it has the appearance of being, as it was in fact, a transaction in the interest of honesty and right. Was it not right that these men who were doing the service should be paid before this bank, or other persons who held orders should receive payment when they had taken collateral which had no existence in fact?

You remember, gentlemen, that Mr. Vaile agreed that he would become responsible for this debt in the German-American National Bank—not that he would pay it. He proposed to the bank that if they would extend the time for a year or two—I do not remember exactly how long, but a sufficiently long time to enable him to get returns from the service to pay this debt—that he would assume it. But they would not do that, and all that they would do, and which they finally did do, was to enter into a contract (which was read to you and is in this record), produced by Mr. Keyser. They made a contract by which Mr. Vaile became responsible for the debt. Senator Dorsey was a surety before that. They made a new contract by which the time was extended, and Vaile and Dorsey became sureties upon it. They were not to pay the debt, but they were simply security for it, and deposited their notes as collateral for the original notes. Mr. Dorsey was dissatisfied because the draft had been received by Mr. Keyser, which he claims he was entitled to have the proceeds of, and Mr. Keyser had appropriated it. It was for some \$2,200 or \$2,300, and Mr. Keyser appropriated four hundred and some odd dollars to a debt that Mr. Dorsey himself owed that bank on an overdraft, and he applied the balance of it on one of these old notes. You remember the transaction. Now, Dorsey insisted that he had not any right to take this money, which he thought he was going to get and ought to have, and apply it on these old notes. And strictly, I do not think that Mr. Keyser ought to have done it. But he insisted upon doing it and did it, and thereupon Mr. Dorsey in his anger took his pen and struck his name from the agreement, with the permission of Mr. Keyser. There were some angry words between them, you remember.

The COURT. General Henkle, I have forgotten whether there was any such evidence; but what is the evidence in regard to the use that was made of the money that was raised from the bank?

Mr. HENKLE. I do not know that there is any; I do not remember any. I will ask my brother Wilson about it, who is more familiar with the testimony than I am.

The COURT. I am not asking anybody to testify now. I merely ask what testimony there is on the subject.

Mr. HENKLE. I understand you.

The COURT. Because, in the case of subcontracts, all the capital is furnished by the subcontractors. He furnishes all the stock for the route.

Mr. HENKLE. The fact is, your honor, that they had been stocking the Tongue River and Bismarck route. Your honor will remember that John W. Dorsey went out there and built ranches and expended large sums of money. One witness testified that the ranches cost some \$6,000, besides the stock, horses, buck-boards, coaches, and so on.

The COURT. Well, so far as the contractors themselves undertook to carry out their own contracts, of course they would have to furnish the

capital; but as to routes that were sublet, the subcontractors would have to furnish all the capital.

Mr. HENKLE. Yes, your honor; I think your honor has not exactly apprehended what I meant.

The COURT. Perhaps not.

Mr. WILSON. If the court will allow me, this was a business much larger than these nineteen routes only; there were more than one hundred of them altogether.

Mr. HENKLE. Yes, there were one hundred and twenty-six.

The COURT. We have no evidence in regard to those aside from the nineteen.

Mr. HENKLE. We have evidence, however, from the Government witnesses, that they were stocking the Bismarck route and expended large sums of money on it.

Mr. WILSON. There is evidence that they were looking out routes generally as to which they had contracts.

The COURT. But if they had sublet the contracts, the subcontractor would have to stock them and furnish all the capital.

Mr. HENKLE. Undoubtedly; I was arguing to the court a little while ago that the subcontractors looked to the contractor for pay.

The COURT. Then they were paid out of the pay for the mail-route?

Mr. HENKLE. Yes, at that time; that was before the law was passed in regard to subcontractors.

The COURT. The subcontractor is not paid until he has earned his money and the route has been running.

Mr. HENKLE. But what I was arguing a moment ago was that Mr. Vaile had put the subcontracts on file for the purpose of protecting these subcontractors in getting the money to pay them, instead of the bank and others getting it who had liens upon the fund.

But, gentlemen, I must hasten. The testimony shows that a feeling of enmity and a quarrel, Mr. Vaile says, took place between him and Senator Dorsey, so that it was unpleasant and impracticable for those two strong-minded men to do business together. And what did they do? Why, as sensible men, who could not agree to act in harmony, they agreed to separate. Like Abraham and Lot they separated, and turned their faces, one going to the North and the other to the South. They pooled these contracts. They sat down and said. "We will fix the value upon each of these routes. This one has no value; that is to say, it is not worth what it cost, and we will put that down at a discount. This other one is worth \$5,000 more than the contract price. We will put that at a premium." And so they went on fixing the values of all the routes before they made any division. Then they had a drawing and casting of lots. They drew for choice, and they selected their routes, and the one who had a route that was valuable, say worth \$5,000 premium, accounted to the other for the route that was worth less than nothing. Now, in that division, as I have already said, Mr. Vaile, for some reason or other, and probably it was because he was the only man that had put in any capital; because he had had the responsibility; and because he had saved it from wreck and put it upon its feet, took 40 per cent.; Mr. Miner 30 per cent.; and Senator Dorsey 30 per cent., for himself and his brother and his brother-in law. My brother—I think it was brother Ker—at some place during the progress of the discussion, said that this contract showed that there was 30 per cent. unaccounted for. That 30 per cent., he inferred, was reserved for Brady. But the fact is, when you come to examine the testimony, there was no reserve

fund at all. Every dollar of it was distributed under this agreement and in that manner.

The COURT. On their theory, their division of this fund would not get rid of Brady's lien on the whole.

Mr. HENKLE. I hope your honor is not going to argue the case for the Government.

The COURT. Not at all. You can answer that, that is all.

Mr. HENKLE. In answer to that suggestion from his honor, I want to know where the evidence is.

The COURT. Oh, yes, you have a right to ask that. Argue that to the jury.

Mr. HENKLE. I say that there is not a scintilla of evidence in this case, neither in writing, in print, nor from the oral delivery of testimony upon the stand, that Brady ever had a cent's worth of interest in it; and I thought I had demonstrated that.

The COURT. I do not want you to understand that I say so or think so; I intimate nothing of the sort. I was merely speaking with reference to the theory of the other side. If their theory is not made out of course it must fall.

Mr. HENKLE. Then, gentlemen, I say that their theory can have no standing except upon facts. We have no theories in a criminal court except those that have the solid foundation of facts found in the testimony. Tell me where that theory has its base. What fact is there from which the slightest deduction may be drawn?

Now I say, gentlemen, here they separated, and I ask you if the testimony ever brings them together again?

I will have to go back a little, I was not paying attention to my notes. I ought to have said that no one of these subcontractors upon all of these routes, where there were contracts at the time when they took hold of them, has ever complained that he did not get his pay. If there had been such a one, do you suppose you would not have heard of it? Would not his story have been told you here—that he run the service, did not get his pay, that Vaile drew the pay and divided it between his partners, or divided it between himself and Brady and some one else; that he did not get it? You have heard of no such thing. Not one of them has undertaken to complain that he did not get his pay. So that I have a right to assume that they were all paid, and paid to the extent of their contract right. I say all; there was one, now—a man by the name of French, on the route from Kearney to Kent, who claimed that he has not been paid in full. Now, you will remember that that was a route originally Peck's, and the testimony shows that John W. Dorsey, I believe, had entered into a contract with a man by the name of French shortly after they got the route; I don't know but French had been carrying it before; and he made a contract with French to do the service. That contract stipulated that he was to have so much for the service as it was then under the contract, and in anticipation of expedition and increase the contract provided a scale by which the pay of the subcontractor was to be increased in case of increase of service, or expedition, or both. Now, he claimed that he had not been paid in full, not because he had not got all the contract called for, but because the route had been expedited, and he did not know it, and that he had not got his expedition pay. The testimony shows that the contract was made with John W. Dorsey, and in the division this contract fell to Vaile and Miner. Dorsey had nothing further to do with it. There is no evidence in the world that either Miner or Vaile ever knew what that contract was at all. And the witness

himself testified that he never put that subcontract on file until February, 1882, and Mr. Vaile never knew of it until the witness came upon the stand and told him. Now, I say that with that exception, there was no complaint in the evidence from any subcontractor that he had not been dealt by fairly or paid in full.

Now, the testimony does not fix definitely the time of this division. It began along in the latter part of March and ran into the 1st of April, and was finally consummated, perhaps, early in May. I want to show you, gentlemen, that early in May the contractors notified the department to change the address of correspondence relating to these routes to the parties to whom it had fallen under this arrangement or division. Here are such notifications, dated May 9, 1879, upon routes 38102, 38112, 38134, 38135, 38140, 38148, and 38151. The contractor was John R. Miner:

Change contractor's address to care of M. C. Rerdell, box 706, Washington, D. C.

It is not necessary for me to read the others. I can give you a reference to go through the record of the evidence put in by the Government, and if you take the trouble to go through it, you will find that they notified the department to change these addresses because the interest in and control of the routes had changed under this division of April, 1879. That evidence was all put in by the Government. Rerdell's box was 706 and Miner's was 714. You will find that the correspondence relating to Vaile and Miner's business was to be directed to box 714, and that relating to the Dorsey routes was to be directed to Rerdell, box 706. The testimony shows that Rerdell was Dorsey's general manager. The Government brought here witnesses from the post-office to show who had rented these boxes, to show this mysterious commingling of correspondence; Rerdell was getting letters in his box for Miner, and Miner was getting letters in his box for Rerdell and Dorsey and Peck, and it showed that they were all mixed up together. And here was incontrovertible proof of conspiracy! When you come to unravel it in the light of facts, you find that it is not only not evidence of conspiracy, but it demonstrates that there was no conspiracy.

But the Government has corroborated the theory of division by all of the testimony that it has introduced touching or pertaining to this inquiry. On each particular route they have given you a table of payments. Now, as my learned brethren who have preceded me have told you, these tables show that after the first payments that were made to Vaile—all of them were made to Vaile down to the 1st of April, 1879—they diverge, scatter. The payments upon the routes that were taken by Vaile and Miner are made to Vaile. The payments upon the routes that were taken by Dorsey are made to Dorsey first, and subsequently to Bosler, who was his financial manager or representative. Is there any doubt about that, gentlemen? Does brother Ker deny that?

Mr. KER. Yes, sir.

Mr. HENKLE. He says he does. Well, I am surprised that he does, because he denies the whole record in the case. I believe that once there was a draft, or something of the kind, that came to Miner by mistake, but that was cleared up in the testimony. But with possibly an occasional mistake, the whole of this record shows just what I have said—that these tables of payment show that upon the Dorsey routes taken for Dorsey—no matter who was the original contractor, whether Miner or Dorsey or Peck—the money went to Dorsey; and on the routes taken by Vaile and Miner the money went to Vaile as far down as it was traced, unless they themselves had made some subsequent arrange-

ment, and transferred their interest to somebody else. Now, I say, gentlemen, that the Government has sustained our theory of the case all the way through with this testimony in the record.

There is one thing that I must not omit before I leave this branch of the case; the record does show orders for post-office drafts made by Miner upon old routes away down, perhaps in 1881 or 1882 in date, long after he had parted with his interest in 1879. Now, fortunately for him these orders were every one of them, I believe, your honor, witnessed by Judge Edmunds, who was the postmaster of the city of Washington, and by Rerdell. The testimony shows that Edmunds died in 1879, and yet here is his genuine signature as a witness to these orders, bearing date as late as 1881. How do you account for that? That is very mysterious. It looks wonderfully like conspiracy or crime. And yet the witnesses from the post-office testified upon the stand that those were the genuine signatures of Judge Edmunds, the late postmaster, and it has not been claimed that he has materialized since he left this country, and made those signatures. How is it then that here is his genuine signature as a witness to these orders signed, when the orders bear date two or three years after his death? Why, it is just as the case shows you. Mr. Miner, when they separated, gave them orders in blank to be filled up as occasions arose for them. The orders of course ought not to bear date before the service is to be paid for, but the draft is due, and these orders were given in blank corresponding with the quarterly payments running through and covering the time down to the expiration or determination of the contract, and they were witnessed and signed by Judge Edmunds, who died in 1879. Now, it just shows this: That the orders were given in blank, or else in anticipation of the quarterly payment, the date was put in, carrying it down.

Mr. WILSON. Those orders were not for the money, but simply to authorize the party to receive the draft.

Mr. KER. The Attorney-General requested me, if anything arose which it would be necessary for him to answer, to ascertain definitely about it. Now, I want to ascertain from my friend, as the representative of his clients, whether he admits that those orders were signed in blank and witnessed in blank, and that they bore date subsequent to the death of Judge Edmunds? In other words, whether the dates were filled in after they were signed and put into the Post-Office Department, in order to draw the money. Is that my friend's admission?

Mr. HENKLE. The testimony itself, my brother, according to my recollection of it, does not exactly disclose.

Mr. KER. That is the point.

Mr. HENKLE. I am arguing from the fact that these orders are witnessed by Judge Edmunds, and it is proved that these signatures in attestation of these orders are the genuine signatures of Judge Edmunds, and that he died in 1879—I am arguing that they must have been in blank with the right given to the party to whom they were given to fill up the blank as occasion arose for it. And is there anything wrong, or illegitimate, or unusual in that?

Mr. KER. It is a clear case of forgery.

Mr. HENKLE. Forgery, my brother says.

The COURT. It was said by one of the witnesses that Judge Edmunds declared on one occasion that he had witnessed at least ten thousand of them.

Mr. WILSON. It is a very common thing, your honor.

The COURT. He seems to have done a great deal of this business.

Mr. HENKLE. There is no doubt but that it was customary, your

honor, before the subcontract law, when nobody but the contractor himself could give the order. It was not to draw the money, but was an order to get the draft.

Mr. WILSON. Nobody could get any money on it, your honor.

The COURT. No, as I understand the order, it was in the nature of a power of attorney to deliver the draft, which draft was payable to the order of the contractor.

Mr. HENKLE. Exactly, your honor; it was in the nature of a power of attorney.

Now, I ask you, gentlemen, where in this evidence you find that, after this separation in April, or early in May, 1879, these parties ever came together in joint interest again? Mr. Vaile tells you that they never had any community or interest from that time forth to the present; that he had no interest in any of the routes named in this indictment, except the six that he and Miner took; that they had no interest in his routes and he had none in theirs. If there is any one who can show to the contrary, let him arise and speak, or forever after hold his peace. Now is the time to do it.

Mr. Merrick says that he finds evidence that they were dealing with each other's routes after that, and he gave you this. Here is a letter dated April 16, 1879.

Mr. WILSON. What route?

Mr. HENKLE. 38135.

WASHINGTON, D. C., April 16, 1879.

HON. THOMAS J. BRADY,

Second Assistant Postmaster-General:

SIR: I beg to transmit herewith my proposition for carrying the mail on route No. 38135, from Pueblo to Greenhorn, Colorado, on expedited schedule.

Hoping it will receive favorable consideration,

I am, very respectfully,

JOHN R. MINER.

Look at that, gentlemen. You are familiar with those signatures. [Letter handed to the jury for inspection.] Mr. Merrick's testimony was that Miner wrote it.

Mr. KER. Rerdell wrote it and signed Miner's name to it.

Mr. HENKLE. Now, gentlemen, I do not want to take your time, but here are a few more of the same sort. You have examined these signatures and the handwriting sufficiently to know the difference between Miner's and Rerdell's, and I will not weary you any further with it. But I say to you that in every instance in which the correspondence seems to have been of letters written to the department, or any one else, and the name of the original contractor is signed to it, where that contract or route had passed from him to the other party, you will find that the signature is used by the other party, and not by him. That was in accordance with their understanding, and in perfect harmony and keeping with the theory of this case; that what was necessary to be done they had license to do, and to use the name of the original contractor to it. And, gentlemen, one of the witnesses upon the stand—it is one of my many infirmities not to remember people's names—a gentleman from the Post-Office Department, told you here upon the stand that it was very common for one man to write the name of another. Mr. French, I am told, is the gentleman's name. He testified that it was very common for one man to sit down there at the table and write a letter and sign the name of another where they were satisfied that he was authorized to do it.

The COURT. He said that was so when he was recognized as the agent for the person whom he represented.

Mr. HENKLE. Yes, sir. Now in all these cases the subcontracts had passed and the department knew just to whom these contracts belonged. There was no deception practiced upon the department, but they were doing simply what the usages of the department at that time required, and that was that the correspondence should be in the name of the original contractor, and, as I understand it, they never addressed a letter to the subcontractor at all.

The COURT. Oh, yes; they must have correspondence with the subcontractors, because the law authorizes subcontractors and they have a lien upon the money for the service, and, of course, that creates the necessity of correspondence.

Mr. WILSON. Not at all. The subcontract is placed on file to enable the subcontractor to get his money, but the department looks only to the contractor, and all the correspondence is with the contractor.

The COURT. The law declares that the subcontractor shall have a lien upon the fund for his pay.

Mr. WILSON. Certainly.

The COURT. How does the office recognize his lien, if it does not correspond with him?

Mr. WILSON. Oh, no; your honor is mistaken about that. It simply sends a draft to him.

The COURT. I do not know that it is a practical question.

Mr. HENKLE. I think I can explain it; I would a good deal rather do it if I can. The contractor never gets rid of his liability to the Government. When he puts in his bid and it is accepted, he accompanies his bid with a bond, and he is liable to the Government for the performance of the contract down to the period of its termination. The subcontract law of 1878 authorized the subcontractor for his benefit to put his subcontract on file in the department, and thereafter the Government will recognize the subcontractor to the extent of paying him the amount of the contract price for his service. They pay him that, and then pay to the contractor the margin that is reserved for him.

The COURT. How do they pay him unless they send it to him?

Mr. HENKLE. They may send it to him in the shape of a draft for his part of it.

Mr. WILSON. The Post-Office Department does not send it to him, your honor, the Treasury Department sends it to the subcontractor. The Post-Office Department has no concern about him at all. That is the evidence in the case.

Mr. HENKLE. That is the reason of the necessity of using the contractor's name after he has parted with his interest.

I believe that was all of the evidence referred to by my brother Merrick of any community after the separation. There are probably other instances in the record where the name of the original contractor is used by the subcontractor after the separation. I have no doubt there are, but they are all used in pursuance of this understanding and in pursuance of the usage of the department.

Now, this thing was all supposed to be very mysterious, very damaging, and very convincing proof that what they said about their division and their separation, and never coming together again, was untrue, was a fabrication for the exigencies of this case. But in the light of the developments of the evidence you see that it is all brushed away, and is consistent with the facts as we claim them to be.

There is one beauty about truth—it is always consistent with itself. There may be appearances that look as though there were differences, but there is a sure way to reconcile them, and when you reach the solu-

tion you will find that they all cohere and harmonize, and that truth cannot be inconsistent with itself.

Now, I challenge my learned friend—as he says the Attorney-General, who is to follow me, wants to know about any of the things stated that he ought to know—I challenge the Attorney-General, through my learned friend, to produce in his argument (and he has the closing of this case) any evidence from this record that will refute the statements I have been making. Now, if this be so, what becomes of this case?

I want to pursue the thread of my argument regularly. I was going to anticipate a little. I want to get through with this first. My friend, brother Merrick, made a good deal out of the affidavits. I had liked to have forgotten that by not paying attention to my notes. I had better follow them, for they keep me from diverging.

My brother Merrick made a good deal of this interchanging of affidavits, this crossing over, and Miner making affidavits upon Dorsey's routes, and Dorsey upon Miner's routes. He says that they made affidavits after the 1st of April upon the different routes. Now, I want to show you what the record shows on these nineteen routes, and you will bear with me, for I will not be long at it.

46247—I invite my friend to verify it from the record—Redding to Alturas. Peck was the contractor; affidavit was made by Peck September 18, 1878, page 1005.

Mr. KER. That was signed by Miner.

Mr. HENKLE. Who said that?

Mr. KER. Mr. Blois.

Mr. HENKLE. I will agree, before I get through, to give you satisfaction about that if the time does not run out.

Mr. WILSON. The time won't run out; there is a great deal of time ahead.

Mr. HENKLE. Pueblo to Rosita, 38134, Miner, contractor; affidavit by John W. Dorsey. That was one of the routes Dorsey took in the division, and on the 21st of April, 1879, Dorsey made the affidavit himself.

Trinidad to Madison, No. 38140; Miner was the contractor; that was one that fell to Dorsey in the division, and on the 26th of April, 1879, Dorsey made the affidavit himself, as the subcontractor.

Rawlins to White River, No. 38113; J. W. Dorsey, contractor; and he made the affidavit himself on the 26th of April, 1879.

Vermillion to Sioux Falls, No. 35015; J. W. Dorsey, contractor; Vaile took it in the subdivision, and on the 14th of May Vaile made the affidavit.

Bismarck to Tongue River, No. 35051; John R. Miner, contractor; on the 30th of September, 1878, Miner made the affidavit.

Mineral Park to Pioche, No. 40113; J. W. Dorsey, contractor; affidavit made by Dorsey, November 26, 1878.

Canyon City to McDermitt, No. 44160; Peck, contractor; affidavit made by Peck, September 18, 1878.

Saguache to Lake City, No. 38150; John R. Miner, contractor; and the affidavit was made by Sanderson, to whom he sold the route early after he got it; affidavit made September 19, 1878.

Tres Alamos to Clifton, No. 40113; John W. Dorsey, contractor; and affidavit made by Dorsey, April 21, 1879.

Engene City to Bridge Creek, No. 44140; Peck, contractor; and he made the affidavit January 22, 1879.

When I say Peck made these affidavits I am referring to the testimony

that the Government adduced here by Mr. Taylor, a notary public, who took the affidavits, and whom the Government brought, at a large expense, two thousand or three thousand miles, and put him upon the stand and had him swear, and vouched for his veracity, and he swore that Peck signed these affidavits. Did he not?

Mr. KER. I believe he did.

Mr. HENKLE. Yes; and then afterwards you brought little Blois from the Post-Office Department, and he swore that Taylor lied about it, and that Miner signed them.

Mr. KER. He did not swear to anything of the kind.

Mr. HENKLE. I will show you that he did when I come to it.

Mr. KER. He is uncontradicted.

Mr. HENKLE. Toquerville to Adairville, No. 41119; John M. Peck, contractor; affidavit made by Peck, January 22, 1879.

The Dalles to Baker City, No. 44155; John W. Peck, contractor; and on the 18th of September, 1878, he made the affidavit sworn to before Taylor.

Mr. KER. That was signed by Miner, so Mr. Vaile says.

Mr. HENKLE. No; Mr. Vaile does not say any such thing. He says that the body of the paper is in Mr. Miner's handwriting, but he did not say anything about the signature. His attention was not called to it at the time, but afterwards he said, upon re-examination, or cross-examination, that his attention had not been called to the signature, and he did not intend to say that it was Miner's signature.

Garland to Parrott (Ojo Caliente), No. 38145; John W. Dorsey, contractor; affidavit made by John W. Dorsey, April 26, 1879.

Silverton to Parrott City, No. 38156; John W. Dorsey, contractor; and Dorsey made affidavit April 21, 1879.

Julian to Colton, No. 46132; Peck, contractor; and affidavit by Peck, December 30, 1878.

Kearney to Kent, No. 34149; Peck, contractor; and Peck made the affidavit, February 1, 1879.

Peublo to Greenhorn, No. 38135; affidavit by John R. Miner, April 17, 1879, and Miner was the contractor.

Mr. KER. Will your honor take a recess now?

The COURT. [To Mr. Henkle.] If you desire it.

Mr. HENKLE. I am quite willing.

The COURT. Well, we will take a recess.

Accordingly (at 12 o'clock and 33 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. HENKLE. Pursuing the idea with which we were dealing when we took our recess, I will say that in addition to these papers I have referred to, where the name of the original contractor had been used by another party who took the contract in the division, there are doubtless in the record quite a number of letters transmitting petitions to the department upon the routes that Dorsey took in the division that purport to be signed by Miner, and *vice versa*; but I say to you, gentlemen, that unless I am very greatly mistaken, and if I am I am honestly so, that so far as I have examined them, and I have tried to examine them carefully, you will find that this same principle runs through them that the name of the contractor is signed by the party owning the route after the division, and will be found to be there either in his own handwrit-

ing or in the handwriting of some one representing him, and not in the handwriting of the original contractor. Now, gentlemen, this is the record as I understand it to be, and I do not think the Government can gainsay it. It is the record that they have made up and presented to you themselves, and I do not think that anybody can say that my deductions from it are not true and legitimate. If that be so, gentlemen, what has become of this conspiracy? I have tried to trace it from its inception, from the raising of the curtain at the interview between Senator Dorsey and Boone until after the period of the date in the indictment; and so far from finding any conspiracy at any point, I claim that the testimony presented on the part of the Government to prove the conspiracy has absolutely demonstrated that there was no such thing.

I say that there is not a scintilla of evidence in this case when you come to understand it, as I have tried to explain it to you, there is not a circumstance that tends to show that after the separation of these parties of their interests in April, 1879, that they ever came together in unity again. Now, what has been put asunder let no man join together unless he does it upon the evidence in this case. We have had nine solid days of argument. We have had rhetoric, eloquence, declamation, wrath, and epithets, but we have had no facts proving, or tending to prove, this case. Arguments have been drawn from the orders of increase and expedition made on particular routes that Brady must have been corrupted because he made them, and must have been corrupted by the party in whose interest it was done; but if the arguments were legitimate from the facts in the case, and if you were of the opinion that the facts justified you in concluding that my clients, Vaile and Miner, had corrupted Brady upon any one of their routes to make orders of increase and expedition, that would not prove the theory of this indictment; that would not prove this case nor tend to prove it. You have got to find coherence, community, unity of interest in all these parties defendant in connection with Brady. Bear in mind, gentlemen, that I am not for one moment conceding or intimating that there is the remotest possibility of your making any such deduction from the evidence as to any order made in this case. On the contrary, I say that every order that is made in this case, so far as the evidence shows, was made upon a sufficient foundation in law and in fact to excuse, if not to have made wise and prudent, such orders.

My brother Merrick has been very much troubled about locating this conspiracy, and getting rid of the fact of this division of interest and connection with that of sustaining the scheme of this case. The court, one day, in illustrating this proposition, spoke of an apple, and dividing an apple, and from that day to this my brother Merrick has been munching upon that apple. Now, that is not the first apple that has given trouble. We are told that all the sins and all the troubles and infirmities that came into this world and were visited upon our poor race, are traceable to the eating of an apple. I want to show you now, gentlemen, as the court has been given as authority repeatedly for that apple theory, just what the court did say about it. Brother Merrick has told you many times that the court said that this could be divided like an apple. On page 740, in delivering an opinion, his honor said:

You cannot divide it as you can an apple amongst several owners, but each one partakes of the character of the whole of all of the other ingredients of the combination. It is one whole made up of different parts, and all the parties according to the scheme of this indictment, in my view, have a legal interest in the whole and in every part.

Now, what becomes of the division of the apple by my friend Merrick?

He gives to you the authority of the court for the suggestion that this conspiracy, or the body of this conspiracy, might be divided up and parceled out like an apple.

Right in this connection I would like to read to you what the court said upon this question. I am claiming, gentlemen, that this scheme is a unit, and that it is indivisible even if you had any evidence to justify the idea that there was a conspiracy of any kind, at any time, or at any place. You must find the scheme to be an entire one or you cannot find any at all. What I read to the court yesterday I desire now to read to the jury. It is from an opinion of his honor, and it is expressed in as terse and forcible language as you will find in any opinion in any book:

Now, the Government in this case has undertaken a mighty task. It has combined some seven or eight defendants in one conspiracy, and it has charged that the subjects of the conspiracy were nineteen different contracts and subcontracts, and it has undertaken to make out its case against all these defendants under this combination of contracts and subcontracts, and under charges specially setting forth the overt acts done by the conspirators and through the medium of the Post-Office Department and the Treasury Department, and it is a scheme of the most comprehensive character, and one which it is called to establish. That is all.

But the court in looking at the offer of evidence in any particular case, must regard the evidence in relation to the comprehensiveness of this indictment and of the scheme of the prosecution. It is necessary that there should be a conspiracy. If the conspiracy be established as charged in this indictment, then it comprehends all these nineteen or twenty different contracts, and the service under those contracts. From the relation of the conspiracy those contracts become blended. They are put into the concern as constituting one capital.

The law in regard to the overt act in pursuance of the conspiracy requires one overt act, and one overt act by any one of the conspirators is enough for the purpose of the prosecution. The conspiracy must be made out. A conspiracy is different from a combination, in this, that the conspiracy must have a corrupt character. A combination or a partnership is lawful. If all these parties had entered into a combination, each one to put in his contract or his subcontract as his contribution to the common capital with a view of dividing the profits, that would have been perfectly lawful. There would be nothing wrong in that either morally or in the eye of the law. That would not, of course, be the subject of a criminal prosecution. It was necessary, therefore, not only that there should be a combination, but that there should be an evil combination, that is, a conspiracy with an evil purpose. It is not required that the indictment in charging the evil purpose shall set out the specific act to be proved. It is necessary that the indictment shall contain some averment to change the lawful combination into an unlawful conspiracy, and that is done when the indictment charges the combination first, and then charges that it was done for the purpose of committing a fraud upon the Government by means of false petitions, false papers, false affidavits, and so on. Without an averment of that kind the indictment would merely charge a lawful combination, and an overt act set out in pursuance of a lawful combination would hardly have made a good indictment. But if the indictment charged in a general way that this was a combination in which these several parties had put their capital and made common stock of it, and that it was an evil combination, because it was done for the purpose of uniting in attempts to defraud the Government by the means generally set out, the means stated constituting the manner in which the evil character is attributed to the combination, that would not be enough, because the statute requires that in pursuance of this evil combination or conspiracy the indictment shall set out some act done in pursuance of that conspiracy. Well, now, it is alleged that here is a particular item which was put into this common fund as a contribution to the capital stock of the parties, consisting of route 44160, and that in regard to this particular route the indictment contains no specification of an overt act such as it contains in regard to some of the others.

Now, the court proceeds:

From the time that this particular route entered into the common combination and became a simple factor along with many others in the common combination, it is immaterial whether the act done was an act done upon this route, or in pursuance of the views of the parties in regard to this route, or in regard to some other route which was its companion in the capital stock of the conspiracy. That is the view that I take of this subject. It is a good deal like a joint tenancy at the common law in a piece of land; the parties are seized *per me et per tu* and *per tu et per me*.

That is the law of this case, gentlemen. Whatever view you or I or

anybody else may entertain of it, his honor makes the law for this case, or lays down the law. What he says is the law, is the law, so far as you and I are concerned. Now, we have been trying to find when this conspiracy began. As I have shown you, my brother Merrick first thought or suggested that it began with Dorsey and Boone. He afterwards abandoned that theory and suggested or hinted that it must have begun when Vaile came in. But he has been very much troubled as to when it began. The indictment has fixed it on the 23d day of May, 1879. Now, Mr. Ker says that that date was put in for fun. In the light of the facts in this case it is pretty funny. Let us look at this a moment. The indictment fixes the conspiracy on the 23d of May. It is not material when the indictment lays it so that it is charged at any time within the time. You cannot go back of the time but you may prove it to have been formed at any time after that time that you please. Now, of course the overt acts come after the formation of the conspiracy, do they not? The overt acts are acts which are done in carrying into effect the conspiracy that has already been formed. Is not that so? Could it be otherwise? The conspiracy is the mother; the overt acts are the progeny. The conspiracy is the flower; the overt acts are the fruit. The conspiracy is the stalk; the overt acts are the corn on the stalk. The statute says that a conspiracy is indictable when you prove that some act is done to carry it into effect, and these are the overt acts. Now, let us look at it. The court said on yesterday, when I was arguing a question of law to his honor, that the overt acts come after the conspiracy. Now, I read to you a few minutes before the recess the dates of the nineteen affidavits. They are nearly all set out in this indictment as overt acts, or several of them at all events.

Mr. TOTTEN. Eleven of them.

Mr. HENKLE. Eleven of these nineteen affidavits are set out in the indictment as overt acts. The conspiracy is alleged to have been formed on the 23d day of May, 1879. There is not one of these affidavits that did not exist previous to the formation of the conspiracy. There is not one of these affidavits later than the 26th of April, 1879. The latest of them is nearly a month before the time laid in the indictment for the formation of the conspiracy. So that, your honor, the child precedes the mother, the fruit precedes the blossom, the corn precedes the stalk. Now, I know your honor admitted these affidavits in evidence in this case for the purpose of establishing the conspiracy. Your honor did not admit them as overt acts, but admitted them for the purpose of establishing the conspiracy, of establishing a conspiracy that did not exist for more than a month after the last of them was performed. Now, I say, your honor, that this is a point that could not have been taken advantage of on a demurrer to the indictment. Why? Because it is not necessary to prove more than one overt act to carry the object of the conspiracy into effect under our statute. So that the overt acts might be inconsistent with the time laid in the indictment as to the formation of the conspiracy, and yet not be demurable. But when you come to try the case then the indictment must be consistent with itself, and must be consistent with the facts that are proven to establish it. The facts that are introduced in this case to establish a conspiracy formed on the 23d of May, 1879, are facts that existed from fifteen months to one month before it came into existence. Again, these false petitions that are alleged as overt acts, and that have been introduced *ad libitum* into this case as evidence, your honor will find upon examination of the record——

The COURT. [Interposing.] I do not know that they were admitted as evidence of overt acts.

Mr. HENKLE. No; not overt acts. Did I say so? I did not mean that.

Mr. TOTTEN. He said they were admitted to establish a conspiracy.

The COURT. I understood him to say that they were admitted for the purpose of establishing the overt acts.

Mr. HENKLE. Possibly I did. I did not mean that. I meant that they are charged in the indictment to be overt acts. They were admitted by your honor in evidence to prove a conspiracy. Now, the record shows that the great bulk of them were filed in the department long before the 23d of May, 1879. I have shown your honor that all the affidavits were filed before then, the last one nearly a month before the time laid in the indictment. These are the pregnant evidences of guilty combination, and these are the things upon which and by which the conspiracy laid in this indictment was to be, and was, established, if established at all. Yet the indictment says that the conspiracy was formed on the 23d of May, 1879, and these things nearly all preceded it by months and months in date. Now, I say, if the court please, that the indictment must be consistent with itself and must be consistent with the facts proven in the case; and either these facts ought all to be rejected or the indictment ought to be held to be defective. It seems to me, gentlemen, that this disposes of this case, if there was any case in it. This is a natural monstrosity, a legal monstrosity, the overt acts preceding the creation of the conspiracy which they are to carry into effect. But I must hasten, gentlemen, as you have learned from what I have read to you in that very admirable opinion by his honor the case must be sustained as it is laid in the indictment. This mighty, Herculean task that the court referred to as having been undertaken by the Government must be performed. This scheme must be proved in its entirety, and there is no division of apples, rotten or sound. It is an entire apple, or it is nothing. It is an apple in its original unity and integrity, or it is nothing. That is the theory of the court, and that is the theory of the law. His honor never delivered a wiser or better sustained opinion in his life than that.

My brother Ker said that some of these affidavits that were attributable to Peck were written by Miner, when I was referring to them awhile ago. His authority for saying so was the testimony of that very veracious witness, Blois.

Mr. MINER. He did not testify to it. I will show you.

Mr. HENKLE. I thought he did. Mr. Bliss in his argument called my client, Mr. Miner, the facile swearer, the convenient and capable swearer, because he swore to Peck's affidavits. There is not any evidence that he swore to the affidavit of anybody else. Now I want you to bear with me a moment while I call your attention to the testimony of Jacob S. Taylor, on pages 470, 471, and 472:

By Mr. MERRICK:

Question. Where do you live?—Answer. I reside in Colfax County; either Santa Fé or Springer is my address.

Q. What State?—A. New Mexico.

Q. What is your business?—A. My business is cattle raising.

Q. What official position did you hold in 1879?—A. I was notary public for Colfax County.

Q. How long were you in that office?—A. Some four years.

Q. I want you to identify some affidavits that I will hand you. [Handing paper to the witness.] Is that your notarial seal?—A. Yes, sir.

Mr. WILSON. Let us see it.

[The paper was submitted to counsel for defense.]

Mr. MERRICK. It is just the oath of the contractor, that is all. This witness took seven affidavits on rontesembraced in this indictment, and in order that he may leave, I will prove the signatures of all of them.

Q. [Handing the witness affidavit on route 34149, from Kearney to Kent.] Did Mr. Peck appear before you and sign that affidavit?—A. He did, sir.

Q. That is his handwriting?—A. Yes, sir.

The COURT. Show that to the other side.

Mr. MERRICK. I have shown it to them.

Q. I hand you Mr. Peck's affidavit on route 44140 from Eugene City to Mitchell. [Submitting the same to witness.] Is that your notarial seal?—A. Yes, sir.

Q. Did Mr. Peck appear before you and execute that?—A. Yes, sir.

Q. That is his handwriting?—A. Yes, sir.

Q. I hand you the affidavit on route 40105 from Ehrenberg to Mineral Park. Did Peck appear before you and execute that?—A. Yes, sir.

Q. He signed it?—A. Yes, sir.

Q. I now hand you the affidavit on route 44155 from The Dalles to Baker City. Did Mr. Peck appear before you and sign that paper, and is that your notarial seal?—A. It is.

Q. Route No. 44160, from Canyon City to Camp McDermitt. Did Mr. Peck appear before you and execute that affidavit?—A. He did.

Q. And it has your notarial seal?—A. Yes, sir.

Q. Route No. 46132, from Julian to Colton. Did Mr. Peck appear before you and sign that affidavit?—A. Yes, sir.

Q. And that is your notarial seal?—A. Yes, sir.

Q. Route No. 46247, from Redding to Alturas. Did Mr. Peck appear before you and execute that affidavit, and is that your notarial seal?—A. He did, and that is my seal.

Mr. TOTTEN. How many affidavits have you got there?

Mr. MERRICK. I have not counted them. Mr. Ker says there are seven.

Mr. TOTTEN. There are eleven mentioned in the indictment.

Mr. MERRICK. I did not prove them all. They were not all taken before Mr. Taylor. I proved what Taylor took.

The COURT. The clerk will mark the seven that were received.

[The clerk marked the affidavits herein named.]

Mr. KER. Read page 471.

Mr. HENKLE. [Reading:]

Q. [Submitting to witness affidavit relating to route 34149.] Do you know in whose handwriting that paper is?—A. No, sir.

Mr. TOTTEN. That is the Kearney and Kent route.

Mr. HENKLE. Let us have the affidavit.

[The affidavit referred to was produced and submitted to the jury for examination, with the statement by Mr. Henkle that it was claimed to be in Mr. Miner's writing.]

Mr. KER. Why don't you read the balance of the testimony.

Mr. HENKLE. I will read it:

Q. Did you look at it at the time it was sworn to before you?—A. About as much as I have looked at it now.

Q. Do you know whether that red ink was on there when it was sworn to before you?—A. I could not say, sir.

Q. When these affidavits were taken before you, you did not look at them at all?—A. No, sir; I did not look at them particularly; I just acknowledged them.

Q. You are not able to testify in reference to their then and present condition?—A. No, sir; I am not.

Q. You could not testify with regard to that?—A. I could not.

Q. You could not say whether there were any blanks, or whether there were not?—A. No, sir; they just brought them to me, and I signed them and acknowledged them, and did not notice them.

Q. You cannot say whether they contained blanks or not?—A. No; I cannot.

Mr. MERRICK. That is all.

Is that all you want me to read?

Mr. KER. Yes.

Mr. HENKLE. Now, I say to you, gentlemen, that after the Government had introduced this witness and vouched for his credibility, and he had sworn that every one of these affidavits was signed and acknowledged by Peck before him, for some reason or other at a later stage in

the case the Government introduced Blois, from the Post-Office Department, who professed acquaintance with the handwriting of most all of these parties, especially of Miner and Rerdell, and he told you that some of these signatures to them were in the handwriting of Miner. It is true, when he came to be cross-examined—it will take too much time to go through all that, but I invite the jury to do it—when he came to be cross-examined by my friend Judge Wilson, when the paper was turned down, and he could see nothing but the signature, he crossed himself [to Mr. Miner] how many times?

Mr. MINER. Six times.

Mr. KER. I object to my friend calling upon Mr. Miner for a substantiation of the number of times a witness crossed himself.

Mr. TOTTEN. The record shows it.

Mr. HENKLE. I have got Mr. Miner to help me.

The COURT. Mr. Henkle is at liberty to take the nod from Mr. Miner, of course. Counsel are supposed not always to speak from their own information, but to represent their clients.

Mr. HENKLE. I had got my client, Mr. Miner, to help me, as he is quite expert.

The COURT. I do not think it is objectionable at all.

Mr. HENKLE. I invite your attention, brother Ker, to this, and you may verify it or disprove it:

34149 (2 A). Blois testifies, page 1496: Does not know who wrote it.

41119 (8 C). Blois testifies, page 1468, is Miner's handwriting. Page 1469, upon objection to the Government contradicting their own witness [Taylor], Mr. Merrick withdrew the paper.

44140 (20 T), page 1844, signature not submitted to Blois.

44155 (50 A). Blois testifies, page 1475: Signature not Miner's.

44160 (51 A, 10 Q). Blois testifies, page 1496: Don't know.

46132 (52 A). Blois testifies, page 1497: Don't know.

46247 (53 A). Blois testifies, page 1498: Don't know.

Mr. KER. What are those?

Mr. HENKLE. They are affidavits on those routes.

There is a case where Peck's name is written by Miner. [Handing] paper to the jury for inspection.]

Mr. DICKSON. [Foreman of the jury.] Is this Miner's handwriting?

Mr. HENKLE. Yes.

Mr. KER. I call attention to 51 A. He says the writing is that of Mr. Miner, signature and all.

Mr. HENKLE. 51 A, Mr. Blois says, is in Miner's handwriting, signature and all.

[The paper marked 51 A is handed to jury.]

Now, gentlemen, it seems to me the most extraordinary thing that I ever knew to be done in a criminal prosecution, that after they had put upon the stand a man whom they had brought all the way from New Mexico to prove that these signatures were all made by Peck himself, then to call another witness to testify that that was not true. Now, what kind of faith can you put in such a prosecution as that? They say to-day—and they say it under the solemnities of an oath—they introduce a witness and say to you in putting him upon the stand, "This man is a credible witness, believe you him." In the exigency of their case it becomes important to them to show that that was not true, and a few days afterwards they call another witness who swears positively that the statement of the first witness is false. Did you ever hear of such a thing in a criminal prosecution before? I ask your honor if you have ever heard of such a thing?

Now. I concede that where a witness has disappointed a party calling him, where he has told him out of court that such and such things are not true, and deceived him for the purpose of procuring himself to be called as a witness in the interest of the adverse party, when he comes upon the stand disappoints the counsel who called him or the party who called him, there it is competent to contradict him by another witness. But there is no such pretense in this case. This witness testified to precisely what he was brought away from New Mexico to testify. His answer was responsive to the question that brother Merrick asked him, and he gave the answer that brother Merrick desired him to give and for which he was brought here. "Did Peck appear before you and sign and execute that affidavit?" "Yes, sir; he did." And that is satisfactory to the Government. Now, a few days afterwards they bring another witness who swears, without even an apology, that Taylor lied. They do not even so much as offer an apology for the sake of decency.

Mr. WILSON. And the second man never saw Peck write.

Mr. HENKLE. And the second man never saw Peck write.

I want to ask you what kind of faith you can have in such a prosecution as that. They tell you one day that thing is so, when they think they are making out their case by it, and a few days afterwards when they become dissatisfied with their case, they tell you again under oath that it is not so. Are they dealing ingenuously and honestly with you, gentlemen? Does not the fact show that the prosecution knew what Taylor would swear to when they put him upon the stand for the purpose of swearing precisely what he did? Did they not know when they put Blois on the stand that he would contradict Taylor, and did they not put him there for that very purpose? How do you explain this? How do you explain it in law? How do you explain it in morals? And, particularly, how do you explain it consistently with the humanity of the law which estimates, as above all price, the liberty of the citizen?

The public prosecutor is presumed to have no interest and no desire to convict the defendant. He is presumed to represent the Government; desires simply that justice shall be done; he is presumed to be impartial; and yet in the robes of this official character they come to you and tell you one thing to-day under oath, and to-morrow another thing under oath. Does it not provoke distrust? Can you put absolute, unvarying faith in a prosecution that will say to you, "Now you see it and now you don't?" Now, I do not care a penny what Blois testified to. I have here a paper showing these inconsistencies where he testified to one thing and crossed himself six times on cross-examination by Judge Wilson, when the papers were shown to him, but he could not see what they were. I would like to give it to the jury, but my brother Ker, I suppose, would object to it.

I do not like to weary you with reading it, but there it is, and if you will take the trouble to examine the record you will find it verified that he crossed himself six times, and he testified as flippantly and as positively as though he were testifying to what he absolutely knew. He did not hesitate a moment. His eye scarcely fell upon the paper until he said. "That is Peck's." "That is Kerdell's." "That is Miner's." Now, I do not think it is worth while to waste ammunition upon this poor boy.

The fact is, gentlemen—and I am justified, I think—and I think, your honor, that I am not traveling out of the record, in saying that in the Post-Office Department there is, with regard to these prosecutions, a

reign of terror. The clerks in that department are afraid to express any opinion that is adverse to the Government. I do not want to be unkind or ungenerous to any man, but my brother Ker used in his able argument the expression that Mr. Woodward had once lost his place in the department on account of these prosecutions, but, he said, he had come back again, and come back to stay. And I say that I am justified in saying, feeling no unkindness towards Mr. Woodward, that he is now pursuing his adversary; he is going for scalps; he is filling his belt with them; and every man who does not bow down to and worship the golden image, off goes his head. So went McGrew; so went French; so went Lilley. Poor little Blois-y did not intend that his valuable head should fall into the basket, and hence he comes here and swears to a lie to save his official life; and he went away happy under the benignant smile of his master. I would feel sorry for Blois if he had felt any compunctions for himself, but he manifestly enjoyed what he was doing. If he was swearing other men into the penitentiary, that is what he was here for. It made no difference to him what suffering, what wrong, what injustice he brought upon another, so that by this act of treachery and infamy he secured his own poor, little official existence. Again I say, before I leave it, what think ye of a prosecution that would resort to such extremities as that?

I am passing over a large part of my notes, for I want, if possible, to conclude my argument to-day. My brother Merrick told you that these contractors were very enterprising; that they began shortly after they got the contracts with their affidavits and their petitions for increase and expedition; that they were very enterprising and very diligent. Now, the first of the affidavits that were filed was on the 18th of September, 1878. The first one of the routes that was expedited was No. 38150, and that was Saguache to Lake City. Upon this route Miner was the original contractor. The pay was \$3,426 for three trips a week; the route was ninety-five miles and the time was thirty-six hours. On the 18th of May, 1878, Miner, Peck & Co. sold this route to Sanderson, who had been the contractor before. (See page 1405.) On the 19th of September, 1878, Sanderson filed his affidavit. I want to call your attention, gentlemen, to this evidence introduced by the Government. On the 19th of September, 1878, Sanderson filed his affidavit for increase and expedition, and on the 20th of September, 1878, the very next day after the affidavit was filed, Brady made an order to increase it to four trips, and increased the pay to \$4,568, and reduced the time from thirty-six to twenty-four hours. This is the case in which there was a clerical error on the part of Turner. It was put into the indictment for the purpose of catching him in some delinquency, but sometimes—

The shaft that's aimed at duck or plover,
Recoils and kicks the shooter over.

I do not catch the poetry exactly, but that is the idea.

Now, there is another thing that I want to call your attention to, that brother Ker did not elaborate. There is another serious mystery, and that is, how Sanderson came to get the first increase on these contracts so easily and readily, and yet he is not in this indictment. There is the most facile and easy case in the whole record—the affidavit filed on one day, and the order made on the next day an increase of four trips and fifteen or sixteen thousand dollars expedition. I think it devolves upon somebody to rise and explain. This, it seems to me, brother Ker, as eminently demanding an explanation. Why is not Sanderson in the

indictment? Will you tell me why you did not put him in? You had him in in the first instance.

Mr. KER. Do you want me to tell you?

Mr. HENKLE. When you come to argue the case.

Mr. KER. I did not have a chance.

Mr. HENKLE. You had him in the first indictment. When you drew the second indictment, for some mysterious reason you left him out. Now, observe, I do not say that there was anything criminal on the part of Sanderson. I do not believe it. I have no doubt in the world it was an honest, *bona fide*, straightforward and just transaction. I have no doubt that route ought to have been expedited and the service upon it increased, but it was done in a more facile manner than any of ours. It was more easily and readily accomplished than any of ours, and yet you indict us for what we so hardly got, and leave him out for what he so easily obtained. Now, I say, gentlemen, that there is something wrong about that. I do not say at whose door it is to be laid; I do not lay it at the door of my excellent friend who draughted this indictment.

Mr. KER. That is the right place to put it.

Mr. HENKLE. He says it is the right place to put it. I do not believe it.

Mr. KER. You would not let me explain.

Mr. HENKLE. You have had your time and have had an opportunity to explain, but you passed over it very easily and never said anything about it, and now I will draw my own deductions from it. If I were ungenerous I might infer that somebody had been bought. I know brother Ker could not be bought. When you want to father it, I say that I do not believe it. I believe that it came from some other party. The hand was the hand of Esau, but the voice was the voice of Jacob.

I say, if I were ungenerous enough, I might ask you to infer that somebody was bought. Let me turn that argument. You are invited to conclude, because there was expedition and increase of service, that Brady was corrupt. My eloquent friend, Merrick, has rung the changes upon it a hundred times; that he must have had some motive to do these things. But he could conceive of no other motive, and invites you to accept as proof from the irresistible force of argument and deduction, that Brady was corrupted, and that he was corrupted by these parties to do these things. Now, I will turn my friends' weapons upon themselves. If I were ungenerous enough I might say that somebody must have been bought for leaving Sanderson out of this indictment when all the men named in all the nineteen routes are in the indictment, and this is the most obnoxious to objection and suspicion of all.

But I acquit you all. I know you did not, brother Ker, and I do not believe anybody did. But I am only trying to show you how miserably puny and deceptive the argument is that you are presenting to the jury, and that you are trying to deceive and mislead them by false and untenable deductions from the facts.

Now, I did propose to take up *seriatim*, and perhaps I ought to say one at a time, the routes in which my clients were interested. I did propose to do this briefly and go through them to see whether I could find any evidence of conspiracy in them. It seems to me almost like cruelty, and yet I do not know what else I can do. I will be as brief as possible, and I shall have to ask you to extend your patience a little longer.

The first route in which they are interested is Kearney to Kent. In this Peck was the contractor, and made the affidavit February 1, 1879. In the division it was taken by Vaile and Miner. On July 10, 1879, an

order of increase and expedition was made by French, not Brady, but by French. You have been told, gentlemen, and I presume you have not forgotten it, by General Totten, and probably by other counsel in the case, how many of these orders that are set out in this indictment as the ground of accusation and complaint against us were made by French, and not by Brady at all.

Now, Mr. Bliss said generally in his argument that they made no claim on account of this order, because it was made by French. The only point in the case is the complaining of French because he did not come up for expedition when the others performed the service. You will remember that the route was advertised to run a straight course for a while and then to deflect to Cedarville, making an angle, and then pass on to Loup City. You remember, gentlemen, that the testimony was that the contract was advertised to be carried in that way. That was a distance of seventy-five miles. You will remember that this man French, who took the subcontract from John W. Dorsey, while Dorsey was managing it before the division, testified that he traveled a straight route, cutting off this angle entirely; that he traveled a straight route from Kearney to Loup, a distance of only forty-eight miles, and then he made a side supply down to Cedarville. Now, he had no business to go that way; it was not the advertised route; it was not the contract route. Cedarville was entitled to have the mail pass both ways, so that they could communicate with their neighbors either way each time the mail made a trip. But he persisted in running it that way, and he ran it to the end of the contract period, or until the time he appeared here on the stand. The route was expedited; I do not remember how much, perhaps from thirty-six hours to thirteen. Now he swears that all the time he carried it in from twelve to thirteen hours, or perhaps, it was eleven to twelve hours before it was expedited, and ever since, and that he did not know that it had been expedited until he came here.

Now, if he had carried the mail as it was his duty to do—his obligation to do it—around by Cedarville, the route would have been seventy-five miles. As he did carry it, it was but forty-eight miles. [To a juror.] Did I not state it correctly; have you the map in your hand? That is my recollection of the testimony. And well he might have made that forty-eight miles in twelve or thirteen hours. But making seventy-five was quite a different proposition. He left the main road at Fitzalon, the witness told you, to go off to Cedarville; that was over the mountains, he said, and there was no road there; that it was impossible for him to go over those mountains and get to Cedarville that way. It turned out afterwards that there was a road, and that came out in the testimony of his friend, the lawyer—Nightingale, I believe his name was—who testified afterwards.

Now, then, French was mad when he found out that there had been expedition. Under his contract with John W. Dorsey he was entitled to such a percentage—I believe 65 per cent. of the expedition in case it was expedited, and inasmuch as he never went over the route that the contract provided for, he jogged along and made it in thirteen hours over these forty-eight miles, and he claimed that having discovered that it had been expedited, he ought to be paid for it. Now, as a matter of justice, he ought not to be paid for it, because he did not perform the service. As a matter of justice as between the Government and a contractor, whether the Government ought to pay is another question, which they may have to settle. But you observe that that is a question with which you have nothing to do, because it does not touch the ques-

tion of conspiracy. The fact about it is that the contractors never knew that French was carrying the mail over the route that he ought to have carried it over as the contract required him to do. Now that is all there is in this case.

Mr. KER. I would like a correction made, if your honor please, my brother Henkle stated that Mr. Bliss said that he made no claim on account of this because French made the order. I do not think there could have been anything of the kind said. It was made by order of General Brady. "Do this—Brady." You will find it on page 366.

Mr. HENKLE. If the court please, I do not like to ask any indulgence, but I am exceedingly weary, and I find that I cannot get through to-day. I have made an honest effort to do so.

The COURT. I have no doubt you have done all you could, and as much as might be expected.

Mr. HENKLE. I will endeavor by diligence to make it up on Monday.

The COURT. [To the bailiff.] Adjourn the court till Monday.

Thereupon (at 2 o'clock and 40 minutes p. m.) the court adjourned until Monday, September 4, 1882.

MONDAY, SEPTEMBER 4, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. HENKLE. May it please the court, and gentlemen of the jury, I had hoped to have completed what I had to say to you on Friday, but I found that the case covered a greater compass than I supposed, though I said what I thought it was my duty to say within its compass on that day. I promise you, however, that I will push along as speedily as possible, and I hope not to detain you very much longer.

I had taken up on Friday before the adjournment of the court the routes in which my clients were interested, and was trying to show you from them that in the evidence the Government has offered to you there was nothing to show the conspiracy charged in this indictment against them. I had hurriedly sketched to you what I supposed were the points in the route from Kearney to Kent. Now, with your indulgence, gentlemen, I will proceed with the rest of them and will begin with 38135, Pueblo to Greenhorn.

This route was one of those taken by my client in the division. It was one upon which Mr. Miner was the original contractor, and certain irregularities are charged to him by the Government before this route passed into the hands of Mr. Dorsey to whom it fell in the division. The route, you will remember, was advertised from Saint Charles to Greenhorn, thirty-five miles in length, service twice a week, schedule sixty-eight hours. Miner was the contractor at \$548 per annum. You will find it beginning on page 514.

The first symptom of imputed fraud in this case is that the route was advertised from Saint Charles to Greenhorn as thirty-five miles. Miner was in Washington and supposed it to be thirty-five miles, as the Government had advertised it for thirty-five miles. The evidence as shown to you, gentlemen, is not that Miner, or in fact any of these gentlemen who were bidders upon these routes embraced in this indictment went out over the route themselves, but they made up their bids here in the city

of Washington, and they made them as they had a right to do, from the data furnished by the Government. The Government had advertised this route as thirty-five miles in length, and Mr. Miner made his bid accordingly. It turned out, you will remember, that it ought to have gone to Pueblo. Perhaps it was not the original design, but the circumstances and the proprieties of the service all made it proper that it should go to Pueblo, which is quite a large city; that Pueblo should be the terminus of one end of this route instead of Saint Charles, where there was no town. Mr. Ingersoll, the postmaster at Pueblo, wrote a letter December 15, 1877, to the Second Assistant Postmaster-General, calling his attention to the mistake. I am in error, gentlemen. The distance to Pueblo was thirty-five miles, which was twelve miles beyond the point advertised. Mr. Ingersoll wrote a letter to the department calling its attention to this mistake, which letter went to the inspection division to which it belonged. No attention was paid to it, probably by mistake, and no readvertisement was ordered, and Miner upon the opening of the bids was found to be the lowest bidder.

Now, there was a route advertised as thirty-five miles long, when in fact it was twelve miles short of the distance to Pueblo, where it ought to have gone, and where it did go afterwards. It is not pretended that Mr. Miner had any better information as to the length of the route when he made his bid than the Government itself. There is certainly no presumption of that, and his contract was to carry the mail from Saint Charles to Greenhorn. This was the route advertised as so many miles, yet when they come to make the contract the distance or length of the route does not enter into the contract at all, and the distance is no part of the contract. It is made the duty of the bidder, and he is presumed to have informed himself as to the length of the route, and if he makes a mistake against himself it is his own mistake and he has nobody to blame but himself, because he ought certainly to have informed himself when he bid. And if the Government makes a mistake they must stand by the mistake. It is their mistake, and what is fair for the goose is fair for the gander. Now, I had better, perhaps, just in that connection call your attention to the law upon that subject. It is on page 140 of the Postal Laws and Regulations of 1879:

BIDDERS MUST INFORM THEMSELVES OF THE CHARACTER OF SERVICE.

Is the heading of it.

The distances stated in the advertisements for mail proposals are given according to the best information; but no increased pay will be allowed should they be greater than advertised, if the points to be supplied are correctly stated. Bidders must inform themselves on this point, and also in reference to the weight of the mail, the condition of roads, hills, streams, &c., and all toll bridges, ferries, or obstructions of any kind by which expense may be incurred. No claim for additional pay, based on such grounds, can be considered; nor for alleged mistakes or misapprehension as to the degree of service; nor for bridges destroyed, ferries discontinued, or other obstructions increasing distance, occurring during the contract term. Post-offices established during a contract term are to be visited without extra pay, if the distance be not increased, and at pro rata pay for any increase of distance.

Mr. TOTTEN. That is copied in the advertisement.

Mr. HENKLE. As General Totten says, that is copied in the advertisement substantially. So that it was not the fault of Mr. Miner that the Government advertised this route as thirty-five miles when it was only twenty-three, and no blame is to be imputed to him if he stood by his contract, for when he made his contract the length of the route had nothing to do with the contract whatever. A contractor simply contracts to carry the mail between given points for so much.

It is said, though, that Mr. Ingersoll, the postmaster at Pueblo, wrote

to the Second Assistant Postmaster-General before the letting that it was advertised too many miles, that it was thirty-five miles, and that it was twelve miles short of that, and that no attention was paid to it and there was no readvertisement. Now it is supposed by my learned brother upon the other side that this is a suspicious circumstance; that Brady knowing that this was Miner's route, and he wanting Miner to make as much out of it as possible, let it go on and let him have the advantage of this distance. Now the fact is, gentlemen, that these letters go to the inspection division, of which our friend Mr. Woodward is the head, and if there is any laches or negligence of default anywhere, it is on the part of Mr. Woodward. It was his business to have informed the Second Assistant Postmaster-General of the fact that he had received such a letter, and to have asked him to have it readvertised if a readvertisement was worth the trifling difference in distance, and there is not a sciutilla of evidence tending to show that Mr. Woodward ever called the attention of the Second Assistant Postmaster-General to this matter at all, or that he ever knew of it, and you, gentlemen, are not so inexperienced in business and so narrow in your views as to the extent of business that was done in this great bureau as to suppose that the Second Assistant Postmaster-General himself reads and examines every letter that comes to any division of his bureau. It is not at all likely in the immense business that was done in that bureau that he would read or know of such a letter unless it was called to his attention by the particular person having charge of that branch of it.

Now, then, I say there is nothing in this case, gentlemen, because there is no evidence tending to show that Mr. Brady ever knew of this letter. If it was proper that he should have known of it, it was the duty of Mr. Woodward to have called his attention to it, and he never did it.

Mr. WILSON. Mr. Lake was head of the inspection division.

Mr. HENKLE. Mr. Lake, then. I beg Mr. Woodward's pardon. I am not animadverting upon him or anybody else. But, then again, how was Brady to know that Miner was going to get that route, gentlemen? Now, this was before it was advertised, and before the contracts were made at all. How was Brady to know that Miner was going to get the contract upon that route, and why should he in advance of the letting be picking out particular routes and giving Miner the advantage of it? Why, you see, gentlemen, how absurd and perfectly ridiculous it is, and it only shows how drowning men will catch at straws—what a little thing this infirm prosecution will seize upon for the purpose of making a little capital against these defendants. You remember the route was afterwards extended to Pueblo, twelve miles added, and the pro rata pay, as I have read you from the law, was increased. Now, it might be, if it were not a rule operating both ways, that strictly when the route was only increased to the number of miles for which it was advertised, perhaps the Government ought not to have paid for more. But that was the rule of the department prescribed by itself, and while it operated in one instance in favor of the contractor, the next time it operated in favor of the Government, and I will show you presently, when we come to another route, Vermillion to Sioux Falls, that it did operate against Miner in that case to a much larger extent, and yet the Government made him stand by it. I have been utterly unable to understand or appreciate any distinction between the rights of the Government on the one side and the rights of the citizen on the other. I do not know why a rule the Government itself makes shall not apply when it is against the Government, and that it shall apply when it is in favor of the Government. I know that the Government deal

very hard with its citizens. I know that in the winter season this city is besieged with men who are trying to collect honest claims from this Government of the United States. I know that all sorts of technicalities and trivial little niceties are interposed in the way of men who have served the Government honestly and faithfully and well to prevent them from getting their honest dues, and there are to-day all over this country men, women, and children who are at the doors of starvation because this great Government of the United States has been so tardy, so derelict in the discharge of its obligations for honest service. I speak what I know, for I have had some experience as a lawyer in trying to collect claims against the Government of the United States, and some of you I know—my friend, the foreman—must have had similar experience, but those of you who have not had personal experience know it as a matter of observation, for everybody who has lived in Washington does know it.

Now, the probability is, gentlemen, that Brady never heard of this thing at all until he read it or heard it read in this indictment. I will not trouble you to wade through the testimony as to the men and horses. There is a substantial correspondence and a little difference in that regard. The witness, Farish, who performed the service, says that the service might have been done, as Miner's oath said, upon the one man and two horses, I believe, upon the then present schedule, and he says that he did it with one man and two horses upon the expedited schedule, and Mr. Miner in his affidavit thought it would require two men and four horses. Now, I suppose the fact is this: That Mr. Farish, living there and doing his work himself and using his own team—you will remember the amusing cross-examination by Mr. Ingersoll of this witness—and driving them harder perhaps than a man may ordinarily do, and they may have been horses of extra metal and endurance, but he used one horse when Mr. Miner estimated on the expedited schedule at two and a quarter miles an hour that it would require two horses to perform the service instead of one.

I will next take up the route 35015, Vermillion to Sioux Falls. The length of that route is seventy-three miles; trips, one; pay, \$398. John Dorsey was the contractor. The schedule was fourteen hours. Now, this route was advertised for fifty miles. It turned out to be seventy-three, and here, as in the other case, Mr. Boynton writes a letter to Mr. Kidder telling him of the mistake in the advertisement. Mr. Kidder was a Delegate in Congress from Dakota. Mr. Boynton out there writes to the Delegate in Congress calling his attention to the fact that this route is seventy-three miles instead of fifty, and that there might be some trouble about it—I do not want to stop to read his letter to you—and asking him to call the attention of the department to the fact, which he did, and no attention was paid to it.

Now, why did not Mr. Brady correct it if he knew that John Dorsey was going to get this route and it was advertised for fifty miles, when in fact it was seventy-three? Why was he going to let his friend John W. Dorsey bid off this route upon the supposition that it was fifty miles when in fact it was seventy-three miles? Why, just for the same reason that occurred in the other case, that perhaps he never knew of it. His attention, perhaps, was never called to it, but it was suffered to stand, and the Government, gentlemen of the jury, got the advantage of it. When they came to contract there was no allowance made for this increased distance of twenty-three miles, and the Government got the advantage of it, as it had a right to do under the terms of the letting.

Now, Brady ordered Brighton embraced on this route, and allowed

\$10.90 per annum increase for two miles. They had to deflect two miles out of the course to take in the town of Brighton, and Brady allowed it on and allowed pro rata **\$10.90**. Now, gentlemen, Brady's per cent. of that order would be **\$2.10**, and yet witnesses are brought here one thousand five hundred and two thousand miles away to establish these facts. The department records are brought here and shown to you, and my friend Bliss is quite jubilant over the discovery of this fact. Now, do you suppose, gentlemen of the jury, that Brady, occupying this important public trust, and receiving this great income of 20 per cent. from all these nine thousand star routers all over the country, would imperil himself in order to get **\$2.10**? Is that for one moment to be supposed? And if, gentlemen, that is one of the evidences of this conspiracy, and it is here like the large orders and undoubtedly made upon the same principle and in the same way they were made—because he deemed it right and his duty to make it, and for no other moving consideration whatever.

This record is exceedingly meager. It was increased to six trips from two and **\$1,635** additional allowed for increase, and it was expedited from fourteen to ten hours, and **\$3,608** allowed for expedition, being pro rata, and this order was made by French, gentlemen, and yet it is asserted in this indictment as evidence of our conspiracy with Brady. There is no pretense in the case; there is no evidence that French was a member of this conspiracy, and if he was a member of this conspiracy the indictment is defective because it does not embrace him as one of the conspirators. But there is no pretense that French was one of the conspirators, and Mr. French testified that the Postmaster General when he dismissed him from the service said that he did not suspect him of corruption at all. And yet, gentlemen, this order is one of the accusations against us; and allow me to say in passing, right here, that a large number of these orders—I believe my friend General Totten gave you a list of the orders which were made in fact by Mr. Brady—

Mr. WILSON. [Interposing.] By French.

Mr. HENKLE. I mean by French, and which in this indictment and in this prosecution are imputed to us as evidence of conspiring with Brady, and it is not pretended that French was moved by any money consideration, and yet he made the orders right along. When Brady was absent the orders were made by French—just such orders as Brady himself would have made, but in fact he did not make; and as I said there is no pretense that he was moved to the making of these orders by any mercenary consideration whatever.

There is nothing in that regard, gentlemen, that I know of further that it would be worth my while to bother you with. I now call your attention to route 44160, Canyon City to Fort McDermitt, Oregon. The length of this route was two hundred and forty-three miles, the trips were one, the time was one hundred and thirty hours, the pay was **\$2,888**, and the contractor was Peck. In the division of routes this fell to Vaile and Miner. On the 4th of July, 1878, Hall, the postmaster at Canyon, writes to the Second Assistant Postmaster-General informing him that the contractor has failed to appear in person or by agent, that he has made diligent inquiries, but cannot ascertain the reason for his non-appearance, but says it is useless to employ temporary service as the route is impassable on account of Indian outbreaks and only open as far as Camp Harney. So that though the contractor did not appear at the time he ought to have appeared by his contract, July 1, on the 4th of July, the postmaster at Canyon City informs the Second Assistant Postmaster-General that it is not necessary, it is useless

to attempt to put on temporary service, because the country is covered with hostile Indians and the service cannot be run.

Now, I know that the contractor was not, as a matter of fact, in condition to put it on, but the Government suffered no injury at that particular time and the poor contractor was doing all he could to get service, and he had not the means, and he had not been able to get a subcontractor to do it. On the 18th of July, now, gentlemen, only fourteen days after the Second Assistant Postmaster-General had been informed that service was impracticable on account of Indian difficulties, Brady writes to the postmaster, Mr. Hall, to know if the contractor has commenced service in person or by agent, and if not, what arrangements have been made for the service, and tells him to report at once. That letter is found on page 1351 of the record.

Now, gentlemen, this does not look very much like conspiracy on the part of Brady. On the 4th of July the postmaster at Canyon informs him that the service has not been put on, the contractor has not appeared and has not put on the service, and it is impracticable on account of Indians, and yet fourteen days afterwards Brady writes out to the postmaster to know if the contractor has yet appeared and if he has not what he has done or is doing for the purpose of putting on temporary service. If John Dorsey was a conspirator with Brady why should Brady be calling the attention of the postmaster to his delinquency? Why should he be inviting from this postmaster a letter in response to his, to go on the files of the department, to show that his fellow conspirator was negligent and that he was indulging him? Does it not show, gentlemen, that Mr. Brady was acting honestly and fairly doing his duty to the public? It was his duty to see that the service was put on these routes. He was not allowing John Dorsey nor anybody else to escape this obligation, except where it was in the interest of the public service that indulgence should be granted, and hence, fourteen days after he is informed that the service is impracticable you find him writing to the postmaster to give him information again whether the contractor has appeared, and if he has not, whether he has done his duty in putting on temporary service.

Now, I say, gentlemen, that this fact that is introduced on the part of the Government as an evidence of guilt, so far as it is conclusive of anything is conclusive of the fact that there was no conspiracy between these men, for it is impossible that Brady should have been calling attention to his delinquency and prodding the postmaster out there because he did not supply it by temporary service.

Now, Mr. Vaile, you remember, had taken hold of these routes. These gentlemen were unable, for want of means, to put service on. They had gotten Mr. Vaile into it, and his men were going around as rapidly as possible subcontracting or putting service upon these routes. Shortly afterwards the service was put upon this route. Mr. Peck met Vaile on the 18th of September, 1878. He says the number of men and animals necessary on the present schedule, is five men and eight animals, and on a reduced schedule of ninety-six hours, there is twelve men and thirty-two animals. I will not take you through the evidence. My recollection about it is, that there is a very slight if any difference in the testimony between the testimony of the witness and that of the affiant in regard to the number of men and horses. Mr. Miner signed a proposition to carry it on a reduced schedule of ninety-six hours, including two extra trips for \$18,612, and this was less than pro rata. Pro rata would have been \$19,848. This was \$1,236 less than pro rata. Now you will remember, gentlemen, that this route was between two

important military stations, and how clamorous they were and how full of petitions, and urgent petitions, and recommendations of military men, and members of Congress, and Senators, the record is in this case for increase of trips and expedition. Now Brady could not have helped expediting and increasing that route, and Mr. Miner, I will show you after awhile, when I come to it, was entitled under the law and under his contract to pro rata, and yet he proposed to do the service for \$1,236 less than pro rata and his proposition was accepted.

Mr. KER. It was not one of Miner's routes.

Mr. HENKLE. It became Miner's route.

Mr. MINER. It became Vaile's.

Mr. HENKLE. It became Vaile's. I speak sometimes inadvertently. The difference in time on each trip was thirty-six hours. Now, gentlemen, that is a very considerable difference in time in the delivery of a mail. Here in Washington I know if our mails were delayed thirty-six hours we would begin to make a fuss about it, and so they would all over the country, and it is important out there, perhaps in general not as important as it is in a business community, but the people have the right to have a speedy mail in the West as well as in the East, and it is not a principle upon which legislation nor business is conducted under the Government of the United States to make fish of one, flesh of another, and fowl of another. All the citizens of the United States are entitled to equal privileges and immunities under the Constitution and the laws of the United States.

I do not intend to bother you with a reference to any of the petitions, but this route was so petitioned for and recommended that I say to you no man occupying the position of General Brady could have resisted the demands made upon him both to expedite and to increase the service upon that route just as he did.

If he did it and when he did it the contractor by his contract was entitled to the full pro rata; and yet he was paid \$1,236 less than pro rata upon his own proposition. Now, you will find, if you will take the trouble to go through the record and examine the correspondence of the affidavit with the men and horses, that it is perfectly consistent. But here I have in my notes a fact that I want to call to your attention. I perhaps ought to have spoken of it a little further back. Pro rata, according to Peck's affidavit, would have given \$19,848. According to the Government proof, taking the men and horses that the Government proves were necessary to do the service upon the expedited schedule, pro rata would have been \$24,351. If you had made your calculation upon the Government proof in this case here upon the stand, the pro rata instead of being \$19,848 would have been \$24,351; and it is in favor of the Government by \$4,503. The difference between the amount allowed and pro rata according to the Government evidence is \$5,639. It is claimed, though, in this case that the affidavit was altered. You remember these affidavits, gentlemen. I am not going to weary you by producing them again. In some instances, I do not know, but several—I don't know how that is—a word is stricken out. In this case the word eight is stricken out, I believe, and five—horses or men—is inserted. This is given to you as a wonderfully suspicious circumstance. My brother Ker commented upon that considerably to show that these affidavits were altered. He did not exactly charge that they were altered in the department by Brady. I do not know that he said who they were altered by. They were altered and that was a wonderfully suspicious circumstance, pregnant with evidence of conspiracy and crime. Now, gentlemen, I do not know when they were altered. I

do not know when the five was struck out and the eight put in, or *vice versa*, as it may be, and I do not know who did it; but you will remember that the Government brought here Mr. Taylor, the notary public before whom the affidavits were all made by Peck in New Mexico, and he swore that he did not remember—and my brother Ker was very anxious for me to read that part of the testimony the other day—whether there were any changes on the face of the affidavits when they were signed or not. The Government has not proven, gentlemen, that any of these affidavits were changed by anybody after they were signed. Gentlemen, Mr. Peck or anybody who drafted the affidavits or anybody else who was interested had a right to make a change in the affidavit upon subsequent information or reflection, concluding that the first was wrong before it was signed and sworn to. Is it possible that because an affidavit is drawn up specifying twenty men and forty horses for the contractor to sign, and when he sees it, he says, "Why that is too much; ten men and twenty horses are sufficient," and he strikes out the one and inserts the other, that that is a suspicious circumstance? Your good sense tells you, gentlemen, that there is nothing in the world in that. Unless the Government shows that these affidavits were corruptly altered after they were executed it amounts to nothing. Where is the evidence that any one of these affidavits was ever altered after it was executed? Where is the evidence?

Mr. KER. On the record.

Mr. HENKLE. My brother says on the record. When he was on his feet he did not show us where it appears on the record. I say there is no such thing on the face of the record nor on the face of anything else.

Mr. KER. Yes, there is.

Mr. HENKLE. There is no evidence at all that these affidavits were altered after they were executed; their own witness whom they wanted to have say so, said he could not say that they were. He is the only witness who has testified touching that point. Now this case is tried on the part of the Government as though all the presumptions were against the defendants and all the presumptions in favor of the Government. It is the first time in my life that I have ever heard a criminal case tried upon the principles upon which this case is tried. As you have learned, gentlemen, all the presumptions are in favor of the defendants. All the presumptions that arise or spring out of the evidence at any stage in it are in favor of the defendants; and these presumptions must be overcome by overwhelming evidence on the part of the Government or they stand as the proof in the case. Now that route was subsequently increased four trips, and \$28,666, or pro rata, was allowed for them. That finally was done in April, 1880. I say if you will recall the petitions and recommendations that were filed in the department, ay, that flooded the department, imperious demands from men in high position and high authority, military and civil, to increase it to a daily mail, you will perceive an important point here. I think the petitions, and recommendations, and demands made it Brady's duty when he increased it to three trips, to have increased it to a daily mail. These petitions did not ask for three trips, they asked for a daily mail; and yet he, in the interest of economy, only granted it half way or not half way, and gave them three trips instead of seven which they were demanding and which they ought to have had. Now, gentlemen, with that increase there was an increase of compensation of \$28,666 for a year and a half or so. That sum was lost to these conspirators. What a comfortable plum that would have been to be divided between these fellows for a

year and a half, or whatever length of time it was—I will not pretend to be accurate, and I am not going to weary you by stopping to hunt up the record. Why did not Brady, if he was a wise conspirator, make a daily service when he made a tri-weekly and divide up this increased sum instead of the smaller one? On this route, gentlemen, there is this damning evidence of guilt, so dark that it cannot be wiped out: There was a petition signed by a page or so of names, some of which were proved to be the names of persons living away down in Utah, while this route was up in Oregon. You remember when we were taking the testimony in this case what an amount of glorification there was over this on the part of the distinguished counsel who represent the Government. How they gloated over this convincing, damning proof of conspiracy. Now, gentlemen, I do not know what the history of that petition is, and I am not going to stop to read it or to show it to you. I believe my brother Wilson did show it to you during his argument, but you will remember this fact, gentlemen, that on the face of the petition the petitioners do not purport to reside along the line of the route. They simply claim to be citizens of the United States, or “the undersigned,” I do not remember which. There is no pretense on the face of the petition that they live in the neighborhood of the route. Is that a false petition? Why? The petition on its face does not say that the people whose names are signed live along the route. It says, “We, the undersigned citizens of the United States.” Now, I want to know, gentlemen, if it is a crime for a man living in Utah to sign a petition as to a route in Oregon? I want to know if it would be a crime for me and my brother Ker to sign a petition to expedite a route in Oregon?

Mr. KER. If we put other people's names to it, it would.

Mr. HENKLE. I am not speaking of that just now. I want to know if there is any crime in signing a respectful petition to the Post-Office Department because we live in the city of Washington and not at the seat of the service? I say to you, gentlemen, that any citizen of the United States from Maine to the Rio Grande and from the Atlantic to the Pacific has the right to sign any respectful petition provided he does not impose upon the department in doing it. This petition does not say that the signers live along the route. Whether there are any names upon the petition that are forged or not I do not know, nor for all the purposes of this case do I care. [Turning to Mr. Ker.] Do you claim that there are any forged names on that petition?

Mr. KER. Certainly, Postmaster Hall's, and two others.

Mr. HENKLE. Postmaster Hall did not know whether it was his signature or not. Mr. Miner says his signature was not on that petition, and that I believe is true. Gentlemen, the fact about it is that whoever attached those names, whoever got up that petition, whoever filed that petition, it is wholly immaterial in this case. There is no evidence at all events that Mr. Brady had anything to do with it or that he ever saw it. Was not that route overwhelmingly petitioned for? Was it not overwhelmingly demanded by petitions that were undoubtedly and confessedly genuine and *bona fide* and by men of high position and low? Was not this petition itself indorsed by Senator Slater?

Mr. WILSON. And Grover and Whiteaker.

Mr. HENKLE. And Grover and Whiteaker, two Senators from Oregon and a member of Congress. I want to know how Brady was to know that these people lived in Utah when the petition was indorsed by these Senators and this member of Congress from the locality where the service was to be performed? I do not know whether they mean to insinuate that Miner had anything to do with it, but if he or any other

one of these defendants interested in these routes had any instrumentality in putting false names upon that petition, it is very manifest that Brady did not know it. If he ever saw it or acted upon it at all, he acted upon it on the faith of the indorsements upon it, as he had a right to do.

I will next call your attention to route 44155, from The Dalles to Baker City. The length of this route is two hundred and seventy-five miles, the number of trips two, the time, one hundred and twenty hours, the contractor, John M. Peck, and the pay, \$8,288. In the division this route was taken by Miner and Vaile. The service was not put on this route on the 1st of July, 1878, and Mrs. Wilson, whom you will remember as a witness, upon the stand testified that she made a contract for temporary service from July 1, 1878, with Mr. John Hailey, and she contracted with him to carry this mail, according to contract, for \$15,500. The contract price with the Government was \$8,288. Now, Mrs. Wilson made this contract for nearly double what the contractor was allowed by the Government. Subsequently Brady would not approve that contract because he thought it was too much, and she made another for \$14,000 with the same party. Now, although these gentlemen did not put on the service at that time, yet they had to pay the temporary contractor. The temporary contractor ran it until about the 16th of August, I think, according to the testimony, and Vaile and Miner had to pay him in hard dollars, first at the rate of \$15,500 a year, I believe, for one month, and for the rest of the time at the rate of \$14,000 a year, when they only got \$8,288, so that no harm accrued to the Government by their failure to be on time in the performance of their contract. It was a little expensive to them but they made no complaint and the Government was not injured. In this case the affidavit was made by Peck, according to the testimony of Taylor. The proposal is signed by Peck's name but was written by Miner. My brother calls my attention to the fact that they proved by Blois that that was Miner's signature.

Mr. KER. By Vaile.

Mr. HENKLE. Oh, no. You will remember, gentlemen, when Mr. Vaile was on the stand this paper—I had forgotten that it was this particular one—was handed by Mr. Merrick to Mr. Vaile and he was asked in whose writing it was. He said it was in the handwriting of Miner. Subsequently upon examination he was asked if he meant that the signature was by Miner and he said no. Now, nobody pretends that Mr. Miner did not write the affidavit. Mr. Miner did write the affidavit doubtless, and sent it down to Mr. Peck, in New Mexico, to have him swear to it, and Mr. Taylor, Mr. Ker's own witness, swears that Peck did swear to it before him. This affidavit shows the number of men and animals necessary to carry the mail on the present schedule of one hundred and twenty hours is eight men and ten animals, and the number necessary to carry it on a schedule of seventy-two hours is twenty-six men and sixty-six animals. This difference in the schedule of forty-eight hours made a difference in the time of two full days, rather an important difference in these times of rapidity in everything. The proposal of Miner was to carry it on seventy-two hours, three times a week, at an increase of \$16,648 per annum. The order was made on October 29, 1878, to increase one trip per week and allow the contractor \$4,144, and reduce the schedule from one hundred and twenty hours to seventy-two hours from November 15, 1878, and allow the contractor \$18,648 additional for expedition, being less than pro rata. Now, gentlemen, I want to call your attention to this: Being less than pro rata. My brother Bliss, I think it was, in the course of his argument and statement of facts, said, if I do not mis-

member, and I do not intend to misstate him in anything certainly, but there were but three instances of allowances that were less than pro rata. I believe this is the third of these six routes of ours. What they were on the Dorsey side I do not know, and it is not any of my business. I have not taken the pains and trouble to make the calculation. But here the proposition is to carry it for an increase of \$18,648, and that is allowed. Now, the pro rata would have been \$51,109 for expedition alone, and yet Miner proposed and Brady allowed him for one additional trip and expedition only \$18,648. By the contract—you will remember, and do not let that get out of your view, gentlemen—the contractor is absolutely entitled to it, and the Government is bound to allow him pro rata when it increases, the service or expedites the route. That is his right. That is the absolute obligation of the Government, unless the contractor will agree to do it for less. Now, here is \$51,109 pro rata for expedition alone, and he is allowed \$18,648 for expedition and an additional trip, the additional trip costing between four and five thousand dollars. The entire pay after the increase to three trips and expedition to seventy-two hours, was \$31,080 per annum, or \$20,000 less than the pro rata for expedition alone. The whole pay after it was increased and expedited was \$31,080, or \$20,000 less than pro rata for expedition alone would have amounted to. I want to enforce that upon you, gentlemen. Now, here Brady had a fair chance to add to the pot for division \$33,000, and yet comply with the contract literally—do nothing more than the contract called for and pledged the Government to do. Why did he not do it? Thirty-three thousand dollars to divide, and yet the improvident fellow throws it away? Is he not a pretty conspirator? He not only conspires against my clients, but he conspires against himself. Oh, but he let Miner do this. It came from that bad man Miner. Miner made the proposition to do it. It first came from him. Why did he not take Miner aside and say to him, “Look here, Miner, do you know what you are doing? Haven’t you got any common sense? Don’t you know that this expedition will amount to \$51,109? Can you not cipher according to the rule of three? What are you about? Here you are proposing to throw away \$33,000. I want my 20 per cent. out of that. It is considerable of an item. You are not so rich that you can afford to throw away your share of it either.” Now, gentlemen, this is the kind of evidence that the Government offers to you to prove this conspiracy between these men. I say that the proof in this case demonstrates that Brady was a faithful public servant. I say that he could not have resisted the appeals to him and to his department, and if he had then the Postmaster-General, who was at the head of the department, would not have allowed him to do it. Yet in this instance alone he throws away about \$33,000 which he might just as well have had as not. Now, you must remember, gentlemen, that I am dealing with the circumstances out of which this conspiracy is to be made or to be proved; for it is not pretended that there is any direct evidence in this case, gentlemen. In another route that I called your attention to, the Canyon City and Fort McDermitt route, a moment ago, before it was increased, the increase being but one trip, the petitions were for six trips and for a daily. Now, Brady lost an opportunity there again. Instead of obeying these petitions which were some for six trips and some for daily service, and these imperious demands of members of Congress and Senators, he increased it only one trip when he might have increased it to six, and had been fully justified. Perhaps it was his duty to have done so.

Now, when it was increased it was finally increased four trips a week,

made a daily service, and \$41,440, being pro rata, was added. That was done on the 27th of June, 1879. They might have had this \$41,440 a year before, and have added that much more to the sum to be divided between them. But we are told that the Postmaster-General ordered it reduced one trip on the 17th of April, 1880, and he took off \$10,360, which was pro rata for that reduction, but that Brady afterwards, on the 16th of July, 1880, ordered it on again, and this is conclusive evidence of guilt. The Postmaster-General makes his order reducing it on the 17th of April, and on the 16th of July Brady orders it back again. Now, gentlemen, you are invited to believe that Brady deliberately in the face of the Postmaster-General, who was his master, and for whom he was in fact nothing but a clerk, sets aside the Postmaster-General's order, revokes it and restores the old order, and that he does that in disobedience to the head of the department, his superior officer. Do you believe it? Do you believe that Brady would make an order setting aside the order of his chief? Do you believe he would dare to do it? How long would he have held his official head upon his shoulders if he had done it? It would have been the very last order he would ever have made in that department. But, gentlemen, do you not know that this very order that they say that Brady made revoking the order of the Postmaster-General was signed by the Postmaster-General himself? Why, gentlemen, you have not forgotten that no order that Brady made is anything more than waste paper until it was vitalized and energized by the signature of the Postmaster-General. So this order was signed by the Postmaster-General and you are told that Brady made this order restoring it after the Postmaster-General had revoked it—this insubordinate subordinate. Do you mean to tell me, sir, that the Postmaster-General was so negligent and inefficient as not to know what orders he signed? Do you mean to tell me that the Postmaster-General of the United States, who was the responsible head of the department, and the only responsible head of the department, would make orders to sign away thousands of dollars without reading them or knowing what they were? Why, if he did he ought to be impeached; he was unfit for his place. I know that he could not enter into all the minutia and details as his clerks did. Neither could Brady. But of course he knew when he signed an order what the order was. Do you suppose his honor here would sign an order prepared by me by which the court was adjudging to my client ten thousand dollars without reading the order and without knowing what it was? Suppose there was nobody on the other side.

The COURT. This is the judicial branch. The other is the executive.

Mr. HENKLE. Yes, I know it is, your honor. But that was judicial so far as that was concerned. No, sir; his honor would say, I want to know what this order is based upon; I am not going to give you an order upon your say so; I want to see whether you are entitled to this order or not. And the Postmaster-General was acting judicially; so far as that was concerned he was adjudging it, and no man and no tribunal on the face of the earth could review his judgment for it was conclusive, as much so as a judgment of this court. And do you tell me that he would sign these orders without knowing what they were? Certainly not.

Now, Mr. Bliss said that they did not impeach the genuineness of the petitions in this case; they only thought that Brady ought not to have granted them. I will not weary you, gentlemen, to go through with the question as to the correspondence between the affidavit and the proof with regard to men and horses. My recollection is that the affi-

lavit is fully sustained in those particulars and perhaps a little more than sustained.

Now, I come to the last of these routes and that is Bismarck and Tongue River. You will remember that that route is three hundred and three miles long. The time was eighty-four hours and the pay was \$2,350. You will remember the letter of Mr. Boone to the department, for he was out there as the agent of J. W. Dorsey & Co. Now, then, on page 1201, Mr. Boone, this witness whom we had upon the stand, writes to the Second Assistant Postmaster-General, under date of the 25th of June, 1878, as follows:

I beg to inclose herewith my affidavit respecting the impracticability of carrying the mails between Bismarck and Tongue River. Bands of Indians from Red Cloud and Spotted Tail agencies are constantly crossing this route going to and coming from Sitting Bull's bands.

No one thinks of venturing out on this line without a large escort, and no white man has ever passed over the proposed line up to date. The route is absolutely unnecessary, and I trust you will discontinue it immediately.

And that is signed and sworn to by Mr. E. A. Boone. Now he is a veracious witness, you know. The Government has introduced him here as a witness and propose to prove a part of their case by him. Of course what he says is true. He says that—

Bands of Indians from Red Cloud and Spotted Tail agencies are constantly crossing this route going to and coming from Sitting Bull's bands.

No one thinks of venturing out on this line without a large escort, and no white man has ever passed over the proposed line up to date.

Then he makes an affidavit:

That he is the authorized agent of John R. Miner, contractor on route 35051, Bismarck to Tongue River, and that his agent, sent forward to Bismarck to put service on said route July 1st, proximo, could find no carriers that would venture over said route unless protected by a large military escort to protect them and the mails from hostile Indians that infest the entire route from Bismarck to Tongue River, and that it is utterly impossible to perform said service without a large escort accompanying each mail; and the deponent further says that the maintenance of this route is wholly unnecessary, as there are no offices between Bismarck and Tongue River, a distance of about 350 miles, and both of said terminal points now have ample mail facilities.

Now, that is what Mr. Boone said on the 25th of June, 1878, and, as I said, the Government must take whatever Mr. Boone says as true, because they have introduced him here to prove a very important part of their case and they have vouched for his credibility.

Now, then, follows a letter written to the department purporting to have been written by Miner. It is signed by a "B." at the bottom, which indicates that it was written by somebody else—by Boone, that is what it means—in which he is asking to be relieved from carrying the mail over that route, and is proposing that it shall be discontinued. But Mr. Miner files an affidavit in September that at three times a week twelve men and thirteen animals are necessary to carry the mail over that route, and the number of men and animals necessary to carry it on a reduced schedule of sixty-five hours is one hundred and fifty men and one hundred and fifty animals. Oh, what a wicked affidavit that was. That is full of and bristling all over with conspiracy. Here they are, gentlemen, but two months before trying to get rid of the route. Here is Mr. Boone, whom the Government vouches for, saying that the service cannot be performed at all, except with a large escort of men to protect the carriers of the mail from hostile Indians, and in that condition of things Mr. Miner makes this affidavit. You will remember, gentlemen, that it was not they who were seeking the service. They were trying to get rid of

it. They were trying to persuade the Second Assistant Postmaster-General that it was not necessary at all. They were doing that because they did not want to carry it upon any terms. Now, Miner makes this affidavit. The people up there at Bismarck and on the other side and below and around were petitioning and urging the department to put service on that route because it was an important line of communication between two important sections of country, and you will remember the testimony was that if it did not go across there the mail had to go fifteen hundred or two thousand miles around, and the military at Fort Miles and the citizens of Bismarck and all along there were extremely anxious for it, and were urging and importuning the department and insisting upon the service being put upon this route. You will remember, gentlemen, that the rule of the department requires absolutely that the contractor *shall*—the imperative form is used—not *may*; it is not optional with him, but the contractor *shall* file his affidavit as to the number of men and animals necessary to perform the service. They would not let Miner off. They compel him to go on and perform the service against his will. Then they require him to make the affidavit, for they are not going to carry it simply one trip, but they are going to expedite it and require him to perform the service. Well, he says, it will take one hundred and fifty men and one hundred and fifty animals. Boone has said that the country is overrun with hostile Indians, and that “the mail cannot be carried without a large guard, and if we must have this guard, it will take not less than one hundred and fifty men.” and yet he proposed to carry it three times a week on a schedule of sixty-five hours, for an additional compensation of \$32,650. Now that proposition was accepted on the part of the Government, and you will remember that Mr. Brewer, that very intelligent and competent clerk from the department, figured here upon the stand and told you the result, and that was that pro rata for three trips, upon the basis of the affidavit, would have made \$155,000. Mr. Miner tells me it was for six trips. It was increased shortly afterwards to six trips a week, and \$35,000 more were added. Then it was \$70,000. I am wrong in that. Mr. Brewer testified that the pro rata after it was increased to six trips a week, instead of being \$70,000, the amount allowed, would have been \$168,000 a year. Now, gentlemen, I do not think myself that one hundred and fifty men were necessary. I am not here for the purpose of stultifying myself, and I am not going to say to you what I do not believe. I would despise myself if I thought I were capable of trying to deceive or mislead you. I claim to be an honest man, and I try to carry my integrity into my professional conduct, and I say to you I do not believe one hundred and fifty men were necessary, and I say the evidence does not say they were necessary, and I do not claim that the evidence sustains that affidavit with regard to the number of men, but I say that at the time that Miner made that affidavit upon the information of Boone, who had gone out there, as he swears, as his agent, for the purpose of putting on service, that the country was covered with hostile Indians, and that the mail could not be carried without a large guard of men—I say that in the light of that information which he had at the time he made the affidavit he was justified in swearing as he did. But yet he did not ask from the Government that he should be compensated pro rata upon that large estimate. He asked simply that where there was an increase to three trips he should be allowed \$32,650, and when it was afterwards increased to six trips it ran up to \$70,000.

Now, it is said that there was another affidavit, and the jacket that

was introduced here does show that there was another affidavit which said that thirty-seven men and seventy-three animals would be sufficient, but the affidavit is nowhere to be found with the papers, and it is given to you as a suspicious circumstance that this affidavit is abstracted from the files of the office. Who stole the affidavit; who took it from the files? Did we do it? Why, gentlemen, we have had no access there. However good our intentions or desires or purposes might have been with regard to it, we could not have done it if we wanted to. Brother Woodward has had these papers in his custody, and if that affidavit has been extracted let him account for it.

Mr. KER. Turner indorsed the jacket.

Mr. HENKLE. I do not care who indorsed the jacket, the papers have been in the possession for more than a year of Mr. Woodward, the vigilant, indefatigable detective and instigator and propagator of this iniquitous prosecution. And while I do not intend to say anything against Mr. Woodward, I cannot exactly imagine any reason for the high encomium passed upon him by my friend brother Merrick for his honesty in his purposes and intent with regard to this case. It seems to me that the testimony in this case shows him to be full of venom and malignity with a fell and unaltering purpose of hunting these men into the penitentiary with evidence or without it if he can compass it. I say these papers have been in the possession of Mr. Woodward, and if there is any papers abstracted that ought to be here let him account for it. It would have made but a trifling difference anyhow. Make your calculation if you please upon that affidavit. I do not know what that affidavit was, but if it was as stated on the jacket it would have made but a slight difference in the amount at any rate.

Now, then, gentlemen, what does the Government proof show with regard to men and animals. It shows that there were, in fact, purchased by these parties for service upon that route two hundred and one animals, fifty-one animals more than Miner swore were necessary, and that is told you by Mr. Ketcham. Mr. Ketcham, you will remember, was introduced by the prosecution, and when he began to tell the truth it became a little displeasing to the prosecution, and they were anxious to impeach him if they could. But he was their own witness, introduced by them, and his credibility was vouched for by them. Now, my brother Wilson has fully discussed the character of that route. [Holding up a jacket.] Here is the jacket, gentlemen. My brother here says it was in Turner's handwriting. We claim it was in Mr. Brewer's handwriting, if you know the handwriting.

Mr. DICKSON. [The foreman.] He so testified.

Mr. HENKLE. The foreman remembers it. Now, I will not detain you, gentlemen, to follow that any further. Before I pass from these routes, as I now propose to do, my brother Merrick said in his argument, referring to Mr. Vaile's want of memory, that he had received a half a million dollars a year from these routes. Now, I hold in my hand a paper containing the exact amount that he did receive for the whole time. On route 34149 the aggregate amount received was \$10,839.80; on route 35015, the amount received was \$6,934.89; on route 35051, \$137,795.42; on route 44155, \$170,412.05; on route 44160, \$82,283.04; on route 46132, \$22,986, making a total aggregate in the whole time all told of \$431,251. And yet you were solemnly told by the Government prosecutor that Vaile received for this service a half a million dollars a year, when the total aggregate received from the whole of the service and for the whole of the time was less than the amount stated for a single year. Now, the average payments per annum were \$123,214.57.

Now, gentlemen, I am going to hurry to a conclusion. A singular thing about this indictment is, in the light of the evidence, that it embraces but nineteen routes. In the earlier part of my argument I contended, as you will remember that the evidence must sustain the scheme of the indictment; that is to say, that if the scheme of the indictment was not sustained the prosecution must fail. Now they combine these nineteen routes and they say that this conspiracy covers these nineteen routes. In the admirable opinion of the court, which I had the honor to read to you on Friday, that was what his honor said about it: that the scheme comprised these nineteen routes which had been contributed by A, B, and C, to constitute one common fund or capital, and that the Government was obliged to sustain this scheme by its indictment. Now, then, gentlemen, this singular fact crops out in the evidence: that instead of these parties having nineteen routes they had one hundred and twenty-six routes.

The COURT. I wish to make a remark there, as so much has been said about my observations on that occasion. There was a piece of evidence offered. It was objected that the evidence offered was not set out in the indictment, not charged in the indictment as an overt act belonging to any one of the contracts. There were nineteen contracts and there were certain affidavits set out as overt acts in pursuance of the conspiracy, but as to this one there was no affidavit charged. The evidence offered on that occasion was objected to on that ground. The court decided that the conspiracy was one; that the indictment combined all these different contracts into one so that an overt act under any one of these contracts was to be regarded in the light of the indictment as an overt act which applied to them all because they had all been combined in the scheme of the indictment. One overt act under one contract, or in regard to the service of one route was equally applicable to them all because they were all combined together and made one in the indictment. That was the whole scope of that ruling.

Mr. HENKLE. Your honor will remember that the court began by saying that the Government had undertaken a mighty task.

The COURT. Yes.

Mr. HENKLE. That they had combined nineteen routes and had combined these eight defendants, and had put them into one bed, so to speak. And that they were compelled to make out their case according to the scheme of the indictment.

The COURT. Yes; but the court nowhere said that a failure to make out a part would be fatal to the indictment, nor did it say anywhere that it was necessary to convict all the defendants or none.

Mr. HENKLE. I do not want to stop now——

The COURT. [Interposing.] It was only for the purpose of making one thing out of all the nineteen that the court spoke on that occasion; for the purpose of showing that the overt act, although under one of the contracts, was applicable to them all.

Mr. HENKLE. Well, your honor, I do not want to enter into a controversy with your honor about it, it seemed to me that the language——

The COURT. [Interposing.] The language was very broad, I acknowledge.

Mr. HENKLE. I do not see how it can be qualified.

The COURT. But it ought to be interpreted in connection with a view of the occasion upon which it was used.

Mr. HENKLE. Now, of course, I do not want to be disrespectful to the court, but I find——

The COURT. [Interposing.] Just turn to the first part of it and see what the occasion was.

Mr. HENKLE. [Referring to the record.] There was a long controversy about the admissibility of certain evidence.

The COURT. See what evidence was offered.

Mr. HENKLE. [Reading:]

The COURT. I would like now to be informed what you propose to prove.

Mr. BLISS. I am proving now the falsity of the oath upon this route, as to the number of men and horses used.

Mr. TOTTEN. There are no false oaths in our case.

Mr. BLISS. I am going to prove also that they did not go on the expedited schedule.

Then Mr. Ingersoll makes quite an argument and Mr. Henkle takes a hand in it a little.

The COURT. Well, it is on an offer of an affidavit.

Mr. TOTTEN. It is on page 1412, where an affidavit was offered in a Sanderson route.

Mr. HENKLE. What the court said is on page 739.

The COURT. I want to get the point to which the remarks of the court were addressed.

Mr. HENKLE. This, your honor, is as near as I can get at it:

The COURT. I would like now to be informed what you propose to prove.

Mr. BLISS. I am proving now the falsity of the oath upon this route as to the number of men and horses used.

Mr. TOTTEN. There are no false oaths in our case.

Mr. BLISS. I am going to prove also that they did not go on the expedited schedule.

It seems to me that upon that the discussion arose.

The COURT. Are you reading from page 1412?

Mr. HENKLE. No, sir; from page 731, and a discussion follows and continues to the time that your honor delivers this opinion.

The COURT. It was on the offer of that evidence.

Mr. HENKLE. Of course it must be on the offer of that evidence.

The COURT. Upon what ground was the evidence objected to?

Mr. INGERSOLL. Because the indictment did not set forth that affidavit.

The COURT. That is exactly what I wanted to get Mr. Henkle to say.

Mr. INGERSOLL. That is just the objection Mr. Totten made. He did not say "in our case," but "in this case."

Mr. HENKLE. [Reading:]

Mr. INGERSOLL. So that the only question is, after they have set out the fraudulent things done on a route, after they have set out all that was illegally done on a route specifically, then they have a right to go into anything else that is said to have happened upon that route without giving us any notice. Now that is the whole question.

Then the court says:

I believe the court has several times given expression to its views on this very question, or questions that are so near to it as to be hardly distinguishable. The last occasion was no longer ago than yesterday.

Now, the Government in this case has undertaken a mighty task. It has combined some seven or eight defendants in one conspiracy, and it has charged that the subjects of the conspiracy were nineteen different contracts and subcontracts, and it has undertaken to make out its case against all these defendants under this combination of contracts and subcontracts, and under charges specially setting forth the overt acts done by the conspirators and through the medium of the Post-Office Department and the Treasury Department, and it is a scheme of the most comprehensive character, and one which it is called to establish.

The COURT. Yes.

Mr. HENKLE. [Continuing to read:]

That is all.

But the court in looking at the offer of evidence in any particular case, must regard the evidence in relation to the comprehensiveness of this indictment—

The COURT. Yes; that is it exactly. The court then decided that question of evidence, looking at it in respect of the scheme of the indictment.

Mr. HENKLE. Let me read along a little further, your honor—

and of the scheme of the prosecution. It is necessary that there should be a conspiracy. If the conspiracy be established as charged in this indictment, then it comprehends all these nineteen or twenty different contracts and the service under those contracts. From the relation of the conspiracy those contracts become blended. They are put into the concern as constituting one capital.

The law in regard to the overt act in pursuance of the conspiracy requires one overt act, and one overt act by any one of the conspirators is enough for the purpose of the prosecution. The conspiracy must be made out. A conspiracy is different from a combination, in this, that the conspiracy must have a corrupt character. A combination or a partnership is lawful. If all these parties had entered into a combination, each one to put in his contract or his subcontract as his contribution to the common capital with a view of dividing the profits, that would have been perfectly lawful. There would be nothing wrong in that either morally or in the eye of the law. That would not, of course, be the subject of a criminal prosecution. It was necessary, therefore, not only that there should be a combination, but that there should be an evil combination, that is, a conspiracy with an evil purpose. It is not required that the indictment in charging the evil purpose shall set out the specific act to be proved. It is necessary that the indictment shall contain some averment to change the lawful combination into an unlawful conspiracy, and that is done when the indictment charges the combination first, and then charges that it was done for the purpose of committing a fraud upon the Government by means of false petitions, false papers, false affidavits, and so on. Without an averment of that kind the indictment would merely charge a lawful combination, and an overt act set out in pursuance of a lawful combination would hardly have made a good indictment. But if the indictment charged in a general way that this was a combination in which these several parties had put their capital and made common stock of it, and that it was an evil combination, because it was done for the purpose of uniting in attempts to defraud the Government by the means generally set out, the means stated constituting the manner in which the evil character is attributed to the combination, that would not be enough, because the statute requires that in pursuance of this evil combination or conspiracy the indictment shall set out some act done in pursuance of that conspiracy. Well, now, it is alleged that here is a particular item which was put into this common fund as a contribution to the capital stock of the parties, consisting of route 44160, and that in regard to this particular route the indictment contains no specification of an overt act such as it contains in regard to some of the others.

Mr. INGERSOLL. Except in regard to the false petition.

The COURT. And that therefore nothing can be received in evidence because of the absence of the overt act as applicable to this particular route.

Mr. INGERSOLL. To the absence of the charge.

The COURT. To the absence of a charge. But that theory is based upon this idea: that this particular route is itself an independent subject.

From the time that this particular route entered into the common combination and became a simple factor along with many others in the common combination, it is immaterial whether the act done was an act done upon this route, or in pursuance of the views of the parties in regard to this route, or in regard to some other route which was its companion in the capital stock of the conspiracy. That is the view that I take of this subject. It is a good deal like a joint tenancy at the common law in a piece of land; the parties are seized *per me et per tu* and *per tu et per me*.

You cannot divide it as you can an apple amongst several owners, but each one partakes of the character of the whole of all of the other ingredients of the combination. It is one whole made up of different parts, and all the parties according to the scheme of this indictment, in my view, have a legal interest in the whole and in every part.

The COURT. Yes. The court was laboring there to make one thing out of the conspiracy, for the purpose of showing that this particular piece of evidence was admissible according to that scheme. That was all.

Mr. HENKLE. I was proceeding to say, gentlemen, that the scheme of this indictment comprehends only nineteen routes when the parties owned in fact one hundred and twenty-six routes, according to the tes-

timony. Now, where are the ninety and nine routes that went not astray? Did these parties confederate and combine together in a conspiracy as to these nineteen routes? Do you believe that? If they conspired at all did not their conspiracy apply to all their capital? Do you believe that they selected out nineteen and said, "We will conspire about these nineteen routes?" Is it not absurd and ridiculous? If they conspired at all they conspired as to the whole of them. Will any man of common sense tell me that that is not so? Did they select out these nineteen routes and agree to conspire as to them and leave the others, more than a hundred, out of the conspiracy? Is that not absurd and ridiculous upon its face? And yet, gentlemen, the evidence must prove the facts as the Government alleges them in the indictment, or the indictment must fail. Suppose you had proof of a conspiracy. Suppose there was a sign or a symptom of testimony with regard to any kind of a conspiracy—which there is not. The facts must correspond with the indictment. The scheme of the indictment is a conspiracy as to nineteen routes, and the facts show if there was a conspiracy at all it was as to one hundred and twenty-six routes. No man of common sense can stand up and tell me that that is not so. What becomes of their case if it be so?

Gentlemen, in the examination of these routes I will tell you what I have been surprised at. I have been absolutely surprised that they should be so clean, so free from taint or fraud or any such thing as the Government has shown them to be. It is a common opinion that Government contracts are not generally and Government contractors are not generally of the highest species of morality. There is a prevailing idea that men in dealing with the Government will take advantage where they can and that they do not deal with the Government as they do with anybody else; and I confess that to some extent I have participated in that heresy as I now believe it to be. As I said I have been surprised in the examination of the evidence on the part of the Government to find these contracts which they introduced and the facts pertaining to them which they introduced as evidence of a great and foul conspiracy so clean and so free from fraud as they are. I did not suppose that you could select an equal number of contracts out of any department of the Federal Government at any time in its history and find them as clean as these contracts seem to be. But it is said that Brady increased and expedited service where it was not needed. Who, gentlemen, I pray you, is to be the judge of that? Is it the prosecution? No. Am I, or is this court? No. Are you? No. Who then? Why, the Postmaster-General of the United States. This is the law of Congress:

The Postmaster-General shall provide for carrying the mail on all post-routes established by law as often as he, having due regard to productiveness and other circumstances, may think proper.

As often as *he*; not as often as you or as I may think proper, but as often as *he* may think proper. Who, then, is to sit in judgment upon him? Is this court? Are you, gentlemen? Certainly not. The absolute discretion is reposed in the Postmaster-General of the United States. He is the supreme arbiter of that question. His discretion is absolutely and finally controlling. The case has been conducted throughout as though we were trying to determine whether these orders which are attributed to Brady were wisely or unwisely made. Frequently my brother Bliss, with that triumphant smile upon his face, would look up after concluding a statement of what he said were facts with regard to a route and say, "Will you say, gentlemen, now that that was a prudent order?" He was asking you whether the order was a prudent

order or not. I mean no disrespect to you, gentlemen, but it is not yours to determine whether the order was a prudent order or not. With the prudence or the propriety of the order you are not concerned. The only question with you is whether the order was corrupt. Says his honor, on page 686:

It is not necessary, it seems to me, to sit here hours and days hearing read genuine petitions which throw no light at all upon the corrupt act or alleged corrupt acts of officers.

And again:

He had authority to make these orders—

Speaking of Brady—

and the court is not going to assume that he made them corruptly. The other side must show that.

That is the only question, gentlemen, that you have to deal with in regard to these orders; not whether they were prudent or imprudent, whether the service required them or whether it did not, whether they were wise or whether they were unwise, whether they were provident or improvident; you are not to judge these orders by any of these things. You are to apply to them solely the question whether they were corruptly made or not, and that you must find from the evidence in the case.

Now, in regard to the propriety of this service, you or I could not judge if we wanted to. It requires a great deal of information as to local geography, the relation of this route to the other, of this community to the other, and of this line of communication to the other to settle a question of that kind. All this information you and I do not have, or at all events I do not have, and I would not be a suitable man to undertake to sit in judgment upon these questions. I do not know, gentlemen, whether you have any better information upon the subject than I have. The Postmaster-General is put there for the purpose of studying these subjects and becoming informed as to them, and he is presumed to acquaint himself with the facts sufficiently to judge wisely and in the interests of the people and of the Government. Hence the Congress of the United States has put this judgment entirely upon him. This whole subject belongs to the political branch of the Government. The Government has its branches, you know, and one is the political branch, and this service is entirely within that department. The judicial department has nothing in the world to do with it, and if it assumes to have it invades a province that does not belong to it. Congress and the Postmaster-General are alone interested in that question. But I must hasten.

Now, gentlemen, I want to say to you right here, because it is not pretended that you are making out this case upon evidence, but upon presumption, and hence these orders are given to you—otherwise they would not be given in evidence at all unless you were justified in inferring something from them—that so far as inference is concerned, any presumption that is drawn from this evidence is against the Postmaster-General himself, and not against Brady. Why do I say that? Because, as I have just told you, the discretion is given to the Postmaster-General by law. And although Brady may send an order to him it is his order, and it cannot have life or existence until it is signed and approved by him. So that if any presumption arises upon the order the presumption is against the Postmaster-General himself and not against Brady. I admit, gentlemen, that you may show by evidence that Brady deceived

the Postmaster-General, and that he himself was moved by corruption. Observe, I say, you may show that Brady was moved and impelled by corruption and that he imposed upon the Postmaster-General and obtained the approval of orders that he would not otherwise have approved. That is a question of fact, and that is a question of fact to be traced to him directly. When you come to presumption that is another thing. If they are to be judged by presumption the presumption ought to be against the Postmaster-General himself, because it was he who made the orders. Have you any doubt, gentlemen, that in fact these were the orders of the Postmaster-General? Are you permitted by what you have seen in the conduct of this case, in what has been delivered to you in evidence, and what has not been delivered to you in evidence, to have any doubt but that these orders that are claimed to be so objectionable as that you must infer guilt from them were in fact the orders of the Postmaster-General himself? I mean not simply in form but in fact. Have you any doubt that Postmaster-General Key approved knowingly every order that he signed, and these very orders that are produced as evidence of crime? You saw Postmaster-General Key here upon the stand. We brought him here to you from his home, a long way off. He was the Postmaster-General, the superior of Brady. We brought him here for the purpose of showing that these were his orders, and that they had his sanction and his approval. We placed him upon that stand and administered to him the oath for the purpose of having him say that.

The COURT. And the court did not allow him to be examined.

Mr. HENKLE. And the court did not allow him to be examined.

The COURT. And the court will arrest your remarks on that subject.

Mr. HENKLE. I was not going to say what he said, your honor.

The COURT. You have no right to say anything about it.

Mr. HENKLE. I was not going to say what he said. I was simply going to say that we proposed to ask him what his policy was and whether these orders did not conform to his policy, and the court would not allow the question to be put. Is there any harm in that?

The COURT. No.

Mr. HENKLE. Did not that transpire in the presence of the jury?

The COURT. Yes. But what right have you to talk on that subject to the jury?

Mr. HENKLE. Why not, your honor? Have I not a right to say what we could not do by order of the court, if it transpired in the presence of the jury?

The COURT. No. You have no right to comment on that.

Mr. HENKLE. Have I not a right to say that your honor ruled that the question of policy was not in the case?

The COURT. I do not know whether I said anything on that occasion or not, but I did say distinctly on two or three occasions that we were not engaged on the trial of any question of policy, but were trying a fraudulent conspiracy.

Mr. HENKLE. Then may I not say, your honor, without traveling out of or transgressing any rule—

The COURT. [Interposing.] I shall not interfere with the rights of counsel in addressing the jury, and do not propose to interfere in the slightest degree with the rights of the jury; but when the court has ruled upon a question, I think it is not asking too much of counsel to yield to the ruling of the court.

Mr. HENKLE. I know, your honor; but a good deal of latitude was allowed to the other side. I am not intending to transgress the rule at

all. My friend Ker, your honor will remember, took a good deal of latitude and referred to a good many things that are not in the evidence, and the court allowed him to do it. Perhaps, because your honor's attention was not directed to it. Mr. Merrick was constantly doing it. No objection was made on our side and your honor made none.

The COURT. I do not remember; but if I have any memory on the subject there was no attempt on the part of those gentlemen to override the decision of the court in regard to the admissibility of a piece of evidence and comment upon that evidence as though it had been admitted.

Mr. HENKLE. I beg your honor's pardon if the court has understood me to override your honor's decision. I take it all back and say I never intended it at all.

The COURT. I am not talking about your intentions. I am talking about the effect of your argument. The court declined to go into the question of policy when the Postmaster-General was here on the ground, that we were not trying a question of policy.

Mr. HENKLE. If your honor will allow me to pursue my argument, I will try to keep within the rule. Gentlemen of the jury, the burden of proving this case is upon the Government, is it not? It is their duty to make out the case by the evidence. They charge that Brady made these orders corruptly. We brought into this court the Postmaster-General, who was his superior, did we not? He was here upon the stand. These gentlemen could, if they had wanted to, have asked him whether he approved of those orders or not, could they not, your honor?

The COURT. I must declare that that is a subterfuge unworthy of your character and the court will not allow it to go any further. I attempted to arrest your remarks of that nature before. You proceeded then in order, under your pledge. Now, this thing, I think, is altogether, *altogether* beneath your standing at this bar. I cannot allow it. I must exercise the power of the court if I cannot rely upon your loyalty as a member of the bar.

Mr. HENKLE. Your honor, I submit, with all becoming propriety, to the rebuke of the court, but I want to reason with your honor a moment about it, in justification of myself. I have not understood that I was transgressing the rules. I thought I was proceeding exactly in the line of the privilege of counsel.

The COURT. [Smiling]. Well, I——

Mr. HENKLE. [Interposing.] Let me ask your honor, now that you have cooled a little, whether it is not competent for a party to remark upon what his adversary might have proved if he had wanted to? We have objected that they could not refer to what our clients did not say, because the statute expressly provides to that effect.

The COURT. That whole subject was disposed of. The Postmaster-General was your witness and the court excluded him.

Mr. HENKLE. Could not I say, your honor, what they might have proved by him if they had wanted to? Was that not my privilege?

The COURT. That is only subterfuge. It is a plain word, but I can think of no other.

Mr. HENKLE. I do not object to plainness of language, your honor. I rather like it. But I am really honest in this matter, and if I am mistaken I want to know it. I want to know if it is not right——

The COURT. [Interposing.] I declare to you, as the judgment of this court, pronounced over and over again, that it is a matter of the most

perfect indifference in this case, in my view, what the opinion of the Postmaster-General was.

Mr. HENKLE. No, it is not that, your honor.

The COURT. If the Postmaster-General had been steeped in the most fraudulent conspiracy, and was not embraced in this indictment, that would have made no difference.

Mr. HENKLE. Certainly.

The COURT. We have nothing to do with that.

Mr. TOTTEN. The charge in the indictment is that the Postmaster-General was deceived.

The COURT. I know; we are trying these defendants on that charge.

Mr. TOTTEN. And General Henkle has a right to remark upon that.

Mr. HENKLE. Can I not say that they might have shown by the Postmaster-General that he was not deceived?

The COURT. If anything was to be shown, it was for you to show it.

Mr. TOTTEN. We are not obliged to prove that the charge in the indictment is true that we corruptly combined for the purpose of deceiving the Postmaster-General. If the Postmaster General was deceived, they might have put him on the stand and proven that, because he was here in court. General Henkle certainly has a right to follow the precedents set by brother Merrick on that subject. Brother Merrick talked half a day on that very subject.

The COURT. Do you say that the Postmaster-General was deceived?

Mr. TOTTEN. No.

Mr. INGERSOLL. He was not.

The COURT. There is no evidence of it.

Mr. HENKLE. I say they could have proved it by him if they had wanted to.

The COURT. That he was not deceived?

Mr. HENKLE. Yes, sir.

The COURT. That would be a curious prosecution.

Mr. HENKLE. Why? That is a part of the scheme of the indictment; that he was deceived by Brady.

Mr. TOTTEN. Certainly it is.

The COURT. But you say they could have proved that he was not deceived.

Mr. HENKLE. They might have asked the question and proved that he was deceived.

Mr. TOTTEN. Counsel has a right to comment upon a fact developed in this court-room. If he was deceived by Brady, or any of these people, they might have asked him that question, and developed the fact to be as they allege it. They did not do it and we have a right to comment upon it. A half a day was consumed by Mr. Merrick in that very office. He wondered and wondered why we did not call almost everybody.

Mr. HENKLE. He constantly told what we might have proved. Yet your honor stops me.

Mr. WILSON. Will your honor allow me a word? Does not your honor remember that Mr. Merrick stood here before this jury and appealed to them to know why the defense had not brought Middleton & Co. here with their books when the money was traced into the hands of Middleton & Co., and why we had not brought Bosler here? Mr. Merrick stood here for a half an hour and denounced our clients, and denounced our side of this case by saying that we had it in our power to bring these witnesses, and we did not do it. Now, I want to know upon what principle, when my brother Henkle comes to comment upon so significant and so prominent a fact in this case as that, and while they charge

that in this case we deceived the Postmaster-General, he cannot turn around upon him and say, "You had the Postmaster-General here on the stand. It was in your power to prove by him that he was not deceived, and you did not do it." Where is the difference in the two cases, your honor? I confess my inability to see it.

Mr. TOTTEN. We certainly have a right to the benefit of that, your honor.

Mr. HENKLE. I submit to rebuke for doing what was done by the other side without rebuke.

The COURT. No. The difference is this, the indictment charges that these persons were engaged in a conspiracy, the object of which was to obtain money from the Government of the United States fraudulently, and by imposition upon the Postmaster-General. The Postmaster-General was brought from Tennessee here by the defense, and placed upon the witness-stand, and an offer made to prove by him that it was the policy of the department during his administration to expedite and increase the service in the Post-Office Department. That evidence was excluded by the court on the ground that we were not trying a question of policy, but a question of alleged fraudulent conspiracy. The Postmaster-General was not examined. Now, a few minutes ago, in the course of your address to the jury, General Henkle, you were referring to the fact that you had brought the Postmaster-General here for the purpose of proving the policy of his administration, and that his evidence was not received. I interrupted that after it had gone on for some time because there was no evidence admitted. Now, for the purpose, it seemed to me of reaching the same thing you turn around and say "We are not permitted to comment upon the act of the court in excluding that testimony but I will pursue the same line of observation under another guise, and that is that the prosecution might have called him to prove that he had been imposed on."

Mr. TOTTEN. And did not.

Mr. HENKLE. And did not.

The COURT. And did not.

Mr. HENKLE. What impropriety is there in that, your honor?

Mr. TOTTEN. Yes.

The COURT. If you had opened up some other branch of remark probably that would have been admissible; but you cannot avail yourself of it for the purpose of pursuing the same line of observation in regard to the exclusion of that testimony.

Mr. HENKLE. I was not caviling at the decision of the court, your honor. I think it was right.

Mr. WILSON. Will your honor allow me to make a suggestion?

The COURT. Oh, well, this thing has probably gone far enough.

Mr. TOTTEN. It is an important matter.

Mr. WILSON. It is an important matter. I think it is but fair that we should have a word about it. In the first place they do charge in this indictment that the Postmaster-General was deceived.

The COURT. They do.

Mr. WILSON. That is an averment of the indictment.

The COURT. Yes, and probably deceived to this day.

Mr. WILSON. That is not the question.

Mr. HENKLE. I hope your honor will not testify.

Mr. WILSON. I am not going to be withdrawn from the line of my remarks. I say first they do aver in the indictment that the Postmaster-General was deceived and that a part of the scheme of this conspiracy was to deceive him. Is not that so?

The COURT. Yes.

Mr. WILSON. That is the affirmative of the indictment and that is for them to prove; undoubtedly so. It is not for us to disprove it. Nobody will dispute that. Now, if they have it in their power to prove it there is no man by whom they can so well prove it as by the Postmaster-General who was deceived.

The COURT. He is the last man in the world who would know it.

Mr. WILSON. That is a matter of argument at any rate. That may be your honor's opinion and I may differ with it. But if he was deceived he is a competent witness by whom to prove the fact that he was deceived.

The COURT. If he has got his eyes open.

Mr. WILSON. Pardon me, I am not going to discuss that. He was a competent witness for that purpose, and presumably he is the man who would know.

The COURT. I do not agree in any single proposition that you have laid down. If he was deceived, the probability is that the same condition of circumstances continues to this day, because the law presumes the same state of facts to continue until there is some evidence that it has been changed.

Mr. WILSON. I submit, if your honor please, that that is a subject-matter of argument to the jury by counsel, and that is one of the very things that we have a right to argue to this jury. We have a right in the first place to argue to the jury that the Postmaster-General, of all other men, is the man who would know whether he was deceived or not, and that the Government might have brought him and have him testify upon that subject; and we have a right to argue the matter to the jury that you have just spoken of. It is for the jury to decide that question and not for the court.

The COURT. What question?

Mr. WILSON. The question as to whether or not he would remain deceived, and whether he would discover that he was deceived. That is the question which this jury has to decide, and not the court.

The COURT. In my opinion counsel have a right to comment to the jury upon the failure of the other side to produce evidence which is shown to exist in the case, and which it has failed to produce. In this case there is no evidence at all to show that the Postmaster-General could prove that he had been deceived.

Mr. HENKLE. Did he testify to it?

The COURT. He did not testify to it; and there is no evidence in the case to show that he could have testified to it.

Mr. HENKLE. Had they not a right to call him and try it?

The COURT. No.

Mr. HENKLE. They had not?

The COURT. No; they might, possibly, if they had chosen to, call him for that purpose.

Mr. HENKLE. That is just what I say.

The COURT. But you have no right to comment upon their failure to produce the Postmaster-General for the purpose of proving a fact which you do not know that he could have proved or would have proved.

Mr. HENKLE. The point is that he himself was deceived. Suppose the question was as to whether I was deceived?

The COURT. If there was evidence in the case to show that the Postmaster-General knew that he was deceived or had been deceived, and they had failed to call him, probably——

Mr. HENKLE. [Interposing.] Who can tell, your honor, but himself whether he was deceived or not?

The COURT. Then they would be calling a witness on an experiment.

Mr. HENKLE. But they charge he was deceived. That is a part of the scheme of the indictment.

The COURT. If he necessarily would know it, of course——

Mr. HENKLE. [Interposing.] That is a question of fact. He could say that he did not know, if he went on the stand.

The COURT. I will stop this discussion. There shall be no more said on the subject.

Mr. HENKLE. Very well. I note an exception. I want it all to go in the record.

Mr. TOTTEN. We all want an exception to the ruling of the court.

The COURT. I know you do.

Mr. HENKLE. I want the whole of this discussion to go in the record.

The COURT. I know you do. I have seldom witnessed a more flagrant attempt to get in unfairly remarks which have been excluded than this has exhibited. They are of no consequence anyway.

Mr. HENKLE. That is a question for the jury, your honor, if it is proper to speak of it to them. Allow me to suggest that your honor does not sit here to decide the facts.

The COURT. I know that.

Mr. HENKLE. That is a question for the jury. I except to the remark which your honor just made as to the matter being of no consequence.

The COURT. We will take our recess now.

At this point (12 o'clock and 42 minutes p. m.) the court took its usual recess.

AFTER RECESS.

The COURT. During the recess I have looked at the report of what transpired when Judge Key was on the stand. On page 2067, at the foot of the page, this question was put to Judge Key by counsel for the defendants:

Did he—

Referring to General Brady—

advise with you in regard to any of the routes in the indictment?—A. I have answered already that I cannot remember how that is. It is possible he may, but I could not say how it is.

Q. Do you remember a route called Redding to Alturas?—A. Yes, sir; I have heard of that.

Q. A California route?—A. I have heard of that route.

Q. Do you remember of having anything to say to the Second Assistant about that route?—A. I do not remember specifically how that is. I might state generally that I may have had conversations with him about some or any of them, but I do not remember.

Mr. MERRICK. That is what he said before.

Q. Do you recollect ever having any conversation with regard to the route from The Dalles to Baker City in Oregon? I will ask you if you were out to Oregon?—A. I was, once.

Q. Do you recollect of having any conversation on your return with the Second Assistant Postmaster-General or any advice that you gave him?—A. I do not remember that I did. I do not know. It is possible I may. In the multitudinous duties of the office and immense number of cases presented, there was nothing to fasten particular cases on my mind generally, except such cases as I acted on myself or such as were brought to me by appeal, or something of that kind.

Q. Did you act on the case from Yuma to Fort Worth?—A. Yes, sir; I acted on it. That was one of these cases.

Mr. MERRICK. That is not in this indictment.

The COURT. That is not in this indictment.

Mr. MERRICK. I object.

The WITNESS. I beg pardon, I did not mean to answer before I was allowed.

Mr. MERRICK. I understand that, sir, and acquit you of any desire so to do. My objection is that the route from Yuma to Fort Worth is not in the indictment.

Mr. INGERSOLL. I propose to prove by him that that was the first route expedited, and that he expedited it and Brady was opposed to it.

Mr. Merrick objected and the court sustained the objection. That is about the substance of what relates to or has any bearing upon the matter that was before the court prior to the recess. With that general impression upon my mind I excluded the remarks that General Henkle proposed to make. I think the exclusion was right. Those remarks were based upon the fact that General Key was here and that the prosecution had failed to call him for the purpose of proving that he had been imposed upon. Well, it is undoubtedly true that if there be evidence to prove the fact within the reach or knowledge of one of the parties and he fails to produce the evidence to prove the fact it is a subject certainly of commentary by the other side.

In this instance there is no evidence at all to show that the prosecution knew that Judge Key could prove the fact that he was imposed on. On the contrary, Judge Key's own evidence in the case shows that he was not aware that he had been imposed upon at all. So that there is no evidence to show that the prosecution have omitted the introduction of any evidence on that subject. It is not a question open for comment to the jury, and on that ground I think comment would be out of place. I cannot hide from myself either the fact that this matter was opened in a different direction. The counsel addressing the jury was commenting in the first place upon the fact that the court had excluded the evidence of Judge Key, and was engaged in drawing inferences from the decision of the court. Those remarks were allowed to run along for some time until it appeared to me it was going too far. The court could not allow counsel to go to the jury over its own head in regard to a question of evidence which it had decided. It was, of course, undoubtedly the right of the court to arrest comments of that sort. Then the learned counsel changed his ground, and proposed to go to the jury with remarks founded upon the fact that the prosecution had failed to call the witness, Judge Key, to prove that he had been imposed on. As I remarked before, it does not appear that Judge Key could prove that fact, and the very reverse is manifest from Judge Key's examination. If he was imposed upon he never knew it. He said on the stand that he did not know it and did not remember what was said or what was done in regard to any one of these routes. It is plain, therefore, that there was no foundation for the comments of counsel, and although the court might be disposed to allow latitude to counsel in their address to the jury, yet under the circumstances of this particular occurrence it seemed plain that the second ground taken by counsel was only another means of getting before the jury the same comments and the same remarks that had been arrested in a direct way, and the court felt called upon in justice to itself to stop this attempt by indirection to reach a point which was plainly improper directly. At the risk therefore of appearing a little discourteous probably to counsel, the court felt called upon to assume the ground, and feels called upon now to maintain the ground that these remarks were out of place at.

the time. Disclaiming therefore any intention of depriving counsel of the freest liberty to comment on the evidence in the case or on the want of evidence on the other side in this case, the court simply rules that for the purpose of protecting its own authority and defending its own position already taken it cannot allow further comment on this subject.

Mr. WILSON. If your honor please, while putting in a like disclaimer so far as my relations to the court are concerned, and so far as the relations of the defendants are concerned, I desire to take an exception to the ruling which the court has just made, for each party, and to have that exception go on the record.

The COURT. Certainly.

Mr. WILSON. And especially to that part of it in which the court passed upon the question of what the evidence of Judge Key proves, or does not prove, or tends to prove, or does not tend to prove.

Mr. HENKLE. I desire to reserve an exception, also.

Mr. MERRICK. Although I did not hear it, I presume as part of the record of the exception the remarks made by the learned gentlemen will appear.

Mr. WILSON. Certainly; that is all there.

Mr. MERRICK. If they are as much out of place as some that I have read there can be no difficulty from the exception.

Mr. HENKLE. Now, if the court please, I only want to say that if your honor understood me, as undoubtedly you did, to be commenting upon the ruling of the court in the case of the testimony of Judge Key adversely to the ruling of the court, I beg to say that your honor totally misapprehended, I think, the language that I used, and I am certain the purpose that I had. I certainly did not intend to use, and I do not think I did use, any word of criticism upon the ruling of the court whatever. On the contrary, I did say, according to my recollection, and it was certainly my opinion, that the ruling of the court as to the admission of the testimony of Judge Key was right. Hence I could not have intended any adverse criticism or comment upon it. But I supposed that I had a right to remark upon the absence of proof, and I supposed it was within the power of Government to have produced it.

The COURT. Yes, that was the second position you occupied.

Mr. HENKLE. I certainly did not comment adversely to your honor's ruling, for my opinion is that it was right. I do not believe myself, placing it upon the ground that your honor did, that the policy of the Government with regard to this matter is involved. It is simply a question as to whether Brady was corrupt or not. I certainly could not, as a lawyer, believe that your honor's exclusion of the testimony as to the policy was wrong. I beg your honor to understand that I did not mean it, and I think your honor has known me too long at this bar to attribute to me a disposition to animadvert to the jury upon the correctness of the ruling of the court. I have never yet been so refractory as that. Whatever my opinion might be as to the correctness of the ruling of the court, and however much I might differ from your honor or any other justice, after the opinion is pronounced it becomes the law of the case for me as well as for the jury. I certainly would not so want in self-respect as to comment adversely upon a decision of the court.

The COURT. It is with great pleasure that the court hears you say what you have said.

Mr. HENKLE. I am sorry, your honor, that I have been misapprehended by the court.

The COURT. I do not acknowledge that I have misapprehended you, but still I receive with pleasure your disclaimer of any such purpose.

Mr. HENKLE. I certainly had no such purpose. [Turning to the jury.] Now, gentlemen of the jury, we have consumed a good deal of time that I hope will not be charged to me in my argument. I want to finish this evening.

The COURT. You have an unlimited credit of time.

Mr. HENKLE. Thank you.

Part of the scheme of this indictment, gentlemen (I suppose I am at liberty to say this, your honor), was that the papers that were filed in the department, the petitions and the affidavits and the recommendations, were manipulated by Turner so as to speak untruly; that false statements were indorsed upon the jackets and false appearances presented by the papers, by reason of which the Postmaster-General was to be imposed upon and was to be procured by this fraud and imposition upon him to make the orders which he was to make in form. Now, gentlemen, it seems the Government has conceded that Mr. Turner did not do these things.

Mr. MERRICK. No.

Mr. HENKLE. At all events that there is not sufficient evidence to justify the jury in coming to a conclusion that he did do these things.

Mr. MERRICK. I said to the jury, may it please your honor, that in my opinion there was a doubt about Turner's having been introduced into the secrets of this conspiracy, so as to become a member of the conspiracy, whilst at the same time the proof showed he had received money for official delinquency.

Mr. HENKLE. There is not a scintilla of testimony in the case that attributes to Mr. Turner one dollar or one farthing of dishonest money. At all events the Government has felt called upon in anticipation of the absolute certainty that the verdict of the jury must be in favor of Turner to have the appearance of discharging him by its grace.

Mr. MERRICK. Do you represent Turner?

Mr. HENKLE. No, sir; I represent the other defendants.

Mr. MERRICK. It is well you do not.

Mr. HENKLE. But I am involved in the same boat with Turner.

Mr. MERRICK. No, sir.

Mr. HENKLE. And so are you. I submitted to you, gentlemen, a day or two ago, in my argument, that the Government having dropped out Turner, or having informed you that the evidence was not sufficient, if that is more satisfactory to my learned friends, to justify them in demanding a verdict at your hands, and hence inviting you to render a verdict in favor of Turner, that the scheme of this indictment has collapsed and the defendants are all entitled to a verdict at your hands whether you find any evidence against them or not. Another part of this scheme was that false petitions were to be furnished and that they were to be acted upon. Now, gentlemen, there is not a scintilla of evidence that Brady ever acted upon a false petition or a forged petition. There has been some attempt to show that there were false petitions. Whether it was successful or not I leave it for you to judge, and do not propose to consume valuable time in commenting upon it. But it is absolutely certain that there is not a scintilla of evidence to show that Brady ever acted upon any false petition or that he ever knew that there was a false petition on file in his office. If there be a word or a line or a letter of such testimony I invite counsel to call my attention to it.

Mr. MERRICK. Kearney to Kent. Thirteen hours. That is a case, sir.

Mr. HENKLE. There is not a word of testimony in this case tending to show that Brady knew anything about it.

Mr. MERRICK. It was in his office.

The COURT. Mr. Merrick, please do not interrupt.

Mr. MERRICK. Then I had better go. I cannot stand this.

Mr. WILSON. No, we are perfectly willing to have our friend Mr. Merrick stay; but let him sit here like the rest of us and listen to the argument. He has had his say for three days.

Mr. MERRICK. When the counsel calls upon me to point out a petition I must point it out. Kearney to Kent was the petition upon which he acted, and "thirteen hours" was shown to be a forgery in the petition.

The COURT. I did not understand the counsel to call your attention to it.

Mr. MERRICK. I thought he did.

The COURT. No.

Mr. MERRICK. Then I beg pardon of him and you.

Mr. HENKLE. I do not feel wronged at all.

The COURT. If he did call upon you it must be regarded as being in a Pickwickian sense.

Mr. HENKLE. I do not feel wronged at all. They may attack me from any quarter. I do not care how or where.

Suppose, gentlemen, that Brady did know the petitions were false and forged; what has that to do with this case or your finding in the case unless you show that by means of these false and forged petitions he or Turner imposed upon the Postmaster-General with them? And have you any evidence of that? As I said before, that feature or element or factor, as his honor has called it, going to prove the case, or to make up the case, has been dropped out of it by dropping out Turner. Now, I say, gentlemen, that the law did not require a petition at all to justify the action of the Postmaster-General. It is not necessary that a petition shall be filed in the department at all. It is the right of the people to file petitions and to present petitions to any power that has the control of action that is of importance to the people. It was the right of the people to petition the Postmaster-General to expedite and increase service upon any given route that they chose, and they were entitled to a respectful consideration by the power to whom they were addressed. It is the right of the people to petition Congress, and it is the duty of Congress to give to them a respectful consideration. But, gentlemen, is the petition necessary to the validity of the act of Congress? Did you ever hear that an act of Congress was invalid because the people did not petition for it, or because false petitions were filed and presented to Congress in favor of it? Did you ever hear of such a thing as that? What has the petition to do with the validity of the action of Congress or the validity of the law after it is passed? Nothing whatever. Yet it has just as much to do with it in the case of Congress in the enactment of a statute as it has in the matter with which we are dealing to-day. I grant you, as I said a moment ago, that if you can show the scheme of this indictment, that these false petitions were used or so manipulated as to deceive the Postmaster-General then they would be germane and legitimate in this case. But the pretense of attempt of doing so has utterly failed and dropped out of the case and it no longer remains; so that it is totally immaterial, though the department had been flooded with false petitions, unless they can show that Brady made them the occasion and the pretext of the action, or unless the Postmaster-General

was deceived by them. Now I call your attention to the law which I read to you awhile ago:

The Postmaster-General shall provide for carrying the mail on all post-routes established by law as often as he—

May think proper. It is not whether the people think proper. It is not whether the people petition him at all. It is not whether anybody thinks proper or anybody asks for it. It is as often as he may think proper.

Mr. MERRICK. Read the rest of it.

Mr. HENKLE. The rest of it, brother Merrick, is—

as often as he, having due regard to productiveness and other circumstances, may think proper.

I did not need to read that in that connection. I read it awhile ago when you were not in, but did not think it pertinent to the question with which I am now dealing. So that, gentlemen, I say this whole question about these false petitions is entirely immaterial, and yet we have spent much valuable time over it in the progress of the case. It amounts to nothing whatever. The question is, and it comes back and recurs and recurs, whether Brady made these orders falsely and corruptly, being moved to it by my client, and that is all the question there is. He had a right to make the orders. It was his duty in proper cases to make the orders. The law devolved it upon him and no man has a right to gainsay it or to question it. The authority of the Postmaster-General is absolute and supreme without reference to petitions. The only question I wish to consider is whether there is any evidence that he made these orders corruptly.

Now, gentlemen, I was remarking awhile ago that this was a matter for Congress, belonging to the political branch of the Government solely, and not to the judicial or any other branch of it. I want now to call your attention to section 44 of the Postal Laws and Regulations:

The Postmaster-General shall make the following annual reports to Congress:

I pass along down to the third:

3rd. A report of all allowances made to contractors within the preceding year above the sums originally stipulated in their respective contracts, and the reasons for the same, and of all orders made whereby additional expense is incurred on any route beyond the original contract price, giving in each case the route, name of the contractor, the original service provided for by the contract, the original price, the additional service required, and the additional allowance therefor.

6th. A report of the fines imposed on and deductions from the pay of contractors made during the preceding year, stating the name of the contractor, the nature of the delinquency, the route on which it occurred, when the fine was imposed; and whether the fine or deduction has been remitted and for what reason.

Now, gentlemen, I want to submit to you, in connection with the remark that I made before, that this belongs to the political branch of the Government. This regulation requires that the Postmaster-General shall annually make report to Congress of all expeditions of service and all increase of trips, the amounts allowed, and the reasons for these orders. I have a right to assume, your honor, that the Postmaster-General has done his duty and that he has made these reports; so that every one of these contracts and orders with which we have been dealing has long since been passed upon and approved by Congress. I have a right to make that inference, I believe.

Mr. MERRICK. Take the act of April 7, 1880, and you will find it all there.

Mr. HENKLE. Then this is a matter that belongs to Congress. You

were asked to make inferences; you were asked to deduce from the fact that these orders were made the criminality of my client and General Brady—Brady for making them and my client for buying him to make them. Yet these orders have all passed the scrutiny of Congress, the only power on the face of the earth that has a right to review them, and have been approved by Congress.

Mr. MERRICK. May it please your honor, I submit that there is no evidence of approval by Congress of these orders further than that contained in the act of April 7, 1880, in which Congress, by implication, if not expressly, disapproved them.

The COURT. Every act of Congress has to be construed.

Mr. HENKLE. Brother Merrick, you have given your very lucid construction of the act of Congress, and the jury have the benefit of it, and now I will give my own.

Mr. MERRICK. Take the act of April 7, 1880.

Mr. HENKLE. I cannot go over your whole argument to see what the time is.

The COURT. [To Mr. Merrick.] He says the reports were made and that they were approved. That is his construction of that act of Congress.

Mr. MERRICK. All right. I take it back and beg your pardon.

Mr. HENKLE. So, gentlemen, with regard to the fines and deductions. They have passed the same scrutiny and have doubtless been approved by the same authority. Now, I want to know who has a right to complain if Congress does not complain? What right have you or I to make the deduction of criminality from these acts which the Congress of the United States has approved? I grant you that if you prove it by evidence that is another thing. I am talking now about deductions, inferences, and presumption. You have had these orders day after day, week after week, and month after month. You were invited to deduce from them because they might seem to you to be extravagant, that therefore they were criminal. I say, in the absence of the proof, that you have no right to make the deduction; that the only power on the face of the earth that has a right to pass upon the question as to whether they were extravagant or imprudent or improper has already passed upon them, and has set its seal of approval upon them. When Congress approves who is there to disapprove?

I had intended to make some remarks upon the subject of productiveness. You will remember when my learned friend was upon the stand making his able and eloquent speech with so little ground for it, and when he was remarking upon this feature of the law in regard to productiveness, I asked him if he would be kind enough to tell me what rule of proportion he thought the law required; and my friend, instead of answering me, treated me to a philippic upon the corruption of Dorsey, and asked me if I did not think he ought to go to the penitentiary. Now, if it be so, gentlemen, that there is any rule by which the productiveness is to be regarded, save the opinion of the Postmaster-General, I fail to find it in the law and I fail to find it in the history of the Government. The law does say that:

The Postmaster-General shall provide for carrying the mail on all post-routes established by law as often as he, having due regard to productiveness and other circumstances, may think proper.

What Congress meant by that and what rule it intended to establish I do not know, and I wanted the benefit of the elucidation of my friend before I made my argument; but I could not evoke it. Now I say that Congress did not mean that the route should pay its own expenses is

perfectly apparent from the fact that it never has been so in the history of the country; all the way down from the beginning the mail service, save in exceptional cases, has not paid for itself. Have you not learned from the testimony in this case that Congress has made annually for years back appropriations of about \$5,000,000 for its star service, and nearly every year they have supplemented it by a deficiency bill to reach and pay for the service employed? How much of that sum has been received from the service itself? My learned friends have introduced column after column here with great gusto, of the productiveness of the routes, this little town and that little town, where the post-office did not pay enough to keep the postmaster in cigars. Mail routes, where it cost large sums of money to run them were referred to, where the service did not pay enough to have bought wagon and horses to put on the routes, scarcely. Yet all this time Congress is making these routes. You will remember, gentlemen, that Congress itself makes the post-routes. The Postmaster-General does not do it. Brady did not do it. Congress does it at the rate of hundreds a year. They make the appropriation of millions of dollars for running these very routes, when they know that they do not pay a hundredth part of the cost of the service. I want to know if that is not the legislative construction, the construction of the only branch of the Government that has a right to pass upon it? Is not that the legislative construction as to what is meant by having due regard to the productiveness of the service? The other circumstances qualify it. They have a right to consider the condition of the country, the opening up and the developing and extending of civilization, the adding to and the increasing of the national wealth. It is not everything that pays directly in money. The Army does not pay; other branches of the service do not pay. Even the judges do not pay. The money that is paid for the judiciary is not received back. So it is with a large part of the Government service. It does not pay directly back in money, and yet it carries on the functions of this great Government. In the case of the Post-Office Department the mail coach is the precursor of civilization. The pioneer follows the mail coach, and he goes to make his home where it goes, and will not go beyond it. It opens up and develops the country. It brings the public lands into market. It adds to the national wealth. To this instrumentality as much as to any other is to be attributed the marvelous development and growth of this Republic of which we are all so proud. Do not tell me that the miserable doctrine that the postal service must pay for itself directly in money is the law. I say it is not. It is not the history of the country. It is not good sense. It is not good policy. But my brother Wilson discussed that subject so ably and so recently that I will not waste any further time upon it.

Now, gentlemen, as I was saying a moment ago, you have been invited to presume the guilt of these parties from these large orders, and I confess to you that it does look strange. Before I came into this case, or had any knowledge of the facts, before I became acquainted with this system, as I have during the progress of this case, when I saw the newspaper accounts of the facts as they have been developed in the testimony, it all looked to me marvelously strange, and I confess, brother Merrick, I was very much inclined to think these parties were guilty of some wrong; and that is just what is the matter with the newspapers and what is the matter with the people of the country. They do not understand this service. They take a route, starting with two or three

thousand dollars, and run it up \$70,000, and it looks as though it needed explanation.

Mr. MERRICK. You have changed your opinion since you got into the case?

Mr. HENKLE. I have.

Mr. MERRICK. Since you got a retainer.

Mr. HENKLE. I have. Now, I say, gentlemen, that that is just what is the matter with the newspapers. The newspapers do not mean to do anything that is wrong. I do not believe that the well-conducted newspapers would howl and hunt down my clients unless they thought they were guilty. My brother said the other day that they represented public sentiment. Probably they do. Public opinion may be reflected in the newspapers. It may be that the public think that these things are so extraordinary that they must be connected with guilt.

Now, gentlemen, I want you to know that these horses and these equipments to run one of these routes must cost something. The case has been discussed to you by my learned brothers as though these large sums were all clear gain; that when a route was run from \$2,350, as the one that I propose to call your attention to now, for one trip up to \$70,000 for six trips, that it looked as though there was something marvelously strange about it, and my friends, as I was going to say, have argued the case to you as though the difference between the \$2,350 and the \$70,000 was all clear profit—velvet.

Mr. MERRICK. No, only the difference between the subcontractor's pay and the contractors.

Mr. HENKLE. I will come to that presently. Now, gentlemen, I will take for instance the case of Bismarck and Tongue River. That route has been singled out for particular and severe animadversion, and as perhaps the most iniquitous of them all. The original contract price was \$2,350, and it was expedited and increased up to \$70,000. Now, that looks strange, and some of these ladies and gentlemen over here who have not been attending this trial I have no doubt would think it needed explanation.

Mr. MERRICK. They are not the jury.

Mr. HENKLE. They are part of your jury for your jury was the country.

Mr. MERRICK. That is the jury that is trying this one. This jury is trying the defendants.

Mr. HENKLE. Now, the testimony of the Government's witness, Ketcham, showed that there were bought and put upon this route two hundred and one horses, did it not? Did not the Government show that? Did not Mr. Ketcham testify that he kept all the time one hundred and thirty-nine effective horses in use, and he kept his other horses for a different service to aid in the prosecution of his business? Did not the testimony show that ranches were built all along that route from fifteen to twenty miles apart? Now, gentlemen, I do not suppose that you have an idea that horses out in that country could be got for nothing unless they stole them. I do not know brother Merrick but you think our clients stole their horses?

Mr. MERRICK. I do not know.

Mr. HENKLE. Well, your witness testified that they were mostly purchased at Saint Louis and down at Kansas City, and they had to be transported fifteen hundred miles.

Mr. KER. Independence was where the horses came from.

Mr. HENKLE. Independence; yes, sir. They had to be transported to the scene where they were to be used, about fifteen hundred miles.

Now, I want to suppose—I am not giving you this as evidence, for it is not evidence, and I would not have a right to give it as evidence, but I have a right, your honor, have I not, to figure a little myself?

The COURT. Oh, yes.

Mr. HENKLE. Now, then, I will suppose two hundred and one animals cost \$150 each, and it seems to me that that would be a pretty low supposition, to buy them out at Independence, or Kansas City, or Saint Louis, and carry them fifteen hundred miles. Two hundred and one animals, at \$150 apiece, would cost \$30,150. Suppose we estimate the buckboards, &c., at \$5,625. Now, suppose we estimate these ranches that you have heard about, and the furniture, and the wells, and the bridges, and the ferries, and building the road—for you remember, gentlemen, that there was not a human habitation on all this three hundred miles. It was virgin prairie, and they had to build their road over these bad lands, these burning lands that troubled us all so, and about which his honor wanted to know. They had to build their road, as I say, and their bridges. They had to construct their ferries, to build their wells, and ranches, and their houses for the men, and all that, and I suppose I would have a right to infer that they cost something out in that country. Now, suppose we estimate \$15,000 for that and you have a total of \$50,775—velvet, velvet, brother Merrick.

Mr. MERRICK. I do not know what that means.

Mr. HENKLE. I am glad you do not. Your want of knowledge indicates a simplicity that I am glad to find. I know what it means.

Now, then, the testimony shows that about two years afterwards the railroad came along. That the testimony shows. I am not going out of the record if I can help it. In about two years the railroad came along and took up this service, and then they had to sell their old horses and their buckboards, and how much do you suppose they could have got for them at auction out there in that new country? You see there was not any other contractor coming along to want to buy them. They did not run the railroad by these old worn-out horses; so that there was no purchaser for them. Let us suppose the whole caboodle sold at auction for \$7,250. Then, gentlemen, you would have a loss of \$43,425 on your plant. That is the cost of the equipment. That is the loss, supposing my figures to be right.

Now, then, let us take the expense of running. Supposing the keep of the animals—horses eat out in that country I suppose as they do in this; suppose you estimate rations at twelve pounds of grain a day and that is four thousand three hundred and eighty pounds per year, and suppose you estimate that it cost five cents a pound, that is \$219 per animal per year, and take the effective animals—I am not taking the two hundred and ten that were not in actual daily use—but take the one hundred and thirty-five animals that were in actual daily use, and you have the sum of \$29,565 for feeding your horses. Now, you take sixteen drivers—I am taking the testimony in the case—and you pay them \$40 a month, and their board costs you \$20, which makes \$60, each of which costs you \$720 a year, which makes an aggregate of \$11,520. Take sixteen ranchmen—and that is the testimony—at \$50 a month and you have \$600 apiece, or an aggregate of \$9,600 a year for ranchmen. Take fifteen men with forage—and that is the testimony—at \$60 a month and you have \$720, which is an aggregate of \$10,800 a year for foragemen. Take twelve men cutting hay, at \$60 a month, for three months, which is \$180 each, making a total of \$2,160.

Mr. MERRICK. Cutting hay all the year around?

Mr. HENKLE. No, sir; three months in the year. Take two blacksmiths—and the testimony showed that they had to have them—at \$100 a month, which is \$1,200 apiece, and that is \$2,400. Two wheelrights, at \$100 a month, which is \$1,200 apiece, making \$2,400. Now, two agents, at \$100 each, \$1,200 each, making \$2,400; one superintendent, at \$125, making \$1,500; eight extra drivers in the winter, \$60 a month for four months, \$240 each, making \$1,920. Now, allow \$3,000 for extras, things that you have not included, and you have a total of \$80,865. Eighty thousand eight hundred and sixty-five dollars, going to the highest bidder; who will take it? You have got it expedited for \$70,000, and yet you denounced my client, Mr. Vaile, when he was upon the stand, leaving the jury to believe that he was swearing falsely when he said that this was run at a loss. There are the figures, gainsay them who will. You figure it, brother Merrick, and show that it can be done for less. I will leave it upon your own testimony. Now let the newspapers and the public understand these facts: That a route that was commenced at \$2,350 and run up to \$70,000, and that when it had reached \$70,000 the contractor was running it at a loss of \$10,000 a year.

Mr. MERRICK. With the right of throwing up his contract under the specific terms of the contract.

Mr. HENKLE. That we will see about. Now, I want to call your attention to this fact, gentlemen: In addition to all this the contractors were fined \$46,299.89 on that route of which was remitted \$13,303, leaving standing unremitted unto the present day \$32,996.15. The entire pay for the whole time—and I refer you to the table in the book—that they had it was \$157,487.33. Now you deduct from that fines unremitted \$32,996.15 and you have a total balance of \$124,491.68. Assuming that the original plant cost \$50,000 you have \$74,491.68. Now, supposing you realize from your plant, which they did not, and you have an aggregate balance all told of the receipts on that great route, which has been such a terrible bugbear to you and to the public and to the newspapers, of \$84,491.68. Of course the ranches and ferries and bridges and all save the worn-out horses and coaches were worthless to them. The total balance received from the aggregate service would scarcely pay the running expenses for a single year. And yet we are heralded all over the land as robbers and thieves plundering the public Treasury because we are carrying their mails for nothing and finding ourselves. If it had not been, gentlemen, for the passengers they carried these men would have been ruined upon this route alone. Now, I do not say, gentlemen, that it is so with regard to all these routes. I have no doubt that some of them are profitable. It must be so or men would not engage in this business. But you take the good with the bad. When you take a route you have to run it. My brother says that you have a right to throw it up. You have in one single contingency the right to throw it up, and that is where it is expedited. Upon expedition you have a right to throw it up if you choose, but where you have all your stock, where you are all equipped for running your road, it all becomes worthless to you. I say this, brother Merrick, if they could have had this route two or three years longer, perhaps having their equipments all furnished, it might have begun to pay when the country was developed and grain was cheaper, and the expense of keeping their men, and the roads were better, and they could have used less men and less horses; they might possibly have done this service at a profit after awhile, but as it was it was a dead loss.

Mr. MERRICK. Would it be proper at all to ask a question?

Mr. HENKLE. Oh, yes, certainly.

Mr. MERRICK. Whether or not if there was a loss, the loss did not accrue from the purchase of stock and the building of ranches in anticipation of expedition, when they did not need them?

Mr. HENKLE. My brother Merrick, I will answer you, perhaps not in the exact language of the court, but in the idea of the court, that the men had a right to expect expedition. They took their routes in contemplation of expedition. Senator Saunders told you here upon the stand that they first got the route for once a week, and then they expected it of course to be increased and expedited, and these men do not become fools because they go into contracting always. Sometimes they do but not always. They are expected to do their business upon intelligent business principles, just as other men do in other avocations of life. They have a right to expect it where they see such a route as this, where the termini divide two sections of country and there is a gap between them upon which there must be service. The public interest demands service, and they have a right to contemplate that that service will be increased and expedited, and when they get their contract they have a right, if they choose to take the chances of the public exigency coming up to their expectations, and build their ranches in anticipation of increase and expedition, if you will.

But, gentlemen, I must hurry. Mr. Bliss told you that the contractors, in dealing with the subcontractors got their service as cheaply as they could; that they did not recognize the principle of pro rata at all; that they got competition between A and B, and got them to bidding what they would do the work for, and they took the one who would do it for the least money and that is natural enough, too. You and I would do that, I reckon, if we had a chance, and brother Bliss said to you that Brady ought to have done it upon the same principle; that the contractors themselves were wiser in their generation than were the officials; that the contractors got their work where they could get it cheapest, while the Government was paying pro rata, and did not go around to seek a cheap service. Now, then, a little difficulty about that is just in the contract that the Government makes itself. I read from this indictment:

And in each of the said contracts and agreements so made and signed by and between the said United States of America, and the said John W. Dorsey, and John R. Miner, and John M. Peck, as aforesaid, it was further stipulated and agreed and set forth, that the said Postmaster-General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service in accordance with law, he allowing a pro rata increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is rendered necessary.

Now, then, that is the contract. So that the Government, if it wants to increase the trips or expedite the time is not at liberty to go out and ask Tom, Dick, and Harry to come in and bid what they will do it for. They are obliged to let the contractor do it. Of course they determine whether they will have the service increased or expedited, but when they have determined to do it they have no option. The contractor is entitled under his contract to the pro rata for the increase or the expedition and that is not the contractor's fault. The contractor does not draw the form of the contract but the contract is prepared and he is required to sign it in that form by the department.

Now, gentlemen, I find that it lacks but five minutes of closing time and I will throw away considerable of my notes that I intended to have talked to you from and will hurry rapidly to the conclusion.

I want to say now, gentlemen, in conclusion, that this is a most ex-

traordinary prosecution. As I remarked in the beginning the ordinary instrumentalities for criminal prosecutions are entirely set aside and ignored. The Government employs a lawyer learned in the law and pays him a large salary, some \$6,000 or \$8,000 a year, to conduct its prosecutions in this form. He has his assistants and his clerks and his stenographers. He is fully equipped and provided to do all his service, and where a man is tried for his life you will find the district attorney or the assistant district attorney taking charge of the prosecution and conducting it. Here the district attorney is set aside and ignored entirely. The Government of the United States has employed my distinguished friend from Philadelphia [Mr. Ker]. Colonel Bliss is brought from the city of New York, my learned and eloquent friend Mr. Merrick from the city of Washington, and these gentlemen have all been retained at an expenditure of the public treasure as to which you know *we are so careful and anxious*. They have all been employed, and their services are to be paid for out of the public Treasury, for the purpose of carrying on this prosecution. I say, gentlemen, this is most extraordinary. I never knew such a case before. I have known extra counsel to be employed, and in the Guiteau case the Government employed two extra counsel. Here they have employed three. There the President of the United States had been slain. Here the question is simply as to whether a few mail contractors have got more money from the public Treasury than they ought to have, and three great lawyers are employed.

But it does not stop there. The Attorney-General of the United States comes from his high place down into this court, clad in the robes of his office. He brings with him the Government of the United States with its majesty and power. For what? What meaneth all this? Why, gentlemen, it is to overawe and overshadow you twelve honest men, to take the place of testimony, because these gentlemen know well enough that if there was no testimony to warrant you in convicting these men you would do your duty. But in the absence of proof you are to be overcome by the presence of power.

Now, gentlemen, I ought to refer you to a historical story, a story found in the grand old Bible and told in its grand old language. You remember it said that Nebuchadnezzar, king of Babylon, erected upon the plains of Dura a golden image and caused proclamation to be made that all of his governors and rulers and sheriffs and officers should assemble on a certain day at the sound of the sackbut, and the psaltery and the harp and the lute, and all the musical instruments and they should all fall down and worship this golden image which Nebuchadnezzar, the king, had set up, and somebody went to the king and told him—I suspect he was the progenitor of my friend Woodward—that there were three jews, whose names were Shadrach, Meshac, and Abednego, who had been set over the affairs of the Province of Babylon, who refused to worship his golden image, and the king was wroth and commanded Shadrach, Meshac, and Abednego to appear before him. They came before him, and he said to them, “Shadrach, Meshac, and Abednego, I have been informed that you have refused to obey my order, that you refused to bow down and worship the golden image that I have set up. Now, I will give you a chance for repentance, when we will try it again. At the sound of the sackbut and psaltery and the harp and the lute and all the other musical instruments if you do not bow down and worship the golden image I will cause you to be put into the burning, fiery furnace.” What did these brave Hebrew men do? Did they say go on, king Nebuchadnezzar, with your music and we will fall

down and worship?" They said, "You need not wait for the music, king Nebuchadnezzar; if it be so that you will trust us into the burning, fiery furnace, our God whom we serve will deliver us out of thy hands, O king. Even be it known unto thee, O king, that we will not serve thy gods, nor fall down and worship the golden image which thou hast set up;" and the king in his anger called his strong men out of his army, and they took Shadrach, Meshac, and Abednego and cast them into the fiery furnace, and the flames leaped out and smote and slew the bearers that threw them in, and these men bound fell down into the fiery furnace. The king supposed that they would be consumed in an instant. "But look now," he says, "Did I not cast three men into the burning, fiery furnace? See! I see four men walking, and the likeness of the fourth and the form of the fourth is like unto the form of the Son of God." And he said, "Shadrach, Meshac, and Abednego come forth." And they came forth, and he made a decree that these men should be protected, and that throughout all the tongues and languages of his vast kingdom he who spoke disrespectfully of the God of Shadrach, Meshac, and Abednego should be put to death.

I hope, gentlemen, you will imitate the example of these brave men, and do as you believe to be right, and then a thirteenth shall be seen walking with you, and he shall also have the form of the Son of God, and though all men shall be against you you shall prevail.

I thank you, gentlemen, for your attention.

At this point (3 o'clock and 12 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

TUESDAY, SEPTEMBER 5, 1882.

The court met at 10 o'clock and 5 minutes a. m.

Present, counsel for the Government and for the defendants.

The COURT. Judge Wilson, I believe you are the special advocate of the Second Assistant Postmaster-General, Brady.

Mr. WILSON. Colonel Totten, Mr. Chandler, and myself represent him.

The COURT. In the course of the trial there was given in evidence a report sent to Congress by the Postmaster-General, in regard to the deficiency in the star-route appropriation and asking for an additional appropriation of \$2,000,000. That communication referred to a communication from the Second Assistant Postmaster-General. I do not know whether the report or communication of the Second Assistant Postmaster-General himself was even given in evidence or read.

Mr. WILSON. My recollection is, your honor, that it was not.

The COURT. It was referred to in the communication of the Postmaster-General.

Mr. WILSON. The Government brought in the letter of the Postmaster-General, transmitting it to Congress, but my recollection is, did not bring in the other document.

Mr. CHANDLER. My recollection is, that it was offered and excluded.

The COURT. It was a part of the Postmaster-General's report to Congress, but whether it was offered or read I have forgotten, and I have not really had time to examine all the evidence in the case.

Mr. WILSON. My recollection is, that the Government did not offer it in evidence.

Mr. MERRICK. I do not remember of its having been offered in evidence at all. I made some examination of the record to see, and supplied the wants which induced me to make that examination by Mr. Blackburn's testimony.

The COURT. The paper was referred to in the report of the Postmaster-General, and in fact by that reference became a part of the report. I had a curiosity to see the report of the Second Assistant, and requested the department to furnish me with a copy. I have read it, but it occurred to me that it had not been given in evidence.

Mr. WILSON. Would your honor have any objection to allowing us to see the copy that you have?

The COURT. Not at all. [Submitting paper to Mr. Wilson.]

Mr. WILSON. We may come to some conclusion about it by recess to-day. I remember we offered two or three of the reports of the Second Assistant in evidence, and they were objected to on the part of the Government and ruled out.

The COURT. This stood on a different footing, as it was by reference made a part of the Postmaster-General's report. [To Mr. Ingersoll]. I believe, Colonel Ingersoll, your time has come to address the jury.

Mr. INGERSOLL. May it please the court, and gentlemen of the jury: Let us understand each other at the very threshold. For one, I am as much opposed to official dishonesty as any man in this world. The taxes in this country are paid by labor and by industry, and they should be collected and disbursed by integrity. The man that is untrue to his official oath, the man that is untrue to the position the people have honored him with ought to be punished. I have not one word to say in defense of any man whom I believe has robbed the Treasury of the United States. I want it understood in the first place that we are not defending, that we are not excusing, that we are not endeavoring to palliate in the slightest degree dishonesty in any Government official. I will go still further: I shall not defend any citizen who has committed what I believe to be a fraud upon the Treasury of this Government. Let us understand each other at the commencement.

You have been told that we are a demoralized people; that the tide of dishonesty is rising ready to sweep from one shore of our country to the other. You have been appealed to to find innocent men guilty in order that that tide may be successfully resisted. You have been told, and I have heard the story a thousand times, that this country was demoralized by what the gentlemen are pleased to call the war, and that owing to the demoralization of the war it is necessary to make an example of somebody that the country may take finally the road to honesty. We were in a war lasting for years, but I take this occasion to deny that that war demoralized the people of the United States. Whoever fights for the right, or whoever fights for what he believes to be right, does not demoralize himself. He ennoble himself. The war through which we passed did not demoralize the people. It was not a demoralization; it was a reformation. It was a period of moral enthusiasm, during which the people of the United States became a thousand times grander and nobler than they had ever been before. The effect of that war has been good, and only good. We were not demoralized by it. When we broke the shackles from four millions of men, women, and children it did not demoralize us. When we changed the hut of the slave into the castle of the freeman it did not demoralize us. When we put the protecting arm of the law about that hut and the flag of this nation above

it, it was not very demoralizing. When we stopped stealing babes the country did not suddenly become corrupted. That war was the noblest affirmation of the human in the history of this world. We are a greater people, we are a grander people, than we were before that war. That war repealed statutes that had been made by robbery and theft. It made this country the home of MAN. We were not demoralized.

There is another thing you have been told in order that you might find somebody guilty. You have been told that our country is distinguished among the nations of the world only for corruption. That is what you have been told. I care not who said it first. It makes no difference to me that it was quoted from a Republican Senator. I deny it. This country is not distinguished for corruption. No true patriot believes it. This country is distinguished for something else. The credit of the United States is perfect. Its bonds are the highest in the world. Its promise is absolute pure gold. Is that the result of being distinguished for corruption? I have heard that nonsense, that intellectual rot all my life, that the people used to be honest, but at present they are exceedingly bad. It is the capital-stock of every prosecuting lawyer; but in it there is not one word of truth. Is this country distinguished only for its corruption throughout Europe? No. It is respected by every prince and by every king; it is loved by every peasant. Is it because we have such a reputation for corruption that a million people from foreign lands sought homes under our flag last year? Is corruption all we are distinguished for? Is it because we are a nation of rascals that the word America sheds light in every hut and in every tenement of Europe? Is it because we are distinguished for corruption that that one word, America, is the dawn of a career to every poor man in the Old World? I always supposed that we were distinguished for free schools, for free speech, for just laws; not for corruption. A country covered over with school-houses, where the children of the poor are put upon an exact equality with those of the rich, is not distinguished for corruption. And yet in the name of this universal corruption you are appealed to to become also corrupt. This nation is substantially a hundred years old, and to-day the assessed property of the United States is valued at \$50,000,000,000. Is that the result of corruption, or is it the result of labor, of integrity, and of virtue? I deny that my country is distinguished for corruption. I assert that it rises above the other nations distinguished for humanity as high as Chimborazo above the plains. Never will I put a stain upon the forehead of my country in order that I may win some case, and in order that I may consign some honest man to the penitentiary. I stand here to deny that this is a corrupt country. Let me say that the only tribute that I ever heard paid to corruption was indirectly paid by Mr. Merrick himself. He told you that official corruption destroyed the French Empire, and upon the ruins of that empire arose the French Republic. He makes official corruption the father of French liberty. If it works that way I hope they will have it in every monarchy on the globe. Napoleon stole something besides money; he stole liberty, and the French people finally got to that condition of mind where they preferred to be trampled on by Germany rather than to have their liberty devoured by Napoleon. From that splendid sentiment sprang the French Republic. This country is the land not of slavery but of liberty, not of unpaid toil but of successful industry. There is not a poor man to-day in all Europe or a poor boy who does not think about America. I recollect one time in Ireland that I met with a little fellow about ten years old with a couple of rags for

pantaloon and a string for a suspender. I said, "My little man, what are you going to do when you grow up?" "*Going to America.*" It is the dream of every peasant in Germany. He will go to America; not because it is the land of corruption, but because it is the land of plenty, the land of free schools, the land where humanity is respected.

There is another thing about this country. We have a king here, and that king is the law. That king is the legally expressed will of a majority, and that law is your sovereign and mine. You have no right to violate one law to carry out another. We all stand equal before that law, and the law must be upheld as an entirety, and in no other way. If in this case you believe these defendants beyond a doubt to be guilty it is your duty to find them so, and you must find them so in order to preserve your own respect. I do not agree with this prosecution in the idea that the perpetuity of the republic depends upon this verdict. Decide as badly as you please, as horridly as you can, the republic will stand. The republic will stand in spite of this verdict, and the republic will stand until people lose confidence in verdicts—until they lose confidence in legal redress. When the time comes that we have no confidence in courts and no confidence in juries then the great temple will lean to its fall, and not until then. As long as we can get redress in the courts, as long as the laws shall be honestly administered, as long as honesty and intelligence sit upon the bench, as long as intelligence sits in the chairs of jurors, this country will stand, the law will be enforced, and the law will be respected. But so far as my clients are concerned, everything they have, everything they love, everything for which they hope, home, friends, wife, children, and that priceless something called reputation, without which a man is simply living clay, everything they have is at stake, and everything depends upon your verdict. I want you to understand that everything depends upon your decision, and yet my clients with their world at stake, home, everything, *everything*, ask only at your hands the mercy of an honest verdict according to the evidence and according to the law. That is all we ask and that we expect. By an honest verdict I mean a verdict in accordance with the testimony and in accordance with the law, a verdict that is a true and honest transcript of each juror's mind, a verdict that is the honest result of this evidence. Whoever takes into consideration the desire, or the supposed desire of the outside public is bribed. Whoever finds a verdict to please power, whoever violates his conscience that he may be in accord, or in supposed accord, with an administration or with the Government, is bribed. Whoever finds a verdict that he may increase his own reputation is bribed. Whoever finds a verdict for fear he will lose his reputation is bribed. Whoever bends to the public judgment, whoever bows before the public press, is bribed.

[The Attorney-General here entered.]

Fear, prejudice, malice, and the love of approbation bribe a thousand men where gold bribes one. An honest verdict is the result not of fear but of courage; not of prejudice but of candor; not of malice but of kindness. Above all it is the result of a love of justice. Allow me to say right here that I believe every solitary man on this jury wishes to give a verdict exactly in accordance with this testimony and exactly in accordance with the law. Every man on this jury wishes to preserve his own manhood. Every man on this jury wishes to give an honest verdict. There are no words sufficiently base to describe a man who will knowingly give a dishonest verdict. I believe every man upon this jury to be absolutely honest in this case. The mind of every juror, like the needle to the pole, should be governed simply by the evidence. That

needle is not disturbed by wind or wave, and the mind of the honest juror never should be disturbed by clamor nor by prejudice nor by suspicion. Your minds should not be affected by the fume, by the froth, by the fiction, and by the fury of this prosecution. You should pay attention simply to the evidence, and to use the language of one of my clients, you should be governed by the frozen facts. That is all you have any right to think of and all you have any right to examine.

Having now said this much about the duties of jurors, let me say one word about the duties of lawyers. I believe it is the duty of a lawyer, no matter whether prosecuting or defending, to make the testimony as clear as he can. If there is anything contradictory it is his business if he possibly can to make it clear. If there is any question of law about which there is a doubt it is his right and it is his duty to give to the court the result of his study and of his thoughts for the purpose of enlightening the court upon that particular branch of law. No matter if he may believe the court understands it, if there is the slightest fear that the court does not or has forgotten it, it is his duty to bring the attention of the court to that law. It is not his duty to abuse anybody. It is not my duty to abuse anybody. There is no logic in abuse; not the slightest; and when a lawyer, under the pretext of explaining the evidence to the jury, calls a defendant a thief and a robber, he steps beyond the line of duty and, in my judgment, beyond the line of his privilege. What light does that throw upon the case? In his effort to explain the law to the court what cloud does it remove from the intellectual horizon of his honor for the attorney to call the defendant a robber, a thief, or a pickpocket? I shall in this case give you what I believe to be the facts. I shall call your attention to the testimony. I shall endeavor to throw what light I am capable of throwing upon this entire question. I shall not deal in personalities. They are beneath me. I shall not deal in epithet. Nobody worth convincing can be convinced in that way. Now, let us see what the law is, and let us see what our facts are. In the beginning of this dusty branch I shall ask the pardon of every juror in advance for going over these facts once again. You see they strike every man in a peculiar way. No two minds are exactly alike. No pair of eyes distinguish exactly the same object or the same peculiarities of the objects. This is an indictment under section 5440 of the Revised Statutes, and there must not only be a conspiracy to defraud but there must be an overt act done in pursuance of that conspiracy for the purpose of effecting the object of it. Now, then, how must these overt acts be stated in this indictment? Is the overt act a part of the crime, and must it be described with the same particularity that you describe the offense? Which of the overt acts set out in this indictment is the overt act depended upon, together with the act of conspiring, to make this offense? I hold, may it please your honor, that every overt act set out in the indictment must be proved exactly as it is alleged, no matter whether the description was necessary to be put in the indictment or not. No matter how foolish, how unnecessary the description, it must be substantiated and it must be proven precisely as it is charged. No matter whether the particular thing described is of importance or not, no matter how infinitely unnecessary it was to speak of it, still, if it is a matter of description, it must be proven precisely as it is charged. Upon that branch of the subject I wish to call the attention of the court to some authority, and it will take me but a few moments. I will call the attention of the court first to the case of the State against Noble, 15 Maine, 476. Here a man was indicted for

fraudulently and willfully taking from the river and converting to his own use certain logs. These logs were described as marked "W" with a cross, and "H" with another cross and with a girdle. Now it seems that a part of this mark was not found, according to the testimony upon the logs taken:

The description of these logs in the indictment is the only way the logs could be distinguished and could not be rejected as surplusage. It has been settled that if a man be indicted for stealing a black horse, and the evidence be that he stole a white one, he cannot be convicted. The description of a log by the mark is more essential than that of a horse by its color. If it was not necessary to describe the log so particularly by the mark, yet having so stated it, there can be no conviction without proof of it.

Now, the court, in deciding this, says:

It may be regarded as a general rule, both in criminal prosecutions and in civil actions, that an unnecessary averment may be rejected, where enough remains to show that an offense has been committed, or that a cause of action exists. In *Ricketts vs. Solway*, 2 Barn. & Ald., 360, Abbott, C. J., says: "There is one exception, however, to this rule, which is, where the allegation contains matter of description. Then, if the proof given be different from the statement, the variance is fatal." As an illustration of this exception, Starkie puts the case of a man charged with stealing a black horse. The allegation of color is unnecessary, yet as it is descriptive of that, which is the subject-matter of the charge, it cannot be rejected as surplusage, and the man convicted of stealing a white horse. The color is not essential to the offense of larceny, but it is made material to fix the identity of that, which the accused is charged with stealing. 3 Stark., 1531.

In the case before us the subject-matter is a pine log marked in a particular manner described. The marks determine the identity, and are, therefore, matter purely of description. It would not be easy to adduce a stronger case of this character. It might have been sufficient to have stated, that the defendant took a log merely, in the words of the statute. But under the charge of taking a pine log we are quite clear that the defendant could not be convicted of taking an oak or a birch log. The offense would be the same; but the charge to which the party was called to answer, and which it was incumbent on him to meet, is for taking a log of an entirely different description. The kind of timber and the artificial marks by which it was distinguished are descriptive parts of the subject-matter of the charge, which cannot be disregarded, although they may have been unnecessarily introduced. The log proved to have been taken was a different one from that charged in the indictment; and the defendant could be legally called upon to answer only for taking the log there described. In our judgment, therefore, the jury were erroneously instructed that the marks might be rejected as surplusage; and the exceptions are accordingly sustained.

I also cite the case of the State against Clark, 3 Foster, New Hampshire, 429:

Indictment for fraudulently altering the assignment of a mortgage. The indictment set forth the mortgage and also the assignment, as it was alleged to have been originally made from Miles Burnham to Noah Clark, the respondent; and alleged that the assignment was signed, sealed, delivered, witnessed by two witnesses, and duly and legally recorded at length, in the registry of deeds of Rockingham County, on the 18th of September, 1844. It then alleged that this assignment was fraudulently altered on the 28th of June, 1844, by inserting the letter "S" in two places, between the words "Noah" and "Clark," so that the assignment originally made to Noah Clark, after the alteration appeared as if it were made to Noah S. Clark.

On trial, the records of deeds were produced, and there was found a record of the assignment purporting to be made to Noah S. Clark, the record bearing date September 18, 1844, but there was no record of any assignment to Noah Clark. The respondent's counsel objected that this evidence did not support the allegations of the indictment. The forgery was alleged to have been committed on the 28th of June, 1844, and the court admitted evidence that Miles Burnham, who executed the assignment, being applied to about the 30th of July, 1846, for a loan of money upon a mortgage of the same property, declined to make the loan unless he was satisfied there was no mortgage of conveyance of the land by Noah Clark, and the person who drew the assignment searched the records with Burnham, and found no such deed on record. This evidence was objected to, but was understood to be introductory to other material, and pertinent evidence, and was therefore admitted; but no such other evidence, to which it was introductory, was offered.

The jury found a verdict of guilty, which the defendant moved to set aside.

Upon that the court says :

We are not able to look upon this statement that the deed was duly recorded as well as witnessed and acknowledged according to the statute, in any other light than as part of the description of the deed and conveyance which the defendant was charged with altering. We are, therefore, of opinion that the evidence upon this point did not sustain the indictment.

Now, if the statement that the mortgage was recorded was such a material part of the description that a failure to prove the record as charged was fatal, so, I say, in these overt acts, if they charge that a thing was done or a paper filed on a certain day and it turns out not to be so, that is a fatal variance, and under that description in the indictment the charge cannot be substantiated. I refer to the case against Northumberland, 46 New Hampshire, 158, and also to the King against Wenuard, 6 Carrington & Paine, 586.

Clark *vs.* Commonwealth, 16 B., Monroe, 213:

“The doctrine seems to have been well settled in England and this country, that in criminal cases, although words merely formal in their character may be treated as surplusage and rejected as such, a descriptive averment in an indictment must be proved as laid, “and no allegation, whether it be necessary or unnecessary, more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment, can be rejected as surplusage.”

And in this case I cite Dorsett's case, 5th Rogers's Record, 77:

On an indictment for coining there was an alleged possession of a die made of iron and steel, when in fact it was made of zinc and antimony. The variance was deemed fatal.

And yet it was not necessary to state of what the die was made. If the indictment had simply said he had in his possession this die, it would have been enough, but the pleader went on and described it, saying it was made of iron and steel. It turned out upon the trial that it was made of zinc and antimony, and the variance was held to be fatal. So I cite the court to Wharton's American Crim. Law, 3d edition, page 291, and to Roscoe on Criminal Evidence, 151. Now I cite the case of the United States against Foye, 1st Curtiss' Circuit Court Reports, 368, and I do not think it will be easy to find a case going any further than this. It goes to the end of the road:

A letter containing money deposited in the mail for the purpose of ascertaining whether its contents were stolen on a particular route and actually sent on a post-route, is a letter intended to be sent by post within the meaning of the post-office act.

This I understand was a decoy letter.

The description of the termini between which the letter was intended to be sent by post cannot be rejected as surplusage, but must be proved as laid.

Upon that the court says :

But a far more difficult question arises under the other part of the objection. The indictment alleges, not only that this letter was intended to be conveyed by post, but describes where it was to be conveyed; it fixes the termini as Georgetown and Ipswich. The allegation is, in substance, that the letter was intended to be conveyed by post from Georgetown to Ipswich. The question is, whether the words from Georgetown to Ipswich, can be treated as surplusage. It was necessary to allege that the letter was intended to be conveyed by post. The words from Georgetown to Ipswich, are descriptive of this intent. They describe, more particularly, that intent which it was necessary to allege. In United States *vs.* Howard, 3 Sumner, 15, Mr. Justice Story lays down the following rule, which we consider to be correct: “No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage.” Apply that rule to this case. It is legally essential to the charge to allege some intent to have the letter conveyed somewhere by post. Suppose the indictment had alleged an intent to have it conveyed between two places where no post-office existed, and over a post-route where no post-

road was established by law. Inasmuch as the court must take notice of the laws establishing post-offices and post-roads, the indictment would then have been bad; because this necessary allegation would, on its face, have been false. Words, therefore, which describe the termini and the route, and thus show what in particular was intended, do identify the intent, and show it to be such an intent as was capable, in point of law, of existing.

And we are obliged to conclude that they cannot be treated as surplusage, and must be proved, substantially, as laid. We are of opinion, therefore, that there was a variance between the indictment and the proof; and that, for this cause, a new trial should be granted.

So I refer you to the State *vs.* Langley, 34th New Hampshire, 530.

The COURT. I think, Colonel Ingersoll, there is no doubt about this doctrine.

Mr. INGERSOLL. I do not want any doubt about it.

The COURT. There cannot be.

Mr. INGERSOLL. Well, I will just read this because I do not want any doubt about it in anybody's mind.

The COURT. I have no doubt about it.

Mr. INGERSOLL. Very well:

If a recovery is to be had, it must be *secundum allegata et probata*; and the rule is one of entire inflexibility in respect to all such descriptive averments of material matters. The cases upon this point, many of which are collected in the case of State *vs.* Copp, 15 N., H., 215, are quite uniform.

Now, if the court please, I not only read this with regard to the overt acts, but with regard to the description of the crime itself—the conspiracy. I will then refer to State against Copp, 15th New Hampshire. I will also refer to the case of Rex against Whelpley, 4th Carrington & Payne, 132; to 3d Starkie on Evidence, sections 1542 to 1544, inclusive; also to the United States against Denee and others, 3d Wood, page 48, and a case under this exact section, 5440:

It seems clear that the statute upon which this indictment is based is not intended to relieve the pleader from any supposed necessity of setting out the means agreed upon to carry out the conspiracy by requiring him to aver some overt act done in pursuance of the conspiracy and make such act a necessary ingredient of the offense.

The court then refers to the Commonwealth against Shed, 7th Cushing, 514, and continues—in that case it was different:

That difficulty does not exist here, for the overt act is part of the offense and must be proved as laid in the indictment.

So I find that the court passed upon this very question, and I wish to call the attention of the court again to one line on page 961 of the record in this case:

But in all cases the principle is simply this: That where the act which was done in pursuance of the conspiracy is described in the indictment it must be described with accuracy and completeness, and if there is a variance in the proof it is fatal to the prosecution.

When I come to that part as to the necessity of describing offenses, then I will cite the court to some other authorities in connection with these.

Now, then, we have got it established, gentlemen of the jury. There is no longer any doubt about that law, and the court will so instruct you, that wherever they set out in the indictment that we did a certain thing in pursuance of the conspiracy they must prove that thing precisely as charged, no matter whether the description was necessary or unnecessary. They must prove precisely as they state. They wrote the indictment, and they wrote it knowing they must prove it, and if they wrote it badly it is not the business of this jury to help them out of that dilemma.

Now, as I say, we come to the dust and ashes of this case, the overt

acts, and I take up these routes precisely in the order in which they were proved by the prosecution.

First. I take up route 34149. Now let us see where we are. The first charge is that we filed false and altered petitions by Peck, Miner, Vaile, and Rerdell. When did we file them? The indictment charges that we filed them on the 10th day of July, 1879. When did the evidence show they were filed? On the 3d day of April, 1878. That is a fatal variance, and that is the end eternal, everlasting, of that overt act. Without taking into consideration the fact that every petition was true and genuine, the petitions were not sent by the persons as charged. It was presented by Senator Saunders, and that is the absolute end of that overt act, and you have no right to take it into consideration any more than though nothing had been said upon the subject.

Second. That on the 10th of July a false oath was placed upon the records. Now, that is an overt act, and you know as well as I do that the description of that must be perfect. If they say it is of one date and the evidence shows that it is of another, it is of no use. It is gone. They say, then, that a false oath was filed. When? On the 10th day of July. Suppose the oath to have been false. When was it filed? The evidence says April 3, 1879. That is the end of the false oath, no matter whether that oath is good or bad. No matter whether they committed perjury or wrote it with perfect and absolute honesty, it is utterly and entirely worthless as an overt act.

Third. An order for expedition July 10, 1879, alleged to have been made by Brady. As a matter of fact the order was signed by French. There is a misdescription. No matter if Brady told him to sign it, it was not as a matter of fact signed by Brady—it was signed by French. They described it as an order signed by Brady. It is an order signed by French, and the misdescription or variance is absolutely fatal, and you have no more right to consider it than you have the decree of some empire long since vanished from the earth. Now, this is all the evidence on this route. That is all of it with the exception of who received the money, and I will come to that after awhile. That is route 34149.

Mr. HENKLE. Kearney to Kent.

Mr. INGERSOLL. Yes. According to their statement in the indictment, holding them by that, there is not the slightest testimony. We can consider that route out. We have only eighteen now to look after. That is the end of that. It has not a solitary prop; upon the roof of that route not a shingle is left—not one.

Let us take the next route, 38135. What do we do in that according to the indictment? And now, gentlemen, recollect they wrote this indictment. You would think we did, but we didn't. They wrote it, and they are bound by it. But if I had been employed on behalf of the defendants to write it I should have written it just in that way.

First. Sending and filing a false oath. When did we send it; when did we file it? On the 26th day of June. That is what the indictment says. What does the evidence say? April 18, 1879. Now that is the end of that. It was a true oath, but that does not make any difference. That oath is gone. That has been sworn out of the case, and dated out of the case. What is the next?

Second. Filing false petitions. When did we file them? The 26th day of June, 1879. The last petition was filed the 8th of May, 1879, and it does not make one particle of difference whether these dates were before or after the conspiracy as set forth, but as a matter of fact, every one of the petitions was true. That charge is gone. A fatal variance.

What is the next fraudulent order? That of June 20. There was never the slightest evidence introduced to show that it was a fraudulent order—not the slightest. And what is the next charge? Fraudulently filing a subcontract. And right here I stop to ask the court, of course, not expecting an answer now but in the charge to the jury, is it possible to defraud the Government of the United States by filing a subcontract?

Now, gentlemen, I want you to think of it. How would you go to work to defraud the Government by filing a subcontract? If the subcontract provides for a greater amount of pay than the Government is giving the original contractor the Government will not pay it; it will only pay up to the amount that it agreed to pay the contractor. It is like A giving an order on B to pay C what A owes B. He need not pay him any more. That is all. And if the ingenuity of malice can think of a way by which the Government can be defrauded by the filing of a subcontract I will abandon the case. It is an impossible, absurd charge, something that never happened and never will happen. Well, that is the end of this route with one exception. This is the Agate route. This is the route where \$30 it is claimed has been taken from the Government. It is that route. You remember the productiveness of that post-office. They established an office and nobody found it out except the fellow that was postmaster, and in his lovely grandeur I think he remained about eighteen months and never sold a stamp. That is all that is left in that route, that order putting Agate upon the route and taking it off, and then giving one month's extra pay. That is all—another child washed—38135—that is all there is to that route; no evidence except epithets, no testimony except abuse. If anything is left under that it is simply "robber, thief, pickpocket." That is all.

Now we come to another route, and I again beg pardon for calling attention to these little things. The Government has forced us to do it. It is like a lawsuit among neighbors. Each is so anxious to beat the other they begin to charge for things that they never dreamed of at the time they were delivered. They will charge for neighborly acts, time lost in attending the funeral of members of each other's family before they get through the lawsuit. So the Government started out in this case and not finding a great point had to put in little ones, and we have to answer the kind of points they make.

41119. Overt acts. First. Filing a false oath. When did we file it? The 25th day of June the indictment says. Who filed it? Peck and Miner. Well, when was it filed or when was it transmitted? According to their story June 23, 1879. This oath is marked 8 C, and an effort was made to prove by a man by the name of Blois that it was a forgery. That was objected to, first that it was not charged to be forged in the indictment; and, second, that a notary public had already sworn that it was genuine and that he could not be impeached in that way, and thereupon that oath was withdrawn, and you will never hear of it any more. I do not know whether it is true or not. That is found on record, page 1469. Now, recollect that oath was withdrawn. That is the end of it.

Second. Filing false petitions. When were they filed? July 8, 1879, and it turned out that that charge was true with two exceptions: First, that they were not filed at that time; and second, that all the petitions were true. That is the only harm about that charge.

Third. A fraudulent order made by Brady, July 8. Now let us see what the fraud consists in. The fraud is claimed to be in expediting to thirty-three hours when the petition only called for forty-eight. You remember the charge, expediting to thirty-three hours when the petition only called for forty-eight. Now let us see. If it is claimed that

to grant more than the petitions ask is a crime, certainly it must be admitted that to grant less is equally a crime. The only evidence now of fraud in this is that he was asked to expedite the forty-eight hours, but he expedited to thirty-three. That is to say, he violated the petitions, and if that is good doctrine, then the petitions must settle whether expedition is to be granted or not. If that is good doctrine, there is no appeal from the petition. I do not believe that doctrine, gentlemen. I believe it is the business of the Post-Office Department to grant all the facilities to the people of the United States that the people need. He must get his information from the people, and from the representatives of the people, and while he is not bound to give all they ask, if he does give what the people want, and what their representatives indorse, you cannot twist or torture it into a crime. That is what I insist. Now the only charge is here, that while they asked for forty-eight hours he gave thirty-three. That is the only crime. Did he pay too much for it? There is no evidence of it. Before I get through I will show you that there is no evidence that he ever paid a dollar too much for any service whatever.

Now, then, if the doctrine contended for by the Government is correct, then a petition is the standard of duty and the warrant of action, and if they gain upon this route they lose upon every other route. Let us examine. There are three charges. First, false petitions. They were all true. Second, false oaths. They offered to prove it, and then withdrew it. Third, that while the petitions called for forty-eight hours he granted thirty-three, and before you can find that that was fraudulent you must understand the precise connections that this mail made with all others, and it was incumbent upon them to prove not an inference but a fact, that there was not only reason but reason in money—sound reasons for expediting it instead of forty-eight to thirty-three. That is the end of that route. There is not a jury on earth, let it be summoned by prejudice and presided over by ignorance, that would find a verdict of guilty upon the testimony in that route. It is impossible. Another child gone.

44155. Let us see what we get there, and I have not got to my client yet. First, filing false petitions, by Peck, Miner, Vaile, and Rerdell. When? On the 27th of June, 1879. Were they false? Let us see. Mr. Bliss, speaking of these petitions contained in a jacket held in his hand, dated the 29th of June, 1879, record, page 687, said, "We do not attack the genuineness of these petitions." That is the end of that. So much for that.

Second. A fraudulent order increasing service, and yet all the petitions are admitted to be genuine, and the order was in accordance with the petitions on the route. Before the order is fraudulent because it is not in accordance with the petitions, and in this route it is a fraud because it is in accordance with the petitions. Now, just take it. Here is the route. Every petition is genuine, the oath is true, not a petition attacked, the order in accordance therewith, and the only evidence that the order is a fraud is that it was in accordance with genuine petitions recommended by the people and by the representatives of the people. That is all.

Let me tell you another thing. Expedition had been granted on the route long before, and this was simply an increase of trips, and no charge is made that the order granting the expedition ever was a fraud.

Third. Another fraudulent order by Brady, of April 17, 1880, and it turns out that this order was in fact made by French. That was the only evidence that it was fraudulent, but the mere fact that French

made it takes it out of this case, and you have no more right to consider it than you would an order made in the Treasury Department. The only objection to this order now, is what? That it was in violation of the petitions. How? That it took off one or two of the trips. That was the fraud of the order of April 17, 1880. The fraud consisted in taking off two or three trips that had been put on.

Now let us see next. The next fraudulent order was July 16, 1880. What was that for? For putting the service back precisely as it was. Now I want you, gentlemen, to understand that, every one of you. Here is a charge in the indictment of a fraudulent order that took off, say, two trips from the service. That is a fraud they say. Then the next order put those two trips back, and that they say is another fraud. It would have been very hard to have made an order in that case to have satisfied the Government; it was an order to decrease it; it was an order to put it back where it was; that is, it was a fraud, consequently it was a fraud to do anything about it. That is all there is in that case.

Let us boil it down. False petitions. That is the charge. The evidence is that the petitions are all true. A false oath is the charge. The evidence is that the oath is true. A fraudulent order decreasing the service, another fraudulent order increasing the service, that is leaving it just where he found it. In other words, according to this indictment, Brady committed a fraud in reducing the trips, and another fraud by putting the trips back. I think it was only one trip that he reduced. Now that is all that there is in that case. People may talk about it one day or one year. That is all there is and that is nothing.

38145. Fraudulently filing what? A subcontract with J. L. Sanderson. I say you cannot fraudulently file a subcontract against the Government. It is an impossibility. Besides all that, Mr. Sanderson filed his own subcontract. There is no evidence that anybody else did file it or present it for filing. It was not our contract; it was Sanderson's subcontract. How comes that in his indictment? Let me tell you. In the first indictment they had Sanderson; and when they copied that first indictment, with certain variations to make this, they forgot this part and put in the fraudulent filing of Sanderson's contract. It never should have been in this case. It has not the slightest relationship. The real charge of fraud in this route is that a retrospective order was made, and this order bore date February 26, 1881, and was retrospective in this: that it was to take effect from the 15th of January, 1881; but, understand me, this was Sanderson's route. He received that money and it has nothing to do with us. Still I will answer it. That retrospective order gave pay from the 15th of January, 1881. Now, it seems that before the order of February 26, an order had been made by telegraph, dated the 15th of January, 1881, to Sanderson, and this telegraphic order was for daily service on eighty-nine miles. The jacket order of February 26, 1881, was for daily service on the whole route from January 15, 1881. If that order had been carried out he would have received pay for daily service on the whole route instead of for daily service on the eighty-nine miles to which he was entitled. It turned out that the order of February 26, 1881, was signed by Postmaster-General Maynard. The only possible charge is that Sanderson received pay for a daily service on the whole route from January 15, 1881, to February 26, 1881, instead of eighty-nine miles. But we find in the table of payments introduced by the Government, that for that quarter a deduction was made of \$3,422.19, showing that the department could only have paid for the daily service on the eighty-nine miles,

and that is exactly what the daily service would come to on the balance of the route. That ends that route. We had nothing to do with it anyway. It was Sanderson. He filed his own contract, he got his own orders, he collected his own money, and settled with the department. We have nothing to do with it and we will bid it farewell.

The next is No. 38156. First, filing false oath June 12, 1879. The oath was filed May 6, 1879. That is the end of that. I do not care whether it is true or false, that is, so far as this verdict is concerned. I care whether it is true or false, so far as my clients are concerned, but so far as this verdict is concerned, it makes no difference. There is a fatal variance. Second, it is alleged that Brady made a fraudulent order June 12, 1879. The order of June 12, 1879, was made by French. There is another fatal variance. You have no right to take it into consideration. French is not one of the parties here. Third, sending a subcontract of Dorsey and filing it. As I told you before, you cannot by any possibility thus defraud the Government; not even if you set up nights to think about it. There is no proof that the subcontract was a fraud. Let us have some sense. It is an absolute impossibility to commit this offense, and therefore we will talk no more about it. Fourth, the fraudulent order of Brady increasing the distance four miles. This was done on the 2th of December, 1880. That is the only real charge in this route. I turn to the record and find from the evidence, on page 943, that the distance was from five to six miles, according to the Government's own proof. Beside all that, the order of which they complain is not in the record. It was never proved by the Government and never offered by the Government, so far as I can find. That is the end of that route. The only charge in it is that they increased the distance four miles, and the evidence of the Government is that it was from five to six.

The next is 46132. Overt acts: Filing a false oath by everybody June 24, 1879. The evidence shows it was filed April 11, 1879. That is the end of that. No matter whether it is true or false, it is gone. Second, the fraudulent filing of a subcontract. Well, I have shown you that that cannot be fraudulent. The subcontract of Vaile shows that Vaile was to receive 100 per cent. It was executed April 1, 1878, in consequence, as my friend General Henkle explained, of a conspiracy made on the 23^d of May following. The service commenced July 1, 1878. There could have been no fraud in it. It was filed as a matter of fact May 24, 1879, and not June 4. Even if it had been a fraud, which is an impossibility, the description is wrong and the variance is fatal. There is no evidence that any order was fraudulent. Every one in this case is supported by petitions, and every petition is admitted to be honest, or proved to be honest and genuine. There is no proof at all, and not the slightest attempt on the part of the Government to prove that there was any fraud on this route. So much for that.

No. 46247. Let us see just where we are. First, filing false and forged petitions. When? July 26, 1879. By whom? By Peck, Dorsey, and Rerdell. Now, after they had solemnly written that in the indictment, and after it had been solemnly found to be a fact by the grand jury, the attorneys for the Government come into court and admit during the trial that all the petitions upon this route were genuine; every one. It was admitted, I say, that every petition was genuine. Read from page 1008 of the record and there you will find what the court said about these very petitions:

I shall take the responsibility of dispensing with the reading of petitions when there is no point made with regard to them.

The petitions were so good, they were so honest, they were so genuine. they were so sensible, that the curiosity of the court was aroused to find what on earth they were being read for on the part of the prosecution. You remember it. Every one genuine, honor bright, from the first line to the last. In reply to the court at that time Mr. Bliss said:

There is no point made as to the increase of trips. These—

Meaning the petitions—

relate to the increase of trips. There is no point made there.

It is thus admitted that every petition was genuine. Second, a fraudulent order increasing one trip. This order was never proved by the Government. It was not even offered by the Government, so that the route stands in this way: First, a charge of false petitions; second, an admission, that the petitions were all genuine; third, a charge that a fraudulent order was made; fourth, no proof that the order was made. That is all there is to that. And that is the end of it.

No. 38134. First, sending false and fraudulent petitions, and filing the same. When? July 8, 1879. On page 1031 of the record, I find the following:

Mr. BLISS. The petitions under your honor's ruling I am not going to offer.

Why? Because they were all genuine. The court had mildly suggested the impropriety of the Government proving its case by reading honest petitions. Consequently, when it came to this, the next route, he said:

The petitions under your honor's ruling I am not going to offer.

Why? Because they are all honest and under a charge in the indictment that they are all fraudulent he did not see the propriety of reading them. That is what he meant. This remark was made because the Government admitted these petitions to be honest. When were these petitions filed? The indictment says July 8. The evidence says May 6. So that if every petition had been a forgery you could not take them into consideration on this route. It is charged that Miner & Co. signed and placed in Brady's office a false oath on July 8. On record, page 1032, it appears that it was filed May 8, 1879, and not as described in the indictment. The pleader has the privilege of describing it right or describing it wrong. If he describes it right it can go in evidence. If he describes it wrong it cannot go in evidence, and they have no right to complain if you throw out evidence that they make it impossible for you to receive. It has been charged with regard to this affidavit that Dorsey was not at that time contractor, and therefore had no right to make the affidavit. The affidavit was made April 21, 1879, and the regulation that such affidavits must be made by the contractors was made July 1, 1879. That is a sufficient answer. The next charge is a fraudulent order made by Brady July 8. The petitions were all admitted to be genuine. There was no evidence that the order was not asked for by the petitions. There was no evidence that the order in and of itself was fraudulent; not the slightest. There is nothing like taking these things up as we go and seeing what the Government has established. I know that you want to know exactly what has been done in this case and you want to find a verdict in accordance with the evidence.

Route 38140. Overt acts: First, making, sending, and filing false petitions. When were they made and sent? The 23d day of May, 1879. There were some petitions filed May 10, 1879, and there was a letter of the same date. They are misdescribed. They are all genuine but they are out of the case as far as this is concerned. I will tell you after

awhile where they are applicable in this case. A letter of Belford, of April 29, 1879, and a letter of Senator Chaffee, of April 24, 1879, we have, while the indictment charges that they were all filed May 23, 1879. There is an absolute and a fatal variance. All these petitions, however, are admitted to be genuine and honest. See record, pages 1001-1003. The charge in the indictment is that they were forged, false, and altered. The admission in open court, by the representative of the Government is, that they were genuine and honest. There is the difference between an indictment and testimony. There is the difference between public rumor and fact. There is the difference between the press and the evidence. The next is that a false oath was filed by John W. Dorsey on the 23d of May, 1879. When was that oath filed? April 30, 1879. A fatal variance. Yet the man who wrote the indictment had the affidavit before him. Why did he not put in the true date? I will tell you after awhile. Did he know it was not true when he put it in the indictment? He did, undoubtedly.

Third. Fraudulent order of May 23; reducing the time from nineteen and three-quarter hours to twelve hours. As a matter of fact, no order was made on the 23d of May upon this route. It is charged in the indictment that it was made on the 23d of May. The evidence shows that it was made on the 9th of May. There is a fatal variance, and that order cannot be considered by this jury as to this branch of the case. Here is an order of which they complain. They charge that it was made on the 23d day of May, the same day the conspiracy was entered into. As a matter of fact, it was made on the 9th of May. On this description it goes out, and it goes out on a still higher principle: That an order could not have been made on the 9th of May in pursuance of a conspiracy made on the 23d of that month. But I am speaking now simply as to the description of this offense.

Fourth. A subcontract was fraudulently filed. I have shown you it is impossible to fraudulently file a contract; utterly impossible. All the agreements imaginable between the contractor and subcontractor cannot even tend to defraud the Government of a solitary dollar. I make a bid and the contract is awarded to me at so much. The mail has to be carried. The Government pays, say \$5,000 a year. It makes no difference to the Government who carries the mail under that contract, so long as it is carried. It is utterly impossible to defraud the Government by contracting with A, B, C, or D. That is the end of that route. The order itself is misdescribed, and that is all there is in it. When the order is gone everything is gone.

No. 38113. Overt acts: Fraudulently filing a subcontract. We do not need to talk about that any more. Second, Brady fraudulently made an order for increase of trips. The evidence is that an increase was asked for by a great many officers, a great many representatives, and by hundreds of citizens, and that the increase was insisted upon not only by the officers who were upon the ground, but by General Sherman himself. I do not know how it is with you, but with me General Sherman's opinion would have great weight. He is a man capable of controlling hundreds of thousands of men in the field, a man with the genius, with the talent, with the courage, and with the intrepidity to win the greatest victories, and to carry on the greatest possible military operations. I could have nearly as much confidence in his opinion as I would in the guess of this prosecution. In my judgment I would think as much of his opinion given freely as I would of the opinion of a lawyer who was paid for giving it. General Sherman has been spoken of slightly in this case, but he will be remembered a long time after

this case is forgotten, after all engaged in it are forgotten, and even after this indictment shall have passed from the memory of man.

No. 38152. Overt acts: Fraudulent orders of August 3, 1880, discontinuing the service and allowing a month's extra pay for the service discontinued. That is all. May it please your honor, in this route the only point is, had the Postmaster-General the right to discontinue the service? And if he did discontinue it was he under any obligation to allow a month's extra pay? It is the only question. I call your honor's attention to the case of the United States against Reeside, 8 Wallace, 38; Fullenwider against the United States, 9 Court of Claims, 403, and Garfield against the United States, 3 Otto, 242. In those cases it is decided not only that the Postmaster-General has the right to allow this month's extra pay, but he must do it. That is in full settlement of all the damages that the contractor may have sustained. The court can see the very foundation of that law. For illustration, I bid upon a route of one thousand miles. I am supposed to get ready to carry the mail. Five hundred miles are taken from that route. The law steps in and says that for that damage I shall have one month's extra pay on the portion of the route discontinued. It makes no difference whether I have made any preparation or not. The law gives me that and no more. If I should go into the Supreme Court and say that my preparations had cost me \$50,000, and the month's extra pay was only \$5,000, I have no redress for the other \$45,000. That is all that is charged in this instance. And if the Second Assistant Postmaster-General or any one else had done differently he would have acted contrary to law. He is indicted for doing in this case exactly what is in accordance with the law. Let us get to the next route. That is all there is in this.

No. 38015. Overt acts: Sending a false oath. When? May 21. The evidence shows that on May 14 it was sent, on May 15 it was filed. A fatal variance no matter whether it is true or false. That oath is gone. That is the end of it. What else? They did not show that the oath was false. First, it is misdescribed in the indictment as to the date it is filed; second, the evidence shows that it is honest and genuine, which is also fatal. That is the end of this route, as far as the indictment is concerned. Second, that Dorsey made and Rerdell filed false petitions. There is no proof that any of the petitions were false, no proof that any were forged, and no proof that John W. Dorsey or M. C. Rerdell had anything to do with that route one way or the other. All the petitions on record, page 1160, are admitted to be genuine except one. One petition asking for a ten-hour schedule was attacked and only one. But this petition was filed May 14, 1879, and that is out so far as the indictment is concerned.

The COURT. What is the date of the indictment?

Mr. INGERSOLL. The 23d day of May. The indictment says that this was filed July 10, 1879; the evidence says May 14, 1879. A fatal variance. It is not the same one they were talking about. They did not find the petition they described. It is their misfortune. Now here is only one petition attacked. Who attacked it? Mr. Shaw. See page 1159. They were going to show that that was a forgery and they were going to show it by Shaw. That was the only one they attacked. What does Shaw say?

I signed a petition for increase of service and expedition upon that route, but I did not read the petition. If I had, I should have discovered a ten-hour schedule.

He would not have discovered it if it had not been there, would he? That shows it was there.

I would not have recommended a ten-hour schedule on a seventy-mile route.

He was the man that was going to prove that ten hours was not there. But it shows that he was not able to do it, because he first swore that he never read it, and second, that he would not have signed it if he had. Good by, Mr. Shaw. That is all there is as to that matter. The court will understand I am going now upon what is in the indictment, and not what has been thrown in from the outside.

The COURT. I understand that.

Mr. INGERSOLL. I am going according to the strict letter of this indictment. I am holding these gentlemen to the law. That is what the law is for. You cannot come into this court and throw seven or eight cords of paper at a man and say, "You are guilty." They have managed this case after that fashion, but I propose to bring them back to the law.

Route 35051. First. Signing, sending, and filing false petitions. When? August 2, 1879. There is no evidence of any petitions being filed on that day—none whatever. The only thing near it is a letter of Frederick Billings, on record, page 1217. This letter was dated July 31, 1879. Under the charge of signing, sending, and filing false petitions, the only evidence is that a man by the name of Billings wrote a letter, and there is not the slightest testimony to show that a solitary word in that letter was false—not one. Nothing to connect it with Mr. Billings; no evidence that he ever spoke to him on the subject; no evidence that Billings knew who was carrying the mail; no evidence that he ever knew or did a thing except to write that letter, and he was interested, I believe, in the Northern Pacific Railroad. Now, that is every thing there is there; that is all there is in that case. Nobody has tried to show that the letter of Billings was not true.

What else? A fraudulent order of August, 1879. Who made it? The indictment says Brady made it. The evidence says it was signed by French and it was in accordance with Billings's letter. Is there any fraud now in that route? Let us be honest. False petitions: Not one filed. False oath: Not one attacked. Simply a letter that we did not write, and that there is no evidence that we ever asked to have it written. That is the end of that. But they cannot even get the letter in, gentlemen. They did not describe it right.

The next route is 40104. Overt acts: First. Fraudulently filing a sub-contract. That you cannot do. When did we file it? July 23, 1879, the indictment says. What does the evidence say? May 8, 1879. First, we could not commit the offense; secondly, you could not prove it under this description.

Second. Filing a false oath. When did we file it? July 23. That is what the indictment says. What does the evidence say? November 26, 1878. A fatal variance. See record, page 1305. That is the end of that. The indictment is for something. You have got to follow it and it certainly is not as hard work to write an offense against a man as it is to prove it. If they cannot write an offense, you certainly ought not to find the man guilty. Besides all that, that oath was not even impeached, it was not even attacked. There was not a word said upon the subject except in the indictment. It was charged to be false and not one word of evidence was offered to this jury to show that it was false.

Third. An alleged fraudulent order of increase by Brady, July 23, 1879. Brady never signed any such order. It was signed by French. That is the end of it, no matter whether it was good or bad, honest or dis-

honest. That is the end of it, and yet there is not a particle of evidence to show that it was dishonest, but you must hold them to their own case as they have written it, and not as they wish it was now.

Fourth. A fraudulent order of April 10, 1880, allowing one month's extra pay on the service reduced. This order was not even proved by the Government. As a matter of fact, it was not offered by the Government, and if it had been offered, and if it had been proved it would have only established the fact that Mr. Brady acted in accordance with law.

Now we come to some more. 44160. First, filing false petitions. When did we file them? July 16, 1880. The proof is that they were filed long before that time. The proof is that Peck, Dorsey, and Rerdell had nothing to do with this route after the 1st of April, 1879, and the petition claimed to be signed by Utah people and claimed to be fraudulent is the petition marked 19 Q. It was filed on the 7th day of May, 1879. That is a fatal variance. The indictment charges it was filed July 16, 1880. The petition cannot be considered. There is another petition marked 20 Q, claimed to have been written by Miner, upon which the name of Hall is said to have been forged. It has no file mark whatever and consequently cannot be the petition referred to in the indictment. That was filed. That, however, has been explained by General Henkle fully. This petition was identified by McBean, and was signed by him, and he recognized the signatures of many of the citizens of Canyon City. Mr. Merrick admitted that the petition, 19 Q, was never acted upon. As a matter of fact, orders had been made before the petition was received, which shows conclusively that they were not acted upon. The petition marked 20 Q, to which Hall's name was, as is claimed, forged, was never filed, and was consequently never acted upon. This charge now stands as follows: Two petitions, one being filed May 17, 1879—a fatal variance—and the other not filed—another fatal variance. These petitions are both described as having been filed July 16, 1880. The variance is absolutely fatal, and these petitions cannot be considered. Besides, the order was made before the petition 19 Q was filed.

Second. The fraudulent order by Brady for increase of trips, July 16, 1880. The only objection to this route is that the expedition was made before service was put on. This was in the power of the Postmaster-General. It has been done many times and is still being done by the Post-Office Department, and the fact that it was done in this case, does not even tend to show that any fraud was committed or intended. That is all there is in that case. The petitions were never acted upon. One was never filed and the other is not described, or rather is misdescribed.

Route 38150. Overt acts: A fraudulent order by Brady reducing service to three trips a week and allowing a month's pay on service dispensed with July 26, 1880. This point, gentlemen, I have already argued. Whenever the Post-Office Department dispenses with any service it is bound to give one month's extra pay any time after the contract has been made and any time after the bid has been accepted. It is bound to give the month's extra pay on the service dispensed with, and this question, as you heard me say a little while ago, has been decided by the Supreme Court in Garfield's case. This route was operated by Sanderson. He was the subcontractor, and according to the subcontract filed and presented here in evidence he received every cent of the pay. We could have had no interest in perpetrating any fraud upon that route. Why? Because another man, J. L. Sanderson, received every dollar and we not one cent.

Another fraudulent order of increase, August 24, from Powderhorn to Barnum, seven miles. No fraud was shown, but the order, in fact, was made for the benefit of Sanderson and not for the benefit of any of the defendants in this case. In other words, it was made for the benefit of the people, it was made because they wished to reach another post-office.

Another charge is that the subcontract made with Sanderson was filed September 18, 1878. Recollect the charge is about filing this subcontract. The fact is it was filed in 1878 to take effect from July 1, 1878. See record, page 1406. On this very route the subcontract took effect the 1st of July, 1878, with Sanderson, and from that moment until now he has received every dollar. This route, as a matter of fact, is out of the scheme. Sanderson carried the mail from the 1st of July, 1878, until the end of that contract, the last day of June, 1882. So much for that route. It is gone. Nobody can get it back, either, in this scheme.

Route 40113. Overt acts: Filing of a false oath. When? June 3, 1879. When was it filed? May 7, 1879. That oath is gone. Was it false? They did not attack it. They never impeached it. Good.

Second. False petitions filed. When? June 3, 1879. All the petitions were filed prior to May 10, 1879. They are gone. One was filed May 23, but none was filed as alleged on June 3. They are gone. A magnificently written instrument. A fatal variance as to every petition. And yet not a solitary petition was attacked. Every petition was genuine and honest.

Third. A fraudulent order by Brady for increase and expedition. This order was asked for by the petitions. No fraud was established. See record page 1503 on this route; also page 2159.

Fourth. They also charge that Brady made a fraudulent order on the 4th of January, 1881. But the Government never proved that order, never offered any order of that date. That is the end of that order.

Fifth. A fraudulent order of February 11, 1881. This was not offered by the Government, and no evidence was offered as to the existence of the order, neither the jacket, nor the order, nor the petitions, so far as I can find. That is the end of that. Every overt act so far, except some of the orders, wrong. The overt acts charged were filing fraudulent petitions. When? May 23, 1879. These are the petitions said to have been gotten up by Wilcox. Mr. Wilcox was a Government witness, and he swore that every petition was honest, that every name was genuine, and that in order to get the names he did not circulate a falsehood, he circulated only the truth. To use his own language, "I did only straightforward, honest work." That is all there is on that.

44140, is the number of this route, and this evidence is on record, page 1568, and in regard to getting up these petitions you will recollect the language used by the court. His honor said in effect clearly, "Every man carrying the mail has the right to take care of his business. He has the right to get up petitions. He has the right to call the attention of the people to what he supposes to be their needs in that regard. He has the right to do it; and the fact that he does it is not the slightest evidence that he has conspired with any human being." Deny me the right to attend to my own affairs? If I have taken the route from the Government, and contract to carry the mail, tell me that I cannot suggest to my fellow-citizens that they ought to have a daily mail instead of a weekly? Tell me that I have not the right to talk it on the corners, in every post-office for which I start, and that if I do I am liable to be pursued and convicted of an infamous offense? Every man has

the right to attend to his own affairs, and he has the right to get all the people he can to help him. He has no right to go around lying about it, but he has the right to call their attention to the facts the same as you would have the right to get a road by your house; just exactly the same as you would have the right to get a school-house built in your district, no matter if you were to have the contract for making the brick. You have a right to say what you please in favor of education, no matter if you are an architect and expect to be employed to build the school-house, and any other doctrine is infinitely absurd.

There is another charge: That a false oath was filed on the 24th of May. The affidavit was made by Mr. Peck, and I believe it has been admitted that Mr. Peck never did anything wrong. Then there is alleged to be a fraudulent order for increase, signed June 26, and they never introduced the slightest evidence tending to show that there was fraud in the order. It was made in accordance with the petitions. It was made in accordance with what we believed to be the policy of the Post-Office Department. And allow me to say to your honor that I think that the general policy of the Post-Office Department, as disclosed in the documents that have been presented in the reports made to Congress that have become a part of this case, I think even from that evidence I have the right to draw an inference as to what the policy of the department was.

The COURT. I have no doubt in the world as to the views of the Post-Office Department in regard to that subject. The court refused to receive evidence on that subject in defense, for the simple reason that the court was of opinion that no Second Assistant Postmaster-General had the authority to establish any policy for this Government or for any branch of this Government. The policy of the Government is to be found in its laws, and the court was unwilling to allow a Second Assistant Postmaster-General to set up his policy in his defense against a charge in this court. He had no right to have a policy.

Mr. INGERSOLL. We never set up the policy of the Second Assistant. We never asked to be allowed to prove the policy of the Second Assistant. We never imagined it nor dreamed of it nor heard of it until this moment. What we wanted to show was the policy, not of the Second Assistant, but of the Postmaster-General. But I am not speaking now upon that branch.

The COURT. The Postmaster-General by law is the head of the department of course. But several assistants were given him by law and he had the authority to apportion out the business of the department amongst those several assistants. The particular business of the department pertaining to the increase of service and expedition of routes belonged under this apportionment to the Second Assistant Postmaster-General. His acts therefore are to be looked to.

Mr. INGERSOLL. I do not claim, if the court please, that his policy had anything to do with it. I simply claim that from the orders that have been introduced, not of the Second Assistant, from the books that have been introduced, showing the views of the Postmaster-General, not of the Second Assistant. I also admit that if the Postmaster-General had ordered by direct order the Second Assistant Postmaster-General to expedite every one of these routes, even then there could have been such a thing as a conspiracy to expedite them too greatly, and to receive money from every man for whom they were expedited. I understand that. But in the absence of any proof that it is so, all I have ever insisted was that the general policy of the head of the department might be followed by any subordinate officer without laying himself open to the charge that he had been purchased. That is all.

Now, gentlemen, all these things had been asked. They had been earnestly solicited by hundreds of Congressmen, by Senators, by judges, by governors, by Cabinet officers, and by hundreds and hundreds of citizens.

Now, let me recapitulate all the overt acts—and I have gone over them all now excepting one, and I will come to that presently. In the indictment there are twelve charges as to filing false petitions. There are ten charges as to false oaths. There are seven charges as to fraudulently filing subcontracts; and the evidence is that the ten oaths are substantially true; that it is impossible to fraudulently file a subcontract; and as to the petitions, that every one is absolutely genuine and honest with the exception of three. They prove that the words “schedule, thirteen hours,” were inserted; that is, they tried to prove that by Mr. Blois, who is an expert on handwriting, as has been demonstrated to you. One with thirteen hours inserted in it, and the very next paragraph in that same petition begs for faster time. I have not the slightest idea that that ever was inserted by anybody. I believe it was in there when it was signed. And why? There would have been, there could have been, there can be, no earthly reason for inserting those words. You cannot imagine a reason for it.

Now, that is thirteen hours. Then there is another one they say had some names of persons living in Utah, and we say that that is not described property; not only that, but that it was never acted upon, and in my judgment that whole thing is a mistake and not a crime, because there were plenty of petitions without that. There was no need of it. All the other petitions have either been proved, or have been admitted to be absolutely genuine.

Now, I have gone over every overt act except payments, and when it was said here in court, or when the objection was made to these being proved as overt acts, the court will remember that again, and again, and again the prosecution denied that they were offered as overt acts.

The COURT. I never understood them as being offered as overt acts.

Mr. INGERSOLL. At that time the court made just the remark that your honor has made now. He said: “But what are the payments?” Now, I will take up the payments, and we will see whether there are any overt acts in the payments, gentlemen.

Now, let me call your attention to that magnificent rule that has been laid down by the court. When you describe an offense you are held by the description. When it is said that I made a false claim against the Government in a conspiracy case, for instance, that I conspired to defraud the Government, that I presented a false claim, it may be that the laxity or lenity of pleading might go to the extent of saying that the pleader need not state the amount of that false claim, but if the pleader does state the amount of that false claim he is bound by that statement. Now, that is my doctrine.

The COURT. What I understood in regard to the evidence of the payments is this: The charge was a conspiracy to defraud and the averment was that the fraud had been completed, and this evidence of payments was to show that the fraud had been carried out.

Mr. INGERSOLL. That is all. Now, let us see if this can be tortured into an overt act. I now come to the presentation of false claims charged to have been presented and collected by these defendants. It is a short business. On the route from Kearney to Kent the charge is that Peck and Vaile presented false claims on the third quarter of 1879 for \$550.72. The entire pay for that quarter, three trips and expedition, was \$795.78. And there is no charge that the increase of trips was

fraudulent. Only the expedition was attacked. The three trips, according to the old schedule price, came to \$735.81, all of which was honestly carried, honestly earned. Now, deducting from the pay, \$795.78, the amount of the three trips on the old schedule honestly performed, \$735.18, if the expedition was fraudulent, we have a fraudulent claim of \$60.16. And yet the Government charges that we made a claim of \$550.72. Not one cent is allowed for carrying the two additional trips without expedition.

There is another trouble about this. It is charged that Peck and Vaile presented this claim for their benefit. The record, page 386, shows that Peck did not present this claim; that it was presented by H. M. Vaile; that H. M. Vaile received the warrant for the full amount; that he held a subcontract at that time for every dollar. This is another fatal variance, and the evidence of Vaile is that every dollar belonged to him; that not a dollar of that money was ever paid to any other one of the defendants; that he paid all the expenses, that he paid the debts, and that there never went a solitary cent to any Government official. So much for that payment.

The next charge is that on route 41119, from Toquerville to Adairville. Peck presented a false claim for the third quarter of 1879, for \$2,460.14. The pay for that quarter was \$3,628.14 for seven trips and expedition. The pay for the three trips on the old schedule was \$876, a difference of \$2,752.14. And yet the Government charges that the false claim presented was \$2,460.14. If they give the figures they must give them correctly. If I am charged with presenting a claim against the Government for \$2,460, that is not substantiated by showing that I presented a claim for \$2,700. If you give the figures you must stand by the figures and you are bound by them. You cannot charge one thing and prove something else. This is a fatal variance.

In addition to this fact, we find the deductions for failures in that very quarter amounted to \$540.42 and this deducted from the other amount leaves \$2,211.72. So that in both cases the variance is absolutely fatal. I am showing you these things, gentlemen, so that you may see that there is in this case no evidence to fit the charges in this indictment.

44140, Eugene City to Bridge Creek. It is charged that Peck and Dorsey presented a false account for the third quarter of 1879, for \$4,783.99. The pay for three trips with expedition was \$4,689.22; the pay for one trip on the old schedule was \$617, a difference of \$4,072.22. The Government says the difference was \$4,783.99, an absolutely fatal variance.

Now, as a matter of fact, there were deductions in that quarter of \$1,932.83, and this is deducted from the entire pay, leaving only as a claim \$3,766.39. And yet the Government charges that we presented a false claim for \$4,783.49. It will not do. It is a fatal variance. But when we take into consideration that there is no claim that the increase of trips was fraudulent, only the expedition, and that by the old schedule one trip came to \$617, that three trips came to \$1,851, and that added to deductions would make \$3,773.83 to be deducted from \$4,689.22, it would leave as a fraudulent claim, even if their claim was true, \$915.39.

Now, the next is 44155, The Dalles to Baker City. The false claim was \$8,896, by Peck. The pay per quarter was \$16,666.09. The pay for three trips and expedition was \$7,770. A difference of \$8,896.09. But there were deductions, \$99.34, leaving \$8,796.75. But by making this claim the Government concedes that the expedition was legal, and

another trouble is that the payment on this route was made to Vaile, not to Peck and Miner. It was made to Vaile, who was the subcontractor for the full amount, and this is another fatal variance.

Now, route 46132, Julian to Colton. The charge is that Peck and Vaile presented a fraudulent claim for the third quarter of 1879, for \$1,657.71. The pay for three trips and expedition is \$1,954.71. For three trips on the old schedule it was \$891, a difference of \$1,063.73. A fatal variance. Besides it was not Peck and Vaile. Vaile was the subcontractor at full rates on this route. He presented the claim. He received the entire pay. Another variance.

Route 44160, Canyon City to Camp McDermitt. The charge is that Peck and Vaile presented a false account for the fourth quarter of 1879, for \$11,819.66. It is charged in the indictment that this was paid in pursuance of the order set out in the indictment, and we find on page 64 that the order was dated July 16, 1880. That was the order. No such payment was made in pursuance of that order for the reason that an order was made nearly a year afterwards, and the order of July 16, 1880, as set out in the indictment, was not retrospective, a fatal mistake in their indictment. As a matter of fact, the pay for the fourth quarter of 1879, was \$5,375. There were deductions to the amount of \$352.72 and the balance was \$5,022.28 instead of \$11,819.66. And this was paid to Vaile, who was a subcontractor at full rates, and the variance in the case is absurd and fatal.

Route 46247, Redding to Alturas. The charge is that Peck and Dorsey filed a fraudulent account for the third quarter of 1879 for \$7,485.06. This was in pursuance of the order set out in the indictment and the only order set out in the indictment is dated February 11, 1881. That is another fatal variance.

The next route is 35051, Bismarck to Miles City. The charge is that Miner and Vaile presented a false account for the fourth quarter of 1879, for \$14,100. The pay for the quarter for six trips was \$17,500. For three trips under the old order, the pay was \$8,750, leaving \$8,750 as the outside sum that could have been fraudulent, and yet the Government charges \$14,100, an absolutely fatal variance. Besides that, there were deductions in that very quarter of \$4,503. This amount deducted from \$8,750 leaves \$4,256.11 as the greatest amount that could by any possibility have been fraudulent.

Three routes are lumped together next in the indictment, 38134, 38135, 38140. 38134, Pueblo to Rosita; 38135, Pueblo to Greenhorn; and 38140, Trinidad to Madison.

The charge here is on page 81 of the indictment that Miner presented a fraudulent account for the fourth quarter of 1879 on all the routes, amounting to \$2,776.47.

The greatest possible difference that could be made on route 38135 is \$767.20. The greatest difference that could be made on route 38134 is \$1,940. The greatest difference that could be made on route 38140 is \$639.51. These three differences added together do not make what is charged in the indictment, \$2,776.47, but as a matter of fact they amount to \$3,396.71. This cannot be the fraudulent claim described in the indictment.

But I find that on the first route there was a reduction of \$12.60, on the second route of \$154.38, and on the third of \$38.02, and these deductions added together make \$205.90 and deducted from the \$3,396.71 leaves \$3,190.81. And yet the Government charges that the fraudulent claim was \$2,776.47. It is impossible that the amount of the claim said to be fraudulent by the Government can be correct; but as a matter of

fact according to the evidence there was no fraud upon any claim in that route.

The next is route 38150, Saguache to Lake City. The charge is that Miner presented a false account for \$2,202 77, and that he did this in pursuance of the order set out in the indictment, and the only order set out is dated August 24, 1880. That is an absolutely fatal variance. As a matter of fact, Sanderson was the subcontractor on this route from July 1, 1878, at full rates, and he carried the mail from July 1, 1878. The route was expedited on his oath and for his benefit. No point was made during the trial that the oath was not true. And the pay was calculated upon Sanderson's oath and the money paid to him. The only claim is that there was an error in the order of \$4,568 per year, and it is admitted that the mistake was afterwards corrected and the money refunded. You remember it, gentlemen. Mr. Turner, in making up the account showing how much the expedition would come to—and you understand the way in which they make up that expedition—made a mistake and added to the expedition and the then schedule the amount of the then schedule, four thousand and odd dollars. He made the mistake and it was honestly made. No man would dishonestly do it because it was so easy of detection, and that was his only fault, gentlemen. The only crime he ever committed in this case was to make that mistake. That mistake was afterwards discovered, and the money was paid back by Mr. Sanderson; and, yet, that man has been indicted, has been taken from his home charged with a crime. He has been pursued as though he were a wild beast. He made one mistake. They could not prove the slightest thing against him. There was no evidence touching him. There was only one way for them, and that was to dismiss him with an insult. You remember the case. Not one thing against that man—not one single thing. He stands as clear of any charge in this indictment as any one upon this jury. He is an honest man. It is admitted now there was no conspiracy on this route either. It is Sanderson's route, not ours. Not only that, but the Government says that it was not one of the routes with which Vaile had anything to do, or in which Vaile had any possible interest. The failure here is fatal to the indictment, and I shall endeavor to show that it is fatal to the entire case.

The next route is 35105, Vermillion to Sioux Falls. It is charged that Vaile and Dorsey presented a false account for the third quarter of 1879, for \$881.14. The pay for six trips and expedition was \$1,085.58. The pay for two trips on the old schedule was \$204.44, showing a balance for once, as stated in the indictment—it being the only time—of \$881.14. Parties are entitled to pay for the extra trips, and the number of men and horses has nothing to do with the value of an extra trip. You understand that. If I agree to carry the mail once a week for \$5,000 a quarter, and you wanted me to carry it twice a week, then I get \$10,000 a quarter, no matter if I do it with the same horses and the same men. That is not the Government's business. You all understand that, do you not? Every time you increase a trip you increase the pay to the exact extent of that trip, no matter whether it takes more horses or not. If I agree to carry the mail once a month for \$5,000 a year, and you want me to carry it once a week I am entitled to \$20,000, no matter if I do it with all the same men and same horses. It is nobody's business. But, if the Government wants the mail carried faster, then I am entitled to pay according to the men and animals required at a more rapid rate. You all understand that. But as a matter of fact, upon this route, Vaile was the subcontractor at full rates, was so recognized by the Govern-

ment and received every dollar himself, and, consequently, the charge that it was paid to John W. Dorsey is not true, and is a fatal variance. The Government proved it was paid to Vaile.

Next we have two routes, 38145, Ojo Caliente to Parrott City, and 38156, Silverton to Parrott City. These routes are put together in the indictment. It is charged that a false account was presented of \$6,004.17, and that this was done in pursuance of an order set out in the indictment. The order set out is on page 47. It is in relation to route 38145. The order was made not in relation to the other route. No order as to the other route was made. This was made February 26, 1881, consequently the claim presented for the third quarter of 1879 could not by any possibility have been in pursuance of that order. That order was made in 1881. The payment for the third quarter of 1879 could not by any possibility have been made in pursuance of that order. The evidence shows that it was paid before and consequently there is a fatal variance.

Routes 40104, Mineral Park to Pioche, and 40113, Wilcox to Clifton—two routes put together. The charge is a fraudulent presentation for the third quarter of 1879, of \$7,064.72. The pay on the first route was \$10,503.62, on the second route \$3,528. No proof has been offered that the expedition was fraudulent. Not a witness was called on route 40113. Not a solitary petition was objected to, the truth of no oath was called in question, the honesty of no order was attacked, and how can you say that the claim was fraudulent? No order attacked, no oath questioned, no petition impeached. The only evidence upon these two routes was something read in regard to productiveness and the size of the mail, and that is all.

Route 38113, Rawlins to White River. The charge is that John W. Dorsey and Rerdell presented a false account for the third quarter of 1879 for \$2,975. The order set out in the indictment was made March 8, 1881, consequently the variance is absolutely fatal, and there is no allegation in the indictment that the expedition was fraudulent.

Now I have gone through every route with the payments. As to the general allegation of the amount of money fraudulently claimed and received, the allegation in the indictment is that J. W. Dorsey received, by virtue of these fraudulent orders, made in pursuance of the conspiracy, brought to perfection by these overt acts, for the year ending the 30th day of June, 1880, \$124,591. Good. The evidence shows that there was paid on the seven Dorsey routes in all \$62,831.46. That is fatal as to that.

But we will go further. One of these routes was turned over to Vaile by Dorsey, route 35015, and the amount paid to Vaile was \$2,837.16. So that the amount paid on the Dorsey routes, instead of being \$124,591, was in truth and in fact \$58,994.30.

Now the charge is that this was all received by John W. Dorsey, whereas the evidence shows that John W. Dorsey received three warrants, two for \$87 each, both of which were recouped, and one warrant for \$392, and that is every cent he ever received, according to the evidence in this case. There is what you might call a discrepancy. The indictment says he got \$124,591. The evidence shows that he got \$392 and not another copper. I shall insist that that is a variance. If it is not a variance, I will take my oath it is a difference.

The second claim is that John R. Miner received upon the routes awarded to him, and claimed to be his in the indictment, \$93,067 for the fiscal year ending June 30, 1880. The evidence is that as a matter of fact on all these routes the money was paid to assignees and subcon-

tractors, and that John R. Miner, as a fact, received not one cent from the Government.

The third charge is that Peck received for the same fiscal year \$187,438. The evidence shows that he received nothing. There is another difference. Thus it will be seen that every link in the chain in this indictment is either a mistake or a falsehood. Every other one is a mistake and then every one is a falsehood, and this indictment was made by adding mistakes to falsehood, and what the indictment weaves the evidence reveals.

Now, why were these dates put in this indictment, gentlemen? We have now gone over every overt act charged in this indictment. The result is that not one of the charges set forth has really been sustained. Hereafter I will notice some things that they have proved outside of the indictment. Nearly every petition and letter is admitted to have been honest and genuine. Those that have been attacked were misdescribed in the indictment and the evidence has shown that they were substantially true. There is a fatal variance between the allegation and the proof so far as these charges in the indictment are concerned, and they are left absolutely without a prop. The dates attached to the overt acts are false. There is only one of the routes in which the petitions are properly described and that is route 44140, where the petitions are alleged to have been and were filed on the 23d of May, and every one was proved to have been genuine and honest. The dates in the indictment were false. Now, why? Let me tell you, gentlemen. They had to deceive the grand jury. It would not do to tell the grand jury these men conspired on the 23d of May, and in pursuance to that conspiracy filed some affidavits on the third day preceding. They had first to deceive the grand jury and put in false dates for the filing of petitions, for the filing of subcontracts, and for the drawing of money. What else did they want these false dates for? To deceive the circuit court, or rather the supreme court—to deceive his honor, because if the date of these petitions, the date of these oaths had been set forth in the indictment it would have been bad. The court would have instantly said, you cannot prove a conspiracy on the 23d of May by showing acts in April previous. So these false dates were put in, in the first place, to fool the grand jury, and in the next place to keep this court in the dark. It was necessary to have a good charge on paper, and why? Did they expect to win this case on that indictment? No; but they could keep it in court long enough to allow them to attack and malign the character of these defendants; they could keep it in court long enough to vent their venom and spleen upon good and honest men, and justify in part the commencement of this prosecution.

At this point (12 o'clock and 40 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. INGERSOLL. [Resuming.] May it please the court, and gentlemen of the jury: This forenoon I tried to strip the green leaves off the tree of this indictment. Now, I propose to attack the principal limbs and trunk. What is the scheme of this indictment? I insist that the law is precisely the same as to the scheme of the conspiracy in its description that it is as to the description of an overt act. Now, what is the

scheme of this indictment? That is to say, the scheme of this conspiracy? We want to know what we are doing. It is the great bulwark of human liberty that the charge against a man must be in writing, and must be truthfully described.

First. For the defendants, with the exception of the officers Brady and Turner, to write and procure the writing of fraudulent letters, communications, and applications. Now, let us be honest. Is there the slightest evidence that a fraudulent letter was ever written. Is there the slightest evidence that a fraudulent communication was ever sent to the department? Not the slightest evidence. Second. To attach to said petitions and applications forged names. Is there any evidence of that except in one case, and the evidence in that case is that the order was made before the petition was received and that the petition was never acted upon. More than that, is there any evidence as to who forged any names to any petitions? Not the slightest. Which of these defendants are you going to find guilty upon that petition when there is not the slightest evidence as to who wrote it? What next? To have these petitions signed by fictitious names or with the names of persons not residing upon the routes. Is there any evidence of that kind? Is there any evidence that the signatures of real persons were attached, and the real persons did not live upon the routes? I leave it to you, gentlemen. Fourth. To make and procure false oaths, declarations, and statements. Those I shall examine. Fifth. For William H. Turner to falsely indorse on the back of these jackets false brief statements of the contents of genuine petitions. You know what has become of that charge, gentlemen. This indictment against Turner has been changed into a certificate of good moral character. That is the end of the indictment so far as he is concerned, and I am glad of it. He is a man who fought to keep the flag of my country in the air, and who laid upon the field of Gettysburg sixteen days with the lead of the enemy in his body, and I am glad to have the evidence show that he was not only a patriot, but an honest man with a spotless reputation. I do not think in order to be a great man that you have got to be as cold as an icicle. I do not think that if you wish to be like God (if there is one) it is necessary to be heartless. That is not my judgment. When I find that a man is honest I am glad of it. When I find that a patriot has been sustained my heart throbs in unison with his. What is the next? That Brady, for the benefit, gain, and profit of *all* the defendants—and I emphasize the word *all* because upon that I am going to cite to the court a little law—made fraudulent orders; that is, for the benefit of Turner, Brady, and everybody else. Eighth. That he caused these fraudulent orders to be certified to the Auditor of the Treasury for the Post-Office Department. Ninth. That Brady refused to enter fines against these contractors when they failed to perform their service; that he fraudulently refused to impose these fines. What is the evidence? The evidence is that the whole amount of fines imposed by Brady was \$126,865.80. That evidence is given in support of the charge that he refused to impose them, yet the imposition amounts to \$126,000. How much of that vast sum did he relieve the contractors from upon the evidence? Twenty-three thousand dollars, leaving standing of fines that were paid, \$103,670.12. That evidence is offered to show that he conspired not to impose the fines. One hundred and twenty-six thousand dollars imposed in fines, and only \$23,000 remitted. Yet the charge was, and an argument has been made upon it before this jury, that the contractors agreed that he was to have 50 per cent. of all fines that he took off. Think of a man making that contract with a man having

power to impose the fines. "Now, all you will take off I will give you 50 per cent. of." There is an old story that a friend of a man who was bitten by a dog said to him, "If you will take some bread and sop it in the blood and give it to the dog it will cure the bite." "Yes," he says: "but, my God, suppose the other dogs should hear of it?" Think of putting yourself in the power of a man who has the right to fine you. And yet that is a part of the logic of this prosecution. The next charge is of fraudulently cutting off service and then fraudulently starting it and allowing a month's extra pay. That happened, I believe, in two cases—\$30 in one case and something more in the other.

The COURT. Thirty-nine dollars.

Mr. INGERSOLL. Then the case is \$9 better than I thought. Twelfth. By the defendants fraudulently filing subcontracts. That I have already shown is an impossible offense. All these things were done for the purpose of deceiving the Postmaster-General. Now, the court has already intimated that we have no right to say that the Postmaster-General would be a good witness to show whether he was deceived or not, and that it may be that his eyes were sealed so tightly that he has not got them open yet. But whether they can prove it by him or by somebody else they have got to prove it in order to make out this case. That is the scheme of this indictment. It makes no difference whether the Postmaster-General has found out that he was deceived or not. This jury have got to find it out before they find a verdict against these defendants. It is possible that the Postmaster-General thinks he was not deceived or that he was; I do not know what his opinion is and do not care. They have got to prove it by somebody. I do not say they can prove it by him. I do not know. This is the scheme, and what I insist is that this scheme must be substantiated and must be proved precisely as it has been laid without the variation of a hair. You must prove it as you have charged it, and you must charge it as you prove it. It is simply a double statement. I wish to submit some authorities to the court upon this question: Must the exact scheme be proved? First, I will refer the court to the 10th edition of Starkie, page 627:

It is a most general rule that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge can ever be rejected. * * * As an absolute and natural identity of the claim or charge alleged with that proved consists in the agreement between them in all particulars, so their legal identity consists in their agreement in all the particulars legally essential to support the charge or claim, and the identity of those particulars depends wholly upon the proof of the allegation and circumstances by which they are ascertained, limited, and described.

No matter whether the description was necessary or unnecessary:

To reject any allegation descriptive of that which is essential to a charge or a claim would obviously tend to mislead the adversary. * * * It seems indeed to be a universal rule that a plaintiff or prosecutor shall in no case be allowed to transgress those limits which in point of description, limitation, and extent he has prescribed for himself; he selects his own terms in order to express the nature and extent of his charge or claim, he cannot therefore justly complain that he is limited by them. * * * As no allegation therefore which is descriptive of any fact or matter which is legally essential to the claim or charge can be rejected altogether, inasmuch as the variance destroys the legal identity of the claim or charge alleged with that which is proved, upon the same principle no allegation can be proved partially in respect to the extent or magnitude where the precise extent or magnitude is in its nature descriptive of the charge or claim.

Nothing can be plainer than that. I refer also to Starkie on Evidence, 7th American edition, vol. 1, page 442. There he says:

In the next place it is clear that no averment of any matter essential to the claim or charge can ever be rejected, and this position extends to all allegations which operate by way of description or limitation of that which is material.

I also cite Russell on Crimes, 9th American edition, vol. 3, page 305, and Roscoe's Criminal Evidence, 7th edition, page 86.

I now call the attention of the court to the case of *Rex vs. Pollman and others*, 2 Campbell, 239. I may say before reading this decision that in my judgment so far as the scheme of this indictment is concerned it should end this case :

This was an indictment against the defendants which charged that they unlawfully and corruptly did meet, combine, conspire, consult, consent, and agree among themselves and together, with divers other evil-disposed persons, to the jurors unknown, unlawfully and corruptly to procure, obtain, receive, have, and take, namely, to the use of them, the said F. P., J. K., and S. H., and of certain other persons to the jurors likewise unknown, large sums of money, namely, the sum of £2,000, as a compensation and reward for an appointment to be made by the lord's commissioners of the treasury of our lord the King of some person to a certain office, touching and concerning His Majesty's customs, to wit, the office of a coast waiter in the port of London, through the corrupt means and procurement of them, the said F. P., J. K., and S. H., and of certain other persons to the jurors unknown, the said office then and there being an office of public trust, touching the landing and shipping coastwise of divers goods liable to certain duties of custom.

The indictment went on and stated various overt acts in furtherance of the conspiracy.

There were several other counts which all laid the conspiracy in the same way.

Now, I come to the part of the case which, in my judgment, affects this:

It appeared that the defendants Pollman, Keylock, and Harvey, had entered into a negotiation with one Hesse, to procure him the office mentioned in the indictment, for the sum of £2,000, which they had agreed to share among themselves in certain stipulated proportions; but, although this money was lodged at the banking-house of Steyke, Snaith & Co., in which the defendant Watson was a partner, and he knew it was to be paid to Pollman and Keylock upon Hesse's appointment, there was no evidence to show that he knew that Sarah Harvey was to have a part of it, or that she was at all implicated in the transaction.

He was a coconspirator, and he knew that the money was to be deposited at this place. He knew that, but he did not know that Sarah Harvey was to have a part of it.

Lord Ellenborough threw out a doubt whether as to Watson the indictment was supported by the evidence.

The evidence being that Watson did not know that it was to be divided in the precise way stated in the indictment. Manifestly, they need not have stated in the indictment how it was to be divided; but having stated it, the question is: Are they bound by the statement? Let us see:

The attorney-general contended that the words in italics coming under a *videlicet* might be entirely rejected. The sense would be complete without them. The indictment would then run that the defendants conspired together to obtain a large sum of money as a consideration and reward for appointment to be made by the lord's commissioners of the treasury. This was the *corpus delicti*. The use to which the money might be applied was wholly immaterial. The offense of conspiring together would be complete however the money might be disposed of.

True.

There was no occasion to state this, and the averment might be treated as surplusage. Suppose the manner in which the money was to be disposed of had been unknown. Would it have been impossible to convict those engaged in the conspiracy? But, without rejecting the words, the variance was immaterial. The charge in the indictment had been substantially made out as laid.

Dallas and Walton, of counsel for Watson, denied that the words could be rejected, though laid under a *videlicet*, as they were material, and they were not repugnant to anything that went before. The application of the money might be of the very essence of the offense. Suppose it had been obtained for the use of the lords of the treasury, who would make the appointment: would not this be a much greater crime than if the money had been obtained for the benefit of a public charity?

I think that reasoning is bad. I think the crime is exactly the same.

But if the words were rejected then the variance was more palpable. In that case, there being no mention of any persons to whose use the money was obtained, the necessary presumption was that it was obtained to the use of the defendants themselves.

That is good sense.

The evidence shows, however, that Watson was to have no part of it, and that he was utterly ignorant of the manner in which it was to be distributed.

LORD ELLENBOROUGH. There can be no doubt that the indictment might have been so drawn as to include Watson in the conspiracy. Even if the manner the money was to be applied was unknown, this might have been stated on the face of the indictment, and then no evidence of its application would have been required. The question is, whether the conspiracy as actually laid be proved by the evidence?

That is the question: Have they made out a case according to the scheme of the indictment? Has the conspiracy as laid been proved by the evidence?

I think that as to Watson it is not. He is charged with conspiring to procure this appointment through the medium of Mrs. Harvey, of whose existence for aught that appears he was utterly ignorant. When a conspiracy is charged it must be charged truly.

He did not know that Mrs. Harvey was to have a portion of the money, and yet she was a member of the conspiracy. The evidence showed that she was to have a portion of it, and Lord Ellenborough says they did not prove the charge as laid, and that it cannot include Watson.

Garrow submitted that it was unnecessary to prove that each of the defendants knew how the money was to be disposed of, and that it was enough to show that the destination of the money was as stated in the indictment. A fact of which all those engaged in the conspiracy must be taken to be cognizant. Watson by engaging with the other conspirators to gain the same end, had adopted the means by which the end was to be accomplished.

That is what the attorney for the Government says. Lord Ellenborough replies:

You must prove that all the defendants were cognizant of the object of the conspiracy and the mode stated in the indictment by which it was to be carried into effect. A contrary doctrine would be extremely dangerous. The defendant Watson must be acquitted.

Now, let us apply that case to this. In the first place they must not only prove this indictment according to the scheme, but they must prove that every defendant understood that scheme, knew the scheme, how it was to be accomplished and what was done with the money.

THE COURT. In that case Watson was acquitted. What was done with the others?

MR. INGERSOLL. They, of course, were found guilty, because they were guilty, as the indictment charged. They knew the exact scheme set forth in the indictment. They were guilty exactly as the indictment said. They divided the money exactly as the indictment charged they divided the money, and they were cognizant of every fact set forth in the indictment. But Watson, although a coconspirator, did not know what was to be done with the money, and consequently was to be discharged. Why? Because they did not prove the conspiracy as to him as charged. They need not have set forth in the indictment what was to be done with the money, but they did set it forth, and then they had to prove it. They need not have said that every man knew what was done with the money, but they did say that every man knew, and they failed to prove it, and when they failed to prove it as to Watson he was discharged.

Now, gentlemen of the jury, what I insist upon and what I shall ask

the court to instruct you is that the Government, no matter how guilty the defendant may be, no matter if he has robbed this Government of hundreds of millions, is to be tried by this indictment, is to be guilty of this charge as written in this indictment and nowhere else; and he has got to understand it. They say he understood it and they have got to prove that he understood it.

Now, upon that same subject they say that the money was to be divided between all these parties—between Rerdell, Turner, and everybody. I think it was Mr. Bliss who said there was no evidence that Rerdell ever had any of the money. Certainly they do not think that Turner obtained any of the money. Is there any evidence of it? Not the slightest. Is there evidence that there ever was any division, any evidence that there was ever any money divided upon a solitary route mentioned in this indictment? Not one particle. If you say there is evidence, when was the division made?

The COURT. The question is not what was done. The question is with what view the conspiracy was entered into.

Mr. INGERSOLL. Certainly.

The COURT. The object of the conspiracy may have failed, and this money might not have been divided as they intended, but still the conspiracy would be here.

Mr. INGERSOLL. Good, perfectly. But if they set forth in this indictment that the money was divided that statement is not worth a last year's dead leaf unless they prove it. That is all I insist upon. You cannot find anybody guilty of charges in an indictment unless you prove them. Unless you prove them they amount to no more than charges written in water, than characters engraved on fog or written on clouds. You have got to prove them.

Now, upon this same point I say that if the scheme has not been established by the evidence, the case falls, no matter what the proof. The offense must not only be proved as charged, but it must be charged as proved, doubling the statement for the sake of doubling the idea of accuracy. That is in Archibold's Criminal Pleadings, American edition, page 36. The same thing is held in First Chitty's Criminal Law, 213. I also refer to the case of King against Walker, 3d Campbell, 264; King *vs.* Robinson, 1st Hope's *Nisi Prius* Reports, 595. I have the books here, but I will not take up the time of this court in reading them.

Now, if I am right that is the language of that indictment. The overt acts with the leaves are gone; the scheme with the branch and trunk are gone. They prove no such scheme, they prove no such division.

I will now proceed to examine the alleged evidence against my clients, Stephen W. and John W. Dorsey, and I want to say right in the commencement that suspicion is not evidence. You charge that a couple of persons conspired. That they met about 9 o'clock on the shadowy side of the street. *A suspicious circumstance.* Why did they not get *under the lamp*? They were seen together once more, and the moment a man came up *they walked off.* GUILTY. They run. And out of these idiotic suspicions that never would have entered the mind, except for the reason that the persons were charged, hundreds of people begin to say, "There is something in it. They met four or five times. One of them wrote a letter to the other, and so help me God it was not dated." *Another suspicious circumstance.* "There was a heading on the paper. It was not the number of his office." So they work it up, and ignorance begins to stare and wonder, to open its mouth, and finally prejudice finds a verdict.

Suspicion, gentlemen, is not evidence. You want to go at this with this idea. Whatever a man does the presumption is it is an honest act until the contrary is shown. These men wrote letters. They had a right to do it. They met. They had a right to meet. They entered into contracts. They had a right to do it, no matter whether they were dated or not dated. One of the greatest judges of England said if you let out of the greatest man's brains all the suspicions, all the rumors, all the mistakes, and all the nonsense, the amount of pure knowledge left would be extremely small. If you take out of this case all the suspicions, all the guesses, all the rumors, all the epithets, all the arrogant declarations, the amount of real evidence would be surprisingly small.

Now, I want to try this case that way. I do not want to try it by prejudice. Prejudice is born of ignorance and malice. One of the greatest men of this country said prejudice is the spider of the mind. It weaves its web over every window and over every crevice where light can enter, and then disputes the existence of the light that it has excluded. That is prejudice. Prejudice will give the lie to all the other senses. It will swear the northern star out of the sky of truth. You must avoid it. It is the womb of injustice, and a man who cannot raise above prejudice is not a civilized man; he is simply a barbarian. I do not want this case tried on prejudice. Prejudice will shut its eyes against the light. I want you to try it without that.

And right here, although it is a subject about which most courts are a little tender, the question arises as to the jury being judges of the law and fact. One of the attorneys for the Government, Mr. Merrick, told us that at one time he insisted that the jury was the judge of the law, and made this remarkable declaration:

But even at the time I spoke the words to the jury I did not believe them to be indicative of safe and true principles of law.

Was he candid then? Is he candid now? I do not know. But his doctrine appears to be this, "When I am afraid of the court I insist on the jury judging the law. When I am afraid of the jury I turn the law over to the court." But in this case, having confidence in both judge and jury, it is wholly immaterial to me how the question is decided.

Now, if it please the court I believe the law to be simply this: I believe the jury to be absolute judges of the facts, and yet if on the facts they find a man guilty whom the court thinks is not guilty, the court will grant a new trial. The court has the power to set aside a verdict because the jury find contrary to the evidence. The court cannot do it, however, when the jury finds a verdict of not guilty. I do not believe that the jury have a right to disregard the law from the court unless a jurymen upon his oath can say that he believes, he knows, or is satisfied that is not the law; and he must be honest in that, and he must not be acting upon caprice. He must be absolutely honest. He must be in that condition of mind that to follow the law pointed out by the court would trample upon his conscience, and that he has not the right to do. That is all the distance I go.

History of the world will show that some of the grandest advances made in law have been made by juries who would not allow their consciences to be trampled into the earth by tyrannical judges. I am not saying that for this case. I am simply saying that as a fact. There was a time in this country when they used to try a man who helped another to gain his liberty, and there was now and then a man on the jury who had sense enough, and heart enough, and conscience enough to say, "I will die before I carry out that kind of a law." They did

not carry it out either, and finally the law became so contemptible, so execrable, that everybody despised it. All I ask this jury to do is just to be governed by the evidence and by the law as the court will give it to them, honestly and fairly.

Now, I am coming to the evidence against John W. Dorsey. I am traveling through this case now we have started it. As you have heard very little about it, gentlemen, and there is nothing in the world like speaking on a fresh subject. I feel an interest in John W. Dorsey. He is my clients. I believe him to be an absolutely honest man. He is willing to take the effect of all his acts. He is no sneak, no skulk. He will take it as it is. Let us see what he has done.

The first witness is Mr. Boone. Mr. Boone swears that John W. Dorsey was one of the original partners. Well, that is so. It is claimed that the conspiracy was entered into before there was any bidding. Well, Boone does not uphold that view. Now, if Boone and Miner and John W. Dorsey and Peck had an arrangement with Brady whereby they were to bid and then have expedition and increase, I want to ask you why did Boone write to all the postmasters to find out about the roads and the cost of provender, and the kind of weather they had in the winter in order to ascertain what bid to make? If he had had an arrangement with the Second Assistant Postmaster-General to expedite the route he would have simply made up his mind to bid lower than anybody else, and he would not have cared a cent what kind of roads they had there, or what kind of weather they had in the winter, or how much horse provender cost, and yet he sent out thousands of circulars to find out these facts. For what? To make bids. What for? According to the Government these were routes on which they had already conspired for expedition and increase without the slightest reference to the horses and men, and of course, if that theory is true, Boone is one of the conspirators. But I will come to that hereafter.

More routes according to Boone's testimony were awarded than they anticipated. They got, I think, one hundred and twenty-six. They had no money to stock the routes. They got more than they expected. Well, that was not a crime. Boone left in August, 1878, and Mr. Merrick takes the ground that Boone had done the work, manipulated all the machinery, and yet could not be trusted with the secret. Boone had gathered all the information, he had done the entire business, and yet the secret up to that time had been successfully kept from him. Do you believe that?

Now, Vaile came, and another partnership was formed, and the second partnership remained in force, I think, till the 1st of April, 1879, or the last day of March, and then the routes were divided. Now, then, John W. Dorsey is charged with conspiracy as to these routes, and these routes were afterwards assigned to S. W. Dorsey to secure advances and indorsements that were made.

Now, of the routes mentioned in the indictment, John W. Dorsey was interested in seven at the time of the division. From Vermillion to Sioux Falls, from White River to Rawlins, from Garland to Parrott City, from Ouray to Los Pinos, from Silverton to Parrott City, from Mineral Park to Pioche, and from Tres Alamos to Clifton. How much money did he get on all these routes? I have already shown you. He received two warrants for \$87 and they recouped them both. He received another warrant for \$392 and succeeded in keeping it. That is all the money he got in these seven routes. Now, the testimony of Mr. Vaile shows, that after April, 1879, if it shows anything, he took those routes

and kept them and never paid a dollar to any official in the world, and he also swears that no matter how much he got, it made no difference as to the routes that had been given to John W. Dorsey and Peck. It could not in any way affect their amount, and that no person in the world except themselves had any interest in them.

Now, it is charged that false affidavits were made by John W. Dorsey, and that the making of these false affidavits was the result of conspiracy. Let us see. It has been shown by the evidence, and I have already shown it, and conclusively shown it, that the affidavit was substantially correct, so far as the proportion was concerned.

Now, let me explain what I mean by proportion. For instance, I am getting \$5,000 a year on a route, and it takes five men and ten horses. That is an aggregate of fifteen. Now, suppose I simply expedite it a certain number of miles an hour and say it will take fifteen men and thirty horses. That makes an aggregate of forty-five does it not. Then the Government gives me three times as much for the expedited service as for the then service. Now, suppose I am getting a thousand dollars, and it only takes one man and one horse, and I make an affidavit that it takes one hundred men and one hundred horses, and if it is expedited it will take two hundred men and two hundred horses, how much more do I get? I get just double, and the result of the affidavit is exactly the same as though I said the one man and one horse that it then took, and it would require two men and two horses. If you keep the proportion you cannot by any possibility commit a fraud against the Government. Now we understand that. Now let us see. When you make an affidavit what do you do? When you make an affidavit of how many horses it will take you take into consideration the length of the term, three or four years. You take into consideration the life of a horse. You take into consideration the roads and the weather. You take into consideration every risk and find it is only a matter of judgment, only a matter of opinion, and the fact that men differ as to their judgment upon those points accounts for the fact that they make different affidavits? If everybody made the same calculation as to food, as to weather, as to roads, as to disease, everybody would make substantially the same bid, but on the same route they differ thousands of dollars a year, because they differ in judgment as to the number of horses it will require and as to the number of men.

And then there is another thing. Some men will make a horse do twice as much as others. Some men are hard and fierce and merciless. Some men are like they ask you to be in this case—icicles. Some men resemble the gods so far that they will make a horse do five times the work they should, and other men are merciful to the dumb beast. So they differ in judgment. One man says he can go twenty-five miles every day, and another man says he can only go fifteen. One man says stations ought to be built twenty-five miles apart; another says they should be built ten miles apart. They differ, and for that reason, gentlemen, the bids differ, and for that reason the affidavits differ.

I shall not speak of all these affidavits, but I shall speak of the ones that have been attacked. Mr. Merrick called Mr. Dorsey a perjurer because he made two affidavits on route 38145. Now, no such charge is made in the indictment, but I will answer it. Now, then, as to the two indictments—

The COURT. Two affidavits.

Mr. INGERSOLL. Two affidavits. Well, there ought to have been two indictments to cover both cases. Now, this is on route 38145, Garland to Parrott City. Now, there were two affidavits made on 38145, as

is set forth in the evidence, but it is not in the indictment. The first affidavit was sworn to March 11, 1879, in Vermont, and filed April 16, 1879. Neither could come in under this conspiracy, any way. The second was made in Washington, April 26, 1879, and filed the same day, *which is a suspicious circumstance*. The letter dated April 23, 1879, according to the prosecution, purports to transmit an affidavit made on the 26th. There is no evidence that the affidavit dated the 26th was inclosed in the letter dated the 23d. The affidavit sets forth the number of men and animals required to run the route on a schedule of fifty hours, three trips a week. There is no evidence as to the character of the paper transmitted, if any was transmitted, nor, in fact, is there any evidence that any paper was transmitted with that letter.

Now, on page 804 of the record, Mr. Bliss submitted two papers to Mr. Sweeney, a witness, saying, "I show you two papers pinned together." Who pinned them? I do not know. "One dated April 26, 1879, and the other dated April 24, 1879." The paper dated April 26, is indorsed in the handwriting of William H. Turner. The indorsement on the paper dated April 24 is in the handwriting of Byron C. Coon. This fact shows that the papers that were read by Mr. Bliss as one paper and marked 17 E, were treated by the department as two separate papers received on separate dates, and so marked and so filed, and they were marked at the time they were identified as numbers 17 and 18. Now, the only question is whether the last affidavit was made for the purpose of committing a fraud upon the Government and whether the change in the figures in the last affidavit were intended to or could in any way defraud the Government of the United States.

Now, let us see what it is. Mr. Merrick charges that the second oath was willful perjury. In order to show that this was an honest transaction, and that Mr. Dorsey should be praised instead of blamed I will call your attention now to the exact state of facts. Now, if I do not make out from this that it was a praiseworthy action instead of perjury, a good, honest action, I will abandon the case. In the first affidavit Dorsey swore that it would require three men and seven animals as the schedule then was, and that for the proposed schedule it would take eleven men and twenty-six animals. Now three men and seven animals make ten, and eleven men and twenty-six animals make thirty-seven. So that by the first affidavit he swore that it would take three and seven-tenths more animals to carry the mail on the expedited schedule than on the schedule as it then was, did he not? Three men and seven animals as against eleven men and twenty-six animals it would take three and seven-tenths more animals, consequently you would get for that three and seven-tenths more pay. Now, let us understand that. That is an increase in the ratio of ten to thirty-seven, and if his pay had been calculated on that first affidavit it would have been \$13,433.04. But it was not calculated on that. He made another affidavit. Now, the second affidavit said that it would take twenty men and animals instead of ten, as it then was, and for the expedition fifty-four men and animals. Now, the ratio between twenty and fifty-four was two and seven-tenths instead of three and seven-tenths, so that under that second affidavit, which they say was willful and corrupt perjury, he would only get \$8,457, and the change of that affidavit, if the amount had been calculated on the first instead of the second, would have cost him for the three years yet remaining of his term \$14,925.60, and that change saved, exactly as if they had made the calculation on the other affidavit, about \$15,000, and yet they tell me that that was willful and corrupt perjury. There has nothing been

shown in the case more perfectly honorable. Nothing shown calculated to put John W. Dorsey in a fairer, in a grander light than this very affidavit that is charged to have been willful perjury. Do you see? He made the first affidavit, and in it he made a mistake against the Government of \$14,925, and then, like an honest man, he corrected it, and for that honest correction he is held up as a perjured scoundrel. It will not do, my friends.

But as a matter of fact, not one of these affidavits is set out in the indictment, not one charged in the indictment. They are wandering tramps that were picked up as they went along with this case, and have no business here.

In route 38152 he made no affidavit. In route 38113 there is no charge in the indictment that he made any affidavit. In the route 38156 the affidavit was not false. It was charged and was not successfully impeached. In route 40104 the affidavit was never disputed and it was never attacked. In route 40113 the affidavit was not attacked, not a solitary witness was examined. In route 35015 no affidavit was made by Dorsey. In route 38134 there are two more affidavits. Now let us see. Here is some more fraud. Put it down, 38134—two affidavits—a great fraud. The first affidavit said three men and twelve animals. That made fifteen; that for the expedition it would take seven men and thirty-eight animals. That made forty-five. In other words, the proportion was fifteen to forty-five, just three times as much. Three times fifteen make forty-five. Then he made a second affidavit, filed with a purpose to defraud the Government. Let us see. In the second affidavit he said that it took two men and six animals. That makes eight. That on the expedition it would take six men and eighteen animals. That makes twenty-four. The proportion was eight to twenty-four. Three times eight make twenty-four; and three times fifteen make forty-five. So that the amount was raised exactly the same to a cent, under the second affidavit that it was under the first, and consequently could not have been made for the purpose of defrauding anybody. Impossible. The proportion of course is the material thing in every affidavit, and it is only by that proportion that you can tell whether they are trying to defraud this Government or not. Suppose that second affidavit had changed the proportion so that he was not to get just the amount of money, then you might say it was a fraud. But it did not change the proportion.

On route 38156 another affidavit is filed and not successfully impeached. I went over that. I have got through with that. That is all there is to it. That is all, that is everything—everything—everything. There is no evidence tending to show that John W. Dorsey ever spoke to Thomas J. Brady. There is no evidence to show that he ever saw him. There is no evidence to show that he was ever seen in his company; no evidence to show that he ever saw Turner; that he ever heard of Turner; that he ever spoke to Turner; that he ever received a letter from Turner; that he ever wrote anything to him; no evidence as a matter of fact that he ever exchanged a word with these men; no evidence that he ever saw Harvey M. Vaile; that he ever spoke to him. Certainly there is no evidence that he ever conspired with him. No evidence that he ever made an agreement with Thomas J. Brady or with Mr. Turner or with any officer—no agreement of any sort, kind, character, or description at any place, upon any subject, or for any purpose, not the slightest; no evidence that he conspired with anybody; no evidence that he ever received from the United States a solitary dollar, with the exception of \$392—not the slightest. There is no evidence that

he ever wrote a false communication to the department—nothing of it. There is no evidence that he ever wrote a petition; no evidence that he ever forged one; no evidence that he ever signed anybody's name to one; no evidence that he did anything of the kind or that he ever changed one; no evidence that he ever put a man's name to it that did not live on the route; no evidence that he ever put in a fictitious name; no evidence that he ever helped to deceive the Postmaster-General—not the slightest. If there is I want somebody just to put their finger upon the evidence. There is no evidence that he ever made a false statement at any time. There is no evidence that he ever paid, as I say, a dollar to any official, and no evidence that he ever promised to pay it. All the evidence is that he got \$392. He made the affidavits in accordance with what he believed to be the truth. The evidence shows that when he made the affidavits on those routes he had no personal interest, that he received not a dollar for making them. He made them because he supposed the contractor or subcontractor had to make them. He made them because he believed them to be true. He was guided by the little experience he had himself and by the statements made to him by others, and in all this evidence there is not a word; not a line, not a letter tending to show he did a dishonest act, and the jury will bear me out that in the affidavits attacked he was substantially right, while in the first instance he was too high; in others he was too low. But there is no evidence that he deliberately swore to what he believed to be untrue. The proportion sworn to by him has always been substantially correct. In other words, gentlemen, the testimony shows that John W. Dorsey is an honest man, and there is no jury, there never was, there never will be, that will find a man like that guilty upon evidence like this. It never happened; it never will happen.

Now, I come to another client, Stephen W. Dorsey, and I feel an interest in him. He is my friend. I like him. He is a good man. He has good sense. He is not simply a politician; he is a statesman, and I want you to understand that he never did an act in this case that he did not thoroughly understand as well as any lawyer in this prosecution ever will understand or as well as any lawyer of the defense ever will understand. He knew exactly his liabilities. He knew exactly his responsibility. He knew exactly what he did and he knew he did only what was right. In the opening of this case Mr. McSweeney made a statement. He told you the exact connection of Dorsey with this matter. He not only told you that, but he told you that Dorsey had lost money on these routes, and that he had never been repaid the money he had advanced, and in that connection he said that he had turned the routes over to James W. Bosler, and the department knew of James W. Bosler because they introduced testimony here that the warrants were paid to James W. Bosler. Mr. McSweeney stated that Bosler controlled the business, and now we are asked by the prosecution "Why did you not bring James W. Bosler on the stand and show that you had lost money?" I return the compliment and say to them, Why did you not bring James W. Bosler on the stand and show that it was not true that we had lost money, as he kept the books? I ask them that. Why did they not bring James W. Bosler?

Mr. MERRICK. If your honor please, there is no evidence whatever as to whether S. W. Dorsey lost money on those routes, and the statement of counsel made in the opening, I respectfully submit, cannot be used as evidence by the counsel in the case.

The COURT. Of course it is impossible for me to say after so long a time spent in receiving evidence what evidence has been given on a dis-

puted question. I cannot say from recollection what evidence has been given on this subject, but I understand the remarks now made are not made upon evidence in the case, but in reply to remarks made in the opening in the case.

Mr. INGERSOLL. Partially so.

Mr. MERRICK. The opening by their counsel.

The COURT. By their counsel.

Mr. MERRICK. By their counsel, Mr. McSweeney.

Mr. INGERSOLL. Let me just state it and the court will understand it perfectly. Mr. McSweeney, in his opening, said that these routes had been turned over to James W. Bosler; that he received the money and paid it out, and that S. W. Dorsey on these very routes had not made money, but lost money. Very well. But that statement was simply a statement. It was never proved afterwards. The Government said to us, "Why did you not bring James W. Bosler to prove that?"

The COURT. Where did they say that?

Mr. INGERSOLL. They said it in their speeches. Mr. Merrick said it.

Mr. MERRICK. Not to prove as to the money.

Mr. INGERSOLL. Ay, "Why did you not bring James W. Bosler?"

Mr. MERRICK. Yes, but not as to proof of money; but as to other questions in reference to the distribution of routes and the loaning of money by Dorsey, and by Bosler to Dorsey, and Dorsey's transfer of the routes to Bosler as security for the loan as appeared in Vaile's testimony.

The COURT. I shall not interfere.

Mr. MERRICK. I shall not attempt to arrest the course of counsel unless there is ground for it, and I ask the court that there being no evidence of this fact, that the counsel shall not——

Mr. INGERSOLL. [Interposing.] I am going to show there is some evidence.

The COURT. I understand it is a remark in reply to an observation of your own.

Mr. INGERSOLL. That is principally it. Now, they introduced the warrants that had been drawn by contractors and subcontractors from the Post-Office Department; they proved that these warrants had been paid to James W. Bosler, and that one after the other, hundreds had been assigned to James W. Bosler. Now, then, I say, they say to us, "Why did you not bring in James W. Bosler, and prove your innocence?" I say why did you not bring in James W. Bosler and prove our guilt? We opened the door. We told you the name of the witness. We told you that he had taken the routes; that he kept the books; that he disbursed the money, and that we had lost money. Instead of robbing the Government the Government has robbed us; and they say, "Why did you not bring Bosler?" and I say to them, why did you not bring him? They know him, and they know he is a reputable man. Good for that.

Now, there is another point. I ask you all to remember what was said in the opening, and I understand that a defense is bound by its opening, bound by what it says to the jury. The question is, has any fact been substantiated in this case that contradicts a statement made in the opening?

The COURT. The defense has no right to avail itself of——

Mr. INGERSOLL. [Interposing.] Of what it says.

The COURT. Of what it says in its opening unless it is followed by evidence.

Mr. INGERSOLL. Certainly not, but it has a right to show that no

evidence has been introduced by the Government that touches that opening statement. It has the right to do that sure.

Now, then, Mr. Boone was a witness for the Government—a smart man. He swore who were interested in the bidding. He told and he positively swore that Dorsey was not interested in these routes. He gave the names of the persons interested, and he swore positively that he was not. Dorsey then, I say, had not the slightest interest. He loaned money, he went security, he assisted in getting sureties on bonds, and you recollect the trouble that they have made about some bonds. Has there any evidence been introduced to show that there was a bad bond? Has any evidence been introduced to show that the name of an insolvent man was put upon any bond as security? Has there been any evidence to show that any action was ever commenced on any of these bonds; any evidence tending to show that every bond was not absolutely good, and, as a matter of fact, the Government waived all of that in offering the contract on route 35015. Mr. Merrick made this remark:

It is offered for the purpose of showing the contract made. The contract itself is not an overt act. That is all right. There is nothing criminal about that.

Good! Nothing criminal about any contract, gentlemen. You will all admit they had a right to make the bids, and if they were the lowest bidders it was the duty of the Government to accept the bids and afterwards to make the contracts in accordance with them. There was nothing wrong in that. That is Dorsey's first step. His first step really was an act of kindness. What was the second step? He was unable to advance any more money. Mr. Peck, Mr. Miner, Mr. Dorsey, and Mr. Boone were unable to advance the money, and so Mr. Boone went out and Mr. Vaile came in, and the new partnership agreed to refund this money that had been advanced; that is, the money advanced by the other parties. What one gets another to advance is really advanced by him as long as he is liable for it. Mr. Vaile, a man of large experience and means, was taken in Boone's place. Is there anything suspicious up to this time? That is the only test of this whole question. Is it natural? If it is natural there is no chance for suspicion. After Mr. Vaile came in a written contract was made on August 16, 1878. There is no conspiracy up to that time. Not the slightest evidence of it; no arrangement with any officers up to that time. Now, under the August contract, Mr. Vaile took the entire business in charge, and he ran it, as I understand, until the 1st day of April, 1879. No officer had any interest in it then. There was no conspiracy then. Vaile received all the money and paid it out. Here we stand on the 1st day of April, 1879. Now, what is the history up to this time? That John W. Dorsey, Peck, Miner, and Boone were bidders; that certain routes had been awarded, they had not the money to stock the routes, and that S. W. Dorsey advanced some money and went security; that afterwards Boone went out and Vaile came in, and the contract was made by virtue of which Vaile became the treasurer and knew everybody, and ran the business to the 1st day of April, 1879. He swears positively that he made no arrangement and that he paid no money. It is also in evidence, that in December, 1878, Stephen W. Dorsey and Vaile met for the first time, and met in the German-American Bank for the purpose of settling the claim upon which Dorsey was security, and replacing the notes upon which Dorsey was by notes of Vaile, Miner & Co. Afterwards these notes were paid by Vaile and the security of Dorsey released. Now, in April, 1879, a division is made. The contract of August, 1878, was done away

with and a division of the routes was made, 70 per cent. being taken by Vaile and Miner and 30 per cent. by John W. Dorsey and Peck. In April, 1879, the parties divide instead of coming together. They do not conspire. They separate. They do not unite. They go asunder. From that moment they agree to have nothing in common. Each man takes his own, and each man attends to his own and does not help anybody else except when they insist that a contractor or subcontractor shall make the affidavit. They made affidavits on the routes on which they were contractors. That is all there is to it up to that time. Then these routes were assigned to Dorsey for the purpose of securing him.

Now I go to the overt acts charged against Stephen W. Dorsey. Do you know I am delighted to get right to that page of my notes. I am delighted that I now have the opportunity to answer and to answer forever all the infamous things that have been charged against this man. Here we are, before this jury, a jury of his fellow-citizens, a jury that has the courage to do right. I have finally the chance of telling here before men who know whether I am speaking the truth or not, what has been charged against Stephen W. Dorsey and what has been proved against him. Let us examine the overt acts charged. On route 38135 it is charged that Miner, Rerdell, and S. W. Dorsey transmitted a false affidavit. The evidence is that the affidavit was made by Miner, not by Dorsey, transmitted by Miner, not by Dorsey, and that it was not transmitted as charged in the indictment, but transmitted on the 18th day of April, 1879. There is no evidence that Dorsey ever heard of that affidavit, that he ever made it, that he ever transmitted it, that he ever saw it, that he ever knew of its existence. That is the first charge. There is not one particle of evidence to show that he ever knew there was such a paper. Upon that written lie, upon that mistake these infamous charges affecting the character of this man have been circulated over the United States.

What is the next? That he with others filed false petitions. I am telling you now all the charges; every one of them. What is the evidence? Oh, it is splendid to get to the facts. The evidence is that every petition is shown to have been genuine. There is no evidence that he ever filed one or sent one or asked to have one sent on that route; and every petition is genuine and no charge made except as to one. In one they said the words "quicker time" were inserted; but the very next paragraph asked for quicker time, and nobody pretended that had been inserted. Besides that, it was charged in the indictment to have been filed on the 26th day of June. As a matter of fact, it was filed on the 8th day of May. It was never filed by Stephen W. Dorsey; it was never gotten up by Stephen W. Dorsey. There is no evidence that he ever knew of it or heard of it. Third, that he fraudulently filed a subcontract. Two mistakes and an impossible offense. That ends that route. That is everything on earth in it. I defy any man to make anything more out of it than I have. I have told every word.

The next is route No. 41119. It is charged that Stephen W. Dorsey with others transmitted a false oath. The evidence is that the oath was made by Peck and it was transmitted by Peck and not by Stephen W. Dorsey. What else? That it is true. There are three mistakes in that charge. They say Dorsey made it. Peck made it. They say Dorsey transmitted it. Peck transmitted it. They say it was false. The evidence shows it true. That is all there is to that route. It is the only charge on that route. No petitions were claimed to be false.

Now we come to route 38145. Let us see if we can do any better on that. The first charge is, that Stephen W. Dorsey fraudulently filed a

subcontract. The subcontract was made with Sanderson. Sanderson got his own contract filed. This charge was copied from the old indictment. It is a mistake, and that is all there is to it. These are the charges that have carried sorrow to many hearts. These are the charges that have darkened homes. These are the charges that have filled nights with grief and horror; every one of them a lie.

The next route is 38156. The first charge is that he transmitted a false oath. The oath was made by John W. Dorsey, and is true. The second charge is of fraudulently filing a subcontract, an impossible offense. That is everything on that route. Absolutely untrue.

Now we come to the next, No. 46247. The charge is filing base petitions. The evidence is that every petition was genuine. Every one. Mr. Bliss said—

We make no point about increase of trips on this route.

Every petition was for increase of trips. You will see that on record, page 1008. That is the only charge on that route, gentlemen. Utterly false!

Come now to route 38140. Charge: Filing false and forged petitions. Evidence: All the petitions genuine. Second charge: Transmitting a false oath and making it. Evidence: Oath made by John W. Dorsey, and true. That is all there is to that route. If they can rake up any more I want to see it. I have been through this record.

Route 38113. Charge: Fraudulently filing a subcontract. That is all. You cannot fraudulently file a subcontract.

Route 40113. Charge: Filing false and forged petitions. Evidence: Every petition admitted by the Government to be genuine. Good. Second: transmitting a false oath. Evidence: Oath made by John W. Dorsey, and the Government introduced no witness to show that it was false. See how these charges fall. See how they bite the ground. That is all.

I have told you every one in this indictment; every one. You will hardly believe it. Now, let me give you the recapitulation. S. W. Dorsey is charged on eight routes with having transmitted four false oaths. The evidence is he never made one nor transmitted one, and that the four oaths were all true. On five routes he is charged with having filed false petitions. The evidence is that all the petitions were genuine. None of the petitions charged in the indictment to have been transmitted by him were transmitted by him. He is charged with filing fraudulent subcontracts, and the evidence is that the subcontracts were genuine, and besides that, as I have said a dozen times, it is utterly impossible to fraudulently file a subcontract. Not a single, solitary charge in this indictment against Stephen W. Dorsey has been substantiated. Not one. He has been called a robber, he has been called a thief; but the evidence shows that he is an honest man. Not one single thing alleged in that indictment has been substantiated against him, and I defy any human being to point to the evidence that does it. Now think of it. All this charge has been made against that man upon that evidence; no other evidence; not another line so far as the indictment is concerned. What is outside of the indictment? That he wrote two letters, taking possession of routes that had been turned over to him as security, which he had a right to do. What else? That he got up some petitions or had them gotten up in the State of Oregon. The man who got them up was brought here as a witness. I believe his name was Wilcox. He swore that everything he did was honest, and that every name to every petition was genuine. Now let us see. Another point has been made

upon S. W. Dorsey. I want to read it to you. This is from the argument of Mr. Merrick :

Peck, John W. Dorsey, and Miner, or some other one of Stephen W. Dorsey's friends. Who was making up this conspiracy? Who was gathering around him arms and hands to reach into the public Treasury for his benefit, while his own were apparently unoccupied with self? S. W. Dorsey. "My brother and brother-in-law will go in, and Miner, or if not Miner, then one of my other friends."

This is quoted.

One of S. W. Dorsey's other facile friends. That was in 1877, gentlemen, the morning of this day of fraud and criminality. In that room where Boone and S. W. Dorsey sat arose the sun, and there was marked his course. There was fashioned the duration and the business of that criminal day.

Now, let us see what the evidence is. The object of that speech is to convince you that Dorsey said to Boone, "I will either put in Miner or one of my friends." Do you know that there is not money enough in the Treasury of the United States, there is not gold and silver enough in the veins of this earth to tempt me to misstate evidence when a man is on trial for his liberty or his life. Let us see what the evidence is:

Q. Who else besides his brother-in-law and brother?—A. I could not say positively whether Mr. Miner's name was mentioned. He either mentioned his name or a friend of his from Sandusky, Ohio.

Now, I submit to you, gentlemen, what does that mean? Mr. Boone, in effect, says, "He told me either it was Miner or a friend of his from Sandusky. That is, he either described Miner by his name or he described him as a friend of his from Sandusky." Then there was objection made, and after that comes another question:

Q. Was anything said of Mr. Miner's coming to Washington?—A. I could not say whether his name was mentioned or a friend of his; a personal friend.

What does that mean? Boone cannot remember whether he called him Miner or called him a friend of his from Sandusky. What else?

A. There was to be nobody that I understood outside of the parties I spoke of.

Q. You and John W. Dorsey and Peck?—A. And Mr. Miner.

Q. Or one of his friends?—A. Or Mr. Dorsey's friend. The arrangement made was not made until they came here. It was only to prepare the necessary blanks and papers pending their coming because the time was getting short, and it was necessary to get the information to bid upon. Nothing was said about any interest at all until after they came here, and then there was a partnership entered into.

Now, I ask you, gentlemen of the jury, what is the meaning of that testimony. The meaning is simply this: Boone could not remember whether he mentioned Miner's name or called him a friend of his from Sandusky, yet the object has been to make you believe that the testimony was that S. W. Dorsey said, "I will either have Miner or I will get another friend of mine." Dorsey had no interest in it, not the interest of one cent, not the interest of one dollar, directly, indirectly, or any other way. He had no interest in having a friend of his. All that Mr. Boone said is that Mr. Dorsey either called this man Miner or described him as a friend from Sandusky, Ohio. The evidence is that Mr. Miner did come, and the evidence is that the arrangement was made. What else is there outside in this case against Stephen W. Dorsey? I ask you to put your hand upon it. I ask anybody to point it out. What other suspicious circumstance is there? I want you to understand that all the suspicious circumstances in the world are good for nothing. All the evidence on earth tending to show a thing does not show it. Anything that only tends that way never gets there; never. You cannot infer a conspiracy. Unless you have the facts proved, you

cannot infer the fact and then infer the conspiracy. There has not been—I want to say it again—there has not been a solitary fraudulent act proven against Stephen W. Dorsey. They have not done it and they cannot do it. All I ask of you, gentlemen, is to find a verdict in accordance with this testimony.

Now if the court will adjourn until to-morrow morning I will finish then.

At this point (2 o'clock and 55 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

WEDNESDAY, SEPTEMBER 6, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

Mr. INGERSOLL. [Resuming.] May it please the court, it appears from the evidence in this case, I think the evidence of Mr. James, that Stephen W. Dorsey at one time, about sixteen or seventeen months ago, made a statement in writing of his connection with all these routes. That statement he gave to the Attorney-General and the Postmaster-General. There is no evidence of what was in that statement. The only evidence is that such a statement is made, embracing his connection with these routes.

The COURT. You offered to prove that.

Mr. INGERSOLL. Oh, no. The reason it was established was I wanted to show whether that statement was made before or after Mr. Rerdell made a statement. The fact simply appears that he made a statement.

The COURT. You offered to prove the fact.

Mr. INGERSOLL. I do not remember offering to prove it. I proved it.

The COURT. If it was not proven—

Mr. INGERSOLL. [Interposing.] I did prove it as a fact.

The COURT. That he made a statement.

Mr. INGERSOLL. Yes, sir. Right here it is [taking up the record].

The COURT. Oh, well, you cannot base any remarks upon that.

Mr. INGERSOLL. Let me read what the evidence says:

Q. Was this statement of Rerdell's made to you after you had received the statements of S. W. Dorsey as to his connection with all these entire routes or with this entire business?

The WITNESS. To what statement do you refer?

Mr. INGERSOLL. To the statement that was made in writing and given to you and the Attorney-General by ex-Senator S. W. Dorsey?

A. It must have been after that.

Q. You mean Rerdell's statement was after that?—A. Yes, sir.

Q. Did you ever see that statement made by Senator Dorsey?—A. It was referred to the Attorney-General.

Q. Did you ever see it?—A. Certainly.

Q. Do you know where it now is?—A. I do not.

I am not going to say a word about what was in that statement, but the court will see that that has a direct bearing upon their action with regard to Rerdell's statement whether it was made before or after, which I will endeavor to show, and the only point that I wanted to make upon that statement now, was that the Government has not endeavored to prove that anything in that statement was inconsistent with the evidence in this case. I am not going to say what the statement was; simply that he made a statement, and it follows as naturally as night fol-

lows morning, and morning follows night, that if that statement had been incorrect it would have been brought forward. That is all.

The COURT. For anything the court knows it might have been a confession. We do not know anything about it.

Mr. INGERSOLL. If it had been a confession it would have been here. That is the point I make. If there had been in that anything inconsistent with the testimony it would have been here.

The COURT. Probably it would.

Mr. INGERSOLL. Yes, sir; that is my point.

The COURT. When a man is charged with crime no man has a right to say that because he did not deny it that is evidence of his guilt.

Mr. INGERSOLL. No, sir; and no man has a right to say that because he did deny it is evidence of his innocence.

The COURT. It is not evidence either way.

Mr. INGERSOLL. It is not evidence either way, and if I am charged with a crime and I make a written statement to the Government of my entire connection with that thing, and they go on and examine it for one year and finally finish the trial without showing that that statement was incorrect, it is a moral demonstration that my statement agreed with the testimony.

The COURT. On the principle, I suppose, of an account rendered and no objection made?

Mr. INGERSOLL. Good. That is a good idea.

The COURT. I do not see anything in that.

Mr. INGERSOLL. I see a great deal in it, and it is a question whether the jury can see anything in it.

The COURT. It is a question whether the court too——

Mr. INGERSOLL. [Interposing.] Very well.

The COURT. [Continuing.] Whether the court is going to allow an argument to be based upon a mere vacuum—wind, nothing.

Mr. INGERSOLL. That would seem to be stealing the foundation of this case. [Laughter, and cries of "Silence" from the bailiffs.] We will consider the argument made to the court, and not to the jury.

The next question, then, is what is the *corpus delicti*; that is, in a case of conspiracy. I do not believe the combination to be the *corpus delicti*—the mere association. It may be the *corpus*, but it is not the *delicti*, and under the law there must not only be a conspiracy, as I understand it, but also an overt act done by one of the conspirators to accomplish the object of the conspiracy. So that the conspiracy with the fraudulent purpose and the overt act constitute the *corpus delicti*. Now, I read from Best on Presumptions, page 279:

The *corpus delicti*, the body of an offense, is the fact of its actually having been committed.

The dead body in a murder case is not the *corpus delicti*. It is the *corpus*, and nothing more. It must be followed by evidence that murder was committed.

The *corpus delicti* is the body substance or foundation of the offense. It is the substantial and fundamental fact of its having been committed.

1 Haggard, 105, opinion by Lord Stowell.

I now refer you to *People vs. Powell*, 63 N. Y., page 92. It seems that the defendants in this case were commissioners of charities of the county of Kings, and they were indicted for conspiring together to buy supplies contrary to law and without duly advertising. Their defense was that they were not aware that such a law existed; that they were ignorant of the law. The court below thought that made no difference.

The court above said before they could be guilty of this crime there must be the intention to commit the crime, and this language is used :

The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do the act prohibited in ignorance of the prohibition. This is implied in the meaning of the word conspiracy. Mere concert is not conspiracy.

So combination is not conspiracy; partnership is not conspiracy; neither is it the *corpus delicti* of conspiracy. There must be the evil intent; there must be the wicked conspiracy not only, but there must be one at least overt act done in pursuance of it before the *corpus delicti* can be established.

The actual criminal intention belongs to the definition of the offense and must be shown to justify a conviction for conspiracy. The offense originally consisted in a combination to convict an innocent person by perversion of the law. It has since been greatly extended, but I am of opinion that proof that the defendants agreed to do an act prohibited by statute, followed by overt acts in furtherance of the agreed purpose, did not conclusively establish that they were guilty of the crime of conspiracy.

It would be hard to find a stronger case, in my judgment, than that. Although they agreed to violate a statute—they agreed to buy supplies without complying with the statute by advertising—they claimed they were in ignorance of it, and the question was whether they were guilty of conspiracy, having no intent to do an illegal act, and the court of appeals decided that that verdict could not stand.

The COURT. Because the court below had instructed the jury that whether what they did was done in ignorance or with knowledge it made no difference.

Mr. INGERSOLL. Certainly; it made no difference. Everybody is supposed to know the law.

Now, the next point is, and great weight has been put upon it, gentlemen, that concurrence of action establishes conspiracy; that if one does a part and another another part and finally the culmination comes, that is absolute evidence, or in other words, an *inference*. Admitting, now, that they were perfectly honest, if any of these parties made a bid, that bid had to be accepted by the Government. They had to act together. The department and the man had to act together to have the bid accepted. The department and the man had to act together to make the contract. The department and the man had to act together to get the pay, and no matter how perfectly honest the transaction was they had to act together from the first step to the payment of the last dollar. Now, in a business where they do have to act together, where one necessarily does one thing and the other necessarily does another, the fact that that happens does not even tend to prove that there is any fraud. Upon this concurrence of action I refer to the case of Metcalfe against O'Connor and wife, in Little's Select Cases, 497. One of the men confessed that a large party went to the house where there was a disturbance and where they tried to take by force a boy from the custody of a man and woman. Now, the fact that these men did go to the house, the fact that they were there at the time this happened, and the fact that one of the conspirators or one of the trespassers had confessed that he went there and that the other went with him for that purpose, the court decides that you cannot infer the purpose of these men from the statement of the other; neither can you infer it from the fact that they were there. You must find out for what purpose they were there by ascertaining what they did and when they were there, and that concurrence in action shows nothing.

The COURT. Did you not say that the decision there was that the conspiracy might be inferred from the combination to do the act?

Mr. INGERSOLL. I will just read it and then there will be no guessing about it:

This is a writ of error prosecuted by the defendants to a judgment for the plaintiffs in an action of trespass for an assault and battery alleged to have been committed upon the plaintiff Ann, the wife of the other plaintiff.

We are of the opinion that the circuit court erred in refusing to instruct the jury, at the instance of the defendants, to find for all of them, except the defendant Metcalfe. He is the only one of the defendants proven to have touched the defendant Ann, and against the other defendants there is no evidence conducing in the slightest degree to prove them guilty of committing any assault or battery upon her, or of any intention to do so.

It is true that it was proved that the other defendants confessed that they were at the house of Connor when the assault and battery charged is alleged to have been committed, and it was also proved that Metcalfe confessed that he and the other defendants had gone there for the purpose of taking from Connor by force an idiot boy whom he had in his custody. But the circumstances of the other defendants being at Connor's house, there is no evidence they were there for any unlawful purpose; nor can it of itself be sufficient to render them responsible for any act done by Metcalfe in which they did not participate; and the confessions of Metcalfe are certainly not legitimate evidence against the others to prove the unlawful purpose with which they went to Connor's, and thereby to charge them with the consequences of his act.

Now, to all appearances they went there together; to all appearances they went there for the one purpose, and Metcalfe, the man who really did the mischief, confessed that they all went there for the one purpose, but the court held that that was not sufficient.

Where several agree or conspire to commit a trespass, or for any other unlawful purpose, they will, no doubt, all be liable for the act of any one of them done in execution of the unlawful purpose; and when the agreement or conspiracy is first proved by other evidence, the confession of one of them will be admissible evidence against the others. But it is well settled that the confessions of one person cannot be admitted against the others to prove that they had conspired with him for an unlawful purpose.

Now, the next evidence that I wish to allude to, gentlemen, is the evidence of Mr. Walsh, and I will only say a few words, because it has been examined and it has been ground to powder. Everything in this world is true in proportion that it agrees with human experience; and you can safely say that everything is false or the probability is that it is false in proportion that it is not in accordance with human experience. Other things being equal, we act substantially alike.

Now, when anything really happens everything else that ever happened will fit it. You take a spar crystal, I do not care how far north you get it, and another spar crystal, no matter how far south you get it, and put them together and they will exactly fit each other—exactly. The slope is precisely the same. And it is so with facts. Every fact in this world will fit every other fact—just exactly. Not a hair's difference. But a lie will not fit anything but another lie made for the purpose—never. It never did. And finally, there has to come a place where this lie, or the lie made for the sake of it, has to join some truth, and there is a bad joint always. And that is the only way to examine testimony. Is it natural? Does it accord with what we know? Does it accord with our experience?

Now, take this testimony of Mr. Walsh, and I find some improbabilities in it. Just let me read you a few:

1. Bankers and brokers do not, as a rule, loan money without taking at least a note. That is my experience. And the poorer this broker is, the less money he has, the more security he wants. He not only wants an indorser but he would like to have a mortgage on your life, liberty, and pursuit of happiness. That is the first improbability.

2. Bankers and brokers do not, as a rule, take notes that bear no interest, or in which the interest is not stated. People who live on

interest find it always to their interest to have the interest mentioned—always. I never got a cent of a banker that I did not pay interest, and generally in advance.

3. Bankers and brokers do not, as a rule, take notes payable on demand, because such notes are not negotiable.

4. It is hardly probable that when a banker and broker held the note of another for \$12,000—the note being unpaid—he would loan \$13,500 more, taking another note on demand in which the rate of interest was not stated.

5. It is still more improbable that the same banker and broker, with a note for \$12,000 and one for \$13,500 being unpaid, would loan \$5,400 more without taking any note or asking any security.

6. When such banker and broker called upon his debtor for a settlement, and exhibited the two notes, and thereupon his debtor took the two notes and put them in his pocket, it is highly improbable that the banker and broker would submit to such treatment.

7. It is improbable that such banker and broker would afterwards commence suit to recover the money, without mentioning to his attorney in fact that the notes had been taken away from him.

8. It is also improbable that the banker and broker would commence another suit for the same subject-matter and still keep the fact that the notes had been taken from him by violence, a secret from his attorney.

9. If Mr. Brady took the notes by force, it is improbable that he would immediately put himself in the power of the man he had robbed, by stating to him that he, Brady, was in the habit of taking bribes.

10. It is improbable that Mr. Brady could, in fact, have done this, which amounted to saying this: "I have taken \$25,500 from you; of course, you are my enemy; of course, you will endeavor to be revenged, and I now point out the way in which you can have your revenge. I am Second Assistant Postmaster-General; I award contracts, increases, and expedition, and upon these I receive 20 per cent. as a bribe. I am a bribe-taker; I am a thief; make the most of it. I give you these facts in order that I may put a weapon in your hands with which you can obtain your revenge."

There are also other improbabilities connected with this testimony.

If Mr. Brady was receiving 20 per cent. of all increases and expeditions, amounting to hundreds of thousands of dollars per annum, it is not easy to see why he would be borrowing money from Mr. Walsh.

Now, if that story is true, boil it down and it is this, because if he got this 20 per cent. from everybody he had oceans of money—boil it all down and it is this: A rich man borrows without necessity and a poor banker loans without security. These twin improbabilities would breed suspicion in credulity itself. No man ever believed that story, no man ever will. There is something wrong about it somewhere, unnatural, improbable, and it is for you to say, gentlemen, whether it is true or not, not for me.

What is the effect of that testimony. So far as my clients are concerned it is admitted, I believe, by the prosecution—it was so stated, I believe, by his honor from the bench—that it could not by any possibility affect any defendant except Mr. Brady, and the question now is, can it even affect him. I call the attention of the court to 40th N. Y., page 228. I give the page from which I read:

To make such admissions or declarations competent evidence, it must stand as a fact in the cause, admitted or proved, that the assignor and assignees were in a conspiracy to defraud the creditors. If that fact exist, then the acts and declarations of either, made in execution of the common purpose, and in aid of its fulfillment, are competent against either of them. The principle of its admissibility *assumes that fact.*

That the conspiracy has been established.

In case of conspiracy, where the combination is proved, the acts and declarations of the conspirators are not received as evidence of that fact, but to show what was done, the means employed, the particular design in respect to the parties to be affected or wronged, and generally those details which, assuming the combination and the illegal purpose, unfold its extent, scope, and influence either upon the public or the individuals who suffer from the wrong, or show the execution of the illegal design. But when the issue is simply and only, was there a conspiracy to defraud, these declarations do not become evidence to establish it.

So far then, as the admission of the evidence in this case, of declarations, subsequent to the assignment, is sought to be sustained as evidence of the common fraud, on the ground of conspiracy, the argument wholly fails. A conspiracy cannot be proved against three by evidence that one admitted it, nor against assignees by proof that the assignor admitted it; it is a fact that must be proved by evidence, the competency of which does not depend upon an assumption that it exists.

So to the same point is the case of *Cowles against Coe*, 21st Connecticut, 220. I will read that portion of the syllabus that conveys the idea:

To prove the alleged conspiracy between the defendant and G., the plaintiff offered the deposition of R., stating declarations made by G. to R., while G. was engaged in purchasing goods of him, on credit, and relative to G.'s responsibility and means of obtaining money through the defendant's aid; these declarations were objected to, not on the ground that the conspiracy had not been sufficiently proved, but because the defendant was not present when they were made; it was held that they were admissible, within the rule regarding declarations made by a conspirator in furtherance of the common object.

Now, let us see what the court says about it:

The remaining question is, whether the declarations of Gale to Edmund Curtiss and William Ives were properly received. These declarations were not offered as in any way tending to prove the combination claimed. The motion shows that they were offered and received, after the plaintiff's evidence on that subject had been introduced. Had they been admitted for that purpose, or if, under the circumstances, they could have had any influence with the jury on that point, we should feel bound to advise a new trial on this account.

All that I have said in respect to Walsh applies to what is known or what is called the confession of Rerdell. It was admitted by the prosecution that not one word said by him could bind any other defendant in the case. But, gentlemen, is there enough even to bind him? Did he confess that he was guilty of the conspiracy set forth in this indictment? And I want to make one other point. In this case there must not only be a conspiracy but an overt act, and no man can confess himself into it without confessing that he was a conspirator, and that he knew that an overt act was to be done; because it takes that conspiracy and the overt act to make the offense. What overt act did Rerdell confess that he was guilty of—what overt act charged in this indictment? One. Filing a subcontract; and by no earthly method, by no earthly reasoning can you come to the conclusion that that could carry it into conspiracy. He must have confessed that he was guilty according to the scheme, according to the indictment set forth and in no other way. That indictment says that the money was to be divided, that it was for the mutual benefit of certain persons. Unless that has been substantiated this case falls. According to the case of the *King against Powell* the scheme of the indictment must be established, otherwise the case goes. In that case they charged it was one way, and they proved it was that way, and one of the defendants did not understand it that way and he was acquitted. Now, suppose they had not proved the scheme as they charged it, then all would have been acquitted; and unless the jury believe beyond a reasonable doubt, from the evidence, that the scheme set forth in the indictment here was the scheme, then they must find everybody not guilty. There is no other way.

What is the next argument? The next argument is extravagance. What is extravagance? If I pay more for a thing than it is worth that is extravagance. If I buy a thing that I do not want that is extravagance, and if I do this knowing it to be wrong, if I do this understanding that I am to have a part of the price, that is bribery, that is corruption, that is rascality. Nobody disputes that. How do you know that a thing is extravagant unless you know the price of it? For instance, an Army officer is charged with extravagance in buying corn upon the plains at \$5 a bushel. How do you prove it is extravagance? You must prove that he could have obtained it for less or that there was a cheaper substitute that he should have obtained. How are you going to prove that too much was paid for carrying the mail upon these routes? Only by showing that it could have been carried for less. What witness was before this jury fixing the price? How are we to establish the fact that it was extravagance? We must show that it could have been obtained for less money. What witness came here and swore that he would carry it for less? And would it be fair to have the entire case decided upon one route when it is in evidence that my clients had 30 per cent. of one hundred and twenty-six routes? Would it be fair to decide the question whether they had made or lost money on one route? Your experience tells you that upon one route they might make a large sum of money and upon several other routes lose largely. A man who has bid for one hundred routes takes into view the average and says "upon some I will lose and upon others I will make." How are you to find that this was extravagance unless you know what it could have been done for? They may say that they subcontracted some of the routes for much less. Yes; but what did they do with the rest of them? I might take a contract to build a dozen houses in this city, and on the first house make \$10,000 clear, and on the balance I might lose \$25,000. You have a right to take these things and to average them. When a man takes a contract he takes into consideration the chances that he must run in that new and wild country. It takes work to carry this mail. You ought to be there sometimes in the winter when the wind comes down with an unbroken sweep of three or four thousand miles, and then tell me what you think it is worth to carry the mail. All these things must be taken into consideration. Another thing: You must remember that every one of these routes was established by Congress. Congress first said, "Here shall be a route; here the mail shall be carried." It was the business then, I believe, of the First Assistant Postmaster-General to name the offices, and the Second Assistant to put on the service. Take that into consideration. Every one of these routes was established by Congress. Take another thing into consideration: That the increase of service and expedition was asked for, petitioned for, begged for, and urged by the members of both houses of Congress, and according to that book, which I believe is in evidence, a majority of both houses of Congress asked, recommended, and urged increase of service and expedition upon some of the nineteen routes in this indictment.

The COURT. What evidence do you refer to?

Mr. INGERSOLL. I refer to the star route investigation in Congress.

The COURT. That record is not in evidence.

Mr. INGERSOLL. I thought that was in evidence.

The COURT. No, sir.

Mr. INGERSOLL. It was used as if it was in evidence. I saw people reading from it, and supposed it was in evidence.

The COURT. It is not in evidence.

Mr. INGERSOLL. Well, we will leave that out. Now upon these nineteen routes—this is in evidence—increase and expedition of service were recommended by such Senators as Booth, Farley, Slater, Grover, Chaffee, Chilcott, Saunders, and by the present Secretary of the Interior, Henry M. Teller, and by such members of Congress as Whiteaker, Page, Luttrell, Pacheco, Berry, Belford, Bingham, chairman of the post-office committee, by Stevens of Arizona, a Delegate, and by Maginnis of Montana, and Kidder of Dakota, by Generals Sherman, Terry, Miles, Hatch, and Wilcox. In addition to these, recommendations were made, and read, by judges of courts, by district attorneys, by governors of Territories, by governors of States, and by members of State legislatures, by colonels, by majors, by captains, and by hundreds and hundreds of good, reputable, honest citizens. They were the ones to decide as a matter of fact whether this increase was or was not necessary. I believe in carrying the mails. I believe in the diffusion of intelligence. I believe the men in Colorado or Wyoming, or any other Territory that are engaged in digging gold or silver from the earth, or in any other pursuits, have just as much right, in the language of Henry M. Teller, to their mail as any gentleman to his in the city of New York. We are a nation that believes in intelligence. We believe in daily mail. That is about the only blessing we get from the General Government, excepting the privilege of paying taxes. Free mail, substantially free, is a blessing.

Now, there is another argument which has been used: *Productiveness*; but that has been so perfectly answered that I allude to it only for one purpose. How would the attorneys for the Government in this case like to have their fees settled upon that basis? PRODUCTIVENESS. Is it possible that this Government cannot afford to carry the mail? Is it possible that the pioneer can get beyond the Government? Is it possible that we are not willing to carry letters and papers to the men that make new Territories and new States and put new stars upon our flag? I have heard all I want on the subject of productiveness.

Now, gentlemen, that is all the evidence there is in this case that I have heard. What kind of evidence must we have in a conspiracy case? You have been told during this trial that it is very hard to get evidence in a conspiracy case, and therefore you must be economical enough to put up with a little. They tell you that this is a very peculiar offense, and people are very secret about it. Well, they are secret about most offenses. Very few people steal in public. Very few commit offenses who expect to be discovered. I know of no difference between this offense and any other. You have got to prove it. No matter how hard it is to prove you must prove it. It is harder to convict a man without testimony, or should be, than to produce testimony to prove it if he is guilty. All these crimes, of course, are committed in secret. That is always the way. But you must prove them. There is no pretense here that there is any direct evidence, any evidence of a meeting, any evidence of agreement, any evidence of an understanding. It is all circumstantial. I lay down these two propositions:

The hypothesis of guilt must flow naturally from the facts proved, and be consistent, not with some of the facts, not with a majority of the facts, but with every fact.

Let me read that again:

The hypothesis of guilt must flow naturally from the facts proved, and must be consistent with them; not some of them, not the majority of them, but all of them.

The second proposition is:

The evidence must be such as to exclude every single reasonable hypothesis except that of the guilt of the defendant. In other words, all the facts proved must be con-

sistent with and point to the guilt of the defendants not only, but every fact must be inconsistent with their innocence.

That is the law, and has been since man spoke Anglo-Saxon. Let me read you that last proposition again. I like to read it :

The evidence must be such as to exclude every reasonable hypothesis except that of the guilt of the defendants. In other words, all the facts proved must be consistent with and point to the guilt of the defendants not only, but they must be inconsistent, and every fact must be inconsistent with their innocence.

Now, just apply that law to the case of John W. Dorsey. Apply that law to the case of Stephen W. Dorsey. Let me read further. I read now from 1 Bishop's Criminal Procedure, paragraph 1077 :

It matters not how clearly the circumstances point to guilt, still, if they are reasonably explainable on a theory which excludes guilt, they cannot satisfy the jury beyond a reasonable doubt that the defendants are guilty, and hence they will be insufficient.

Just apply that to the case of Stephen W. Dorsey and John W. Dorsey. I would be willing that this jury should render a verdict with that changed. Change it. You are to find guilty if you have the slightest doubt of innocence. Even under that rule you could not find a verdict of guilty against John W. or Stephen W. Dorsey. If the rule were that you are to find guilty if you have a doubt as to innocence you could not do it; how much less when the rule is that you must have no doubt as to their guilt. The proposition is preposterous and I will not insult your intelligence by arguing it any further.

Now, then, there is another thing I want to keep before you. When a man has a little suspicion in his mind he tortures everything; he tortures the most innocent actions into the evidence of crime. Suspicion is a kind of intellectual dye that colors every thought that comes in contact with it. I remember I once had a conversation with Surgeon-General Hammond, in which he went on to state that he thought many people were confined in asylums charged with insanity who were perfectly sane. I asked him how he accounted for it. Said he, "Physicians are sent for to examine the man, and they are told before they get to him that he is crazy; therefore, the moment they look upon him they are hunting for insane acts and not sane acts; they are looking not to see how naturally he acts, but how unnaturally he acts." They are poisoned with the suspicion that he is insane, and if he coughs twice, or if he gets up and walks about uneasily—*his mind is a little unsettled; something wrong!* If he suddenly gets angry—SURE THING! When a man believes himself to be sane and knows himself to be sane he is charged with insanity, the very warmth, the very heat of his denial will convince thousands of people that he is insane. He suddenly finds himself insecure, and the very insecurity that he feels makes him act strangely. He finds in a moment that explanation only complicates. He finds that his denial is worthless; that his friends are suspicious, and that under pretense of his own good he is to be seized and incarcerated. Many a man as sane as you or I has under such circumstances gone to madness. It is a hard thing to explain. The more you talk about it the more outsiders having a suspicion are convinced that you are insane. It is much the same way when a man is charged with crime. It is heralded through all the papers, "this man is a robber and a thief." Why do they put it in the papers? Put anything good in a paper about Mr. Smith, and Mr. Smith is the only man who will buy it. Put in something bad about Mr. Smith and they will have to run the press nights to supply his neighbors with copies. The bad sells. The good does not. Then you must remember another thing: That these papers are large; some of them several hundred columns, for all I know—sixty

or a hundred. Just imagine the pains it would take and money it would cost to get facts enough to fill a paper like that. Economy will not permit of it. They publish what they imagine they can sell. As a rule people would rather hear something bad than something good. It is a splendid certificate to our race that rascality is still considered news. If they only put in honest actions as news it would be a certificate that honesty was rare; but as long as they publish the bad as news it is a certificate that the majority of mankind is still good.

Now, to be charged with a crime and to be suddenly deserted by your friends, and to know that you are absolutely innocent, is almost enough to drive the sanest man mad. I want you to think what these defendants have suffered in these long months. If the men who started this prosecution, if the men who originally poisoned the press of the country, feel that they have been rewarded simply because innocent men have suffered agony, let them so feel. I do not envy them their feelings.

There is another thing, gentlemen: The prosecution have endeavored to terrorize this jury. The effort has been deliberately made to terrorize you and every one of you. It was plainly intimated by Mr. Ker that this jury had been touched, and that if you failed to convict you would be suspected of having been bribed. That was an effort to terrorize you, and the foundation of that argument was a belief in your moral cowardice. No man would have made it to you unless he believed at heart you were cowards. What does that argument mean? I cannot say whether you will be suspected or not; but in my opinion, a juror in the discharge of his duty has no right to think of any consequence personal to himself. That is the beauty of doing right. You need not think of anything else. The future will take care of itself. I do not agree with the suggestion that it is better that you should be applauded for a crime than blamed for a virtue. Suppose you should gain the applause of the whole United States by giving a false verdict; how would the echo of that applause strike your heart? I believe that it is not wiser to preserve the appearance of being honest than to be honest with the appearance against you. I would rather be absolutely honest, and have everybody in the world think I was dishonest, than to be dishonest and have the whole world believe in my honesty. You see you have got to stay with yourself all the time. You have to be your own company, and to be compelled to know that your company is dishonest, that your company is infamous, is not pleasant. I would rather know I was honest than have the whole world put upon the forehead of my reputation the brand of rascality.

You were also told that the people generally have anticipated your verdict. That is simply an effort to terrorize you, so that you will say, "If the people think that way, of course we must think that way. No matter about the evidence. No matter if we have sworn to do justice. We will all try and be popular." You were told in effect that the people were expecting a conviction, and the only inference is that you ought not to disappoint the public, and that it is your duty to piece and patch the testimony and violate your oath, rather than to disappoint the general expectation. Mr. Merrick told you you were trying these defendants, but that the people of the whole country were trying you. What was the object of that statement? Simply to terrorize this jury. What was the basis of that statement? Why, that not one of you have got the pluck to do right. It was not a compliment, gentlemen. It was intended for one, no doubt, but when you see where it was born, it becomes an insult. I do not believe you are going to care what the people say, or whether the people expect a verdict of guilty, or not. You

have been told that they do. I might with equal propriety tell you that they do not. I might with equal propriety say there is not a man in this court-house who expects a verdict of guilty. With equal propriety I might say, and will say, that there is not a man on this jury who expects there will be a verdict of guilty. But, what has that to do with us? Try this case according to the evidence; and, if you know that every man, woman, and child in the United States wanted an acquittal, and you are satisfied of the guilt of the defendants, it is your duty to find them guilty. If I were on the jury I would, in the language of the greatest man that ever trod this earth—

Strip myself to death as to a bed
That longing had been sick for,

before I would give a false verdict.

Again, Mr. Merrick said, after having stated in effect that a majority of the people were convinced of the guilt of the defendants, that the majority of the men of the United States do not often think wrong. What was the object? To terrorize you. That is all. This verdict is to be carried by universal suffrage; you are to let the men who are not on oath decide for the men who are; to let the men who have not heard the testimony give the verdict of the men who have heard the testimony. What else? Again the same gentleman said:

There is to be a verdict, a verdict of the people for or against us.

What is the object? To frighten you. Let the people have their verdict; you must have yours. If your verdict is founded on the evidence it will be upheld by every honest man in the world who knows the evidence. You need certainly to place very little value upon the opinion of those who do not know the evidence. Mr. Merrick also suggested—I will hardly put it that way—he was brave enough to hope that you have not been bribed. Brave enough to hope that! All this, gentlemen, is done simply for the purpose of terrorizing you. I tell you to find a verdict according to the evidence, no matter whom it hits, no matter whom it destroys, no matter whom it kills. Save your own consciences alive. Your verdict must rest on the evidence that has been introduced, and all else must be thrown aside, disregarded like forgotten dreams. All that you have read, all the press has printed, must find no lodgment in your brains. You must regard them no more than you would the noises of animals made in sleep. You must stand by the testimony. You must stand by the law that the court gives you. That is all we ask. These articles in the newspapers were not printed in the hope that justice might be done. They were printed in the hope that you may be influenced to disregard the evidence, in the hope that finally slander might be justified by your verdict. Gentlemen, you ought to remember that in this case you are absolutely supreme. You have nothing to do with the supposed desires of any men, or the supposed desires of any department, or the supposed desires of any Government, or the supposed desires of any President, or the supposed desires of the public. You have nothing to do with those things. You have to do only with the evidence. Here all power is powerless except your own. Position is naught. If the defendants are guilty and the evidence convinces you that they are, your verdict must be in accordance with the evidence. You have no right to take into consideration the consequences. When you are asked to find a verdict contrary to the evidence, when you are asked to piece out the testimony with your suspicions, then you are bound to take into consideration all the consequences. When appeals are made to your prejudice and to your fears,

then the consequences should rise like mountains before you. Then you should think of the lives you are asked to wreck, of the homes your verdict would darken, of the hearts it would desolate, of the cheeks it would wet with tears, and of the reputations it would blast and blacken, of the wives it would worse than widow, and of the children it would more than orphan. When you are asked to find a false verdict think of these consequences. When you are asked to please the public think of these consequences. When you are asked to please the press think of these consequences. When you are asked to act from fear, hatred, prejudice, malice, or cowardice think then of these consequences. But whenever you do right, consequences are nothing to you, because you are not responsible for them. Whoever does right clothes himself in a suit of armor that the arrows of consequences can never penetrate. When you do wrong you are responsible for all the consequences, the last sigh and the last tear. If you do right nature is responsible. If you do wrong you are responsible.

You were told, too, by Mr. Merrick that you should have no sympathy: that you should be like icicles; that you should be godlike. A cool conception of Deity! In that connection this heartless language, as it appears to me, was used:

Man when he undertakes to judge his brother man undertakes to perform the highest duty given to humanity.

Good!

He should perform that duty without fear, without prejudice, without hatred, and without malice. He should perform that duty honestly, grandly, nobly.

I read on:

Inclosed within the jury-box or on the bench he is separated from the great mass of mankind—

Then you should not pay any attention to the opinion of the public. If you are separated you should not be dominated by the press. If you are separated you should not be disturbed by the desires of anybody. But he continues:

and sentiments of brotherhood die away.

He was a nice man about that time:

Standing above humanity and nearest God he looks down upon his fellows and judges them without any reference to the sorrow his judgment may bring.

That is not my doctrine. The higher you get in the scale of being the grander, the nobler, and the tenderer you will become. Kindness is always an evidence of greatness. Malice is the property of small souls. Whoever allows the feeling of brotherhood to die in his heart becomes a wild beast. You know it and so do I:

Not the king's crown nor the deputed sword,
The marshal's truncheon nor the judge's robe
Become them with one-half so good a grace as mercy does.

And yet the only mercy we ask in this case, gentlemen, is the mercy of an honest verdict. That is all.

I appeal to you for my clients, because the evidence shows that they are honest men. I appeal to you for my client, Stephen W. Dorsey, because the evidence shows that he is a man, a man with an intellectual horizon and a mental sky, a man of genius, generous, and honest. And yet this prosecution, this Government, these attorneys representing the majesty of the Republic, representing the only real republic that ever existed, have asked you, gentlemen of the jury, not only to violate the law, they have asked you to violate the law of nature. They have

maligned mercy. They have laughed at mercy. They have trampled upon the holiest human ties, and they have even made light of the fact that a wife in this trial has sat by her husband's side. Think of it.

There is a painting in the Louvre, a painting of desolation, of despair and love. It represents the night of the crucifixion. The world is represented in shadow. The stars are dead, and yet in the darkness is seen a kneeling form. It is Mary Magdalene with loving lips and hands pressed against the bleeding feet of Christ. The skies were never dark enough nor starless enough. The storm was never fierce enough nor wild enough, the quick bolts of heaven were never lurid enough, and the arrows of slander never flew thick enough to drive a noble woman from her husband's side. And so it is in all of human speech the *holiest word* is WIFE.

And now, gentlemen, I have examined this testimony, I have examined every charge in the indictment against my clients not only, but every charge made outside of the indictment. I have shown you that the indictment is one thing and the evidence another. I have shown you that not one single charge has been substantiated against John W. Dorsey. I have demonstrated to you that not one solitary charge has been established against Stephen W. Dorsey—not one. I believe that I have shown to you that there is no foundation for a verdict of guilty against any defendant in this case.

I have spoken now, gentlemen, the last words that will be spoken in public for my clients, the last words that will be spoken in public for any of these defendants, the last words that will be heard in their favor until I hear from the lips of this foreman two eloquent words—NOT GUILTY.

And now thanking the court for many acts of personal kindness, and you, gentlemen of the jury, for your almost infinite patience, I leave my clients with all they have and with all they love and with all who love them in your hands.

Mr. MERRICK. Before the court takes a recess I will ask your honor to allow me to have the paper mentioned the other morning by Mr. Wilson.

The COURT. I left it at home.

Mr. MERRICK. I was going to say, sir, that I have never seen the paper, and I do not know what its contents are, but it being apparently an official document from the Second Assistant, addressed to the Postmaster-General, and the Second Assistant being one of the defendants, I have no objection to it being read to the jury, other than that I do not know what is in it. The other side refuses to consent. Of course, it is too late. It was referred to in one of the papers, and its presence will probably be important to complete the paper referred to. I have never seen it in my life.

Mr. INGERSOLL. I object to anything being considered in evidence now that was not considered in evidence while I was speaking.

Mr. MERRICK. The reason I did not make this suggestion to the court earlier was because Mr. Wilson had promised to let me have the paper this morning.

Mr. TOTTEN. I sent it up.

Mr. MERRICK. [To Mr. Wilson.] You told me that you would give it to me this morning, and that is the reason why I did not call the attention of the court to it yesterday.

The COURT. I put it in my portfolio and carried it home, and have not opened the portfolio since.

Mr. WILSON. I was called out of the court yesterday afternoon, and Colonel Totten sent it to his honor in my absence.

Mr. MERRICK. As it was a declaration of one of the parties, I supposed there would be an acquiescence to letting it come in.

The ATTORNEY-GENERAL. As Mr. Ingersoll informed me yesterday that he would continue his remarks until recess, I have left my papers at home. . If the court will now take a recess, I will go on after recess for the remainder of the day and continue to-morrow, and I will probably occupy but one or two hours to-morrow. I do not propose to consume much time.

The COURT. We will take a recess, then, until 1 o'clock.

At this point (11 o'clock and 45 minutes p. m.) the court took a recess until one o'clock.

AFTER RECESS.

The ATTORNEY-GENERAL. May it please the court, gentlemen of the jury: It is now just about one year since I was retained in this case. I was absent from home and I received a telegraphic message from the then Attorney-General, Mr. MacVeagh, requesting me to see if I could make it convenient to meet my friend, Mr. Bliss, at Long Branch, to take charge of this case. I conferred with him, for my first impression was that I could not. I conferred with him by telegram, and claimed the privilege of considering whether I could or could not. My professional engagements were numerous then, and took me away from Philadelphia. Finally, up at Altoona, in the mountains of Pennsylvania, where I was trying an important coal-mine case, I determined that I could and would take charge of the case, provided, upon inspection, it appeared to me to be one that ought to be prosecuted. I came to Washington. When I arrived here I found that there was a difficulty as to one particular contract as to which the statute of limitations might run, and the Government might be excluded from prosecuting. In consequence of that, for the purpose of testing the whole of these cases as well as for the purpose of determining whether or not we had a right to proceed by information, an information was filed and the star-route cases in their details—that is, their offensive details—those details which have made them odious, was developed. And upon that investigation before Judge Cox I came to a conclusion that they were cases that ought to be prosecuted and disposed of in a court of justice; that it was a duty the accused owed to themselves to solicit an investigation, one of them having been a Senator of the United States and the other a Second Assistant Postmaster-General. It seemed to me then that men occupying positions such as they had occupied should have demanded an investigation as a point of honor due to the public as well as to their personal dignity. When the case was heard here upon the application to maintain the information we were told in tones that sounded like trumpets, that all they wanted was a fair investigation before a grand jury and a traverse jury, according to law and not contrary to what they alleged was a violation of the regular course of litigation. They cried, "Give us the opportunity to come before the public. Let us be fairly heard in the usual way in which cases are tried and we will come in here and triumphantly vindicate ourselves." I respected them, that they had the manhood to stand up and talk in that way, and I responded to the sen-

timent they professed to be animated by. It was their duty. They owed it to their personal honor to demand an investigation.

Well, they have had an indictment, and they went before a grand jury and the grand jury found that indictment, and now they have a traverse jury, and they have had a trial. Let me ask you to testify whether or not they have shown a zeal to tell the whole truth and nothing but the truth, and have a fair and full investigation? Here is an indictment than which no better indictment was ever drawn. Under the circumstances, when it was prepared, with all the difficulties that surrounded the collection and marshaling the facts, no man ever encountered more trouble to prepare an indictment than did Mr. Ker. I selected him because I was determined that the best man I knew of in the preparation of such papers should be the man to prepare that paper for the sake of the defendants as well as of the Government. They had a right if acquitted, to be acquitted upon an indictment that contained every item of charge that was prepared against them, so that the acquittal should be a full and perfect and honorable discharge.

How have they met it? From the hour that indictment was preferred down to this very minute, till the last minute that you heard Mr. Ingersoll, there has been nothing but carping, hypercriticism upon it, and attempts to persuade you to acquit them upon the score of mere technical difficulties amounting almost to a surrender of the merits. These were the men who came into court boasting that all they wanted was an opportunity to vindicate themselves before the world. They wanted no technicalities. They did not object to the information upon technical considerations, but because informations were odious things, they were extraordinary things, unusual, and if they were to be tried, they wanted to be tried according to the due forms of law, to appear before a grand jury of their fellow-citizens and have them pass upon the case; to appear before a petit jury and confront the facts like men and contradict them.

Gentlemen, what I am stating to you is a fact. Others are here to testify to it. I witnessed and heard it all. But let me first explain why I am here. [To the court.] I am here to see fair play. I am here upon the behalf of the Government that wishes no man's conviction unless he is clearly guilty; to say that if these men are innocent they must be acquitted; to say that the Government would not have the law strained in the slightest degree to secure a conviction. The honor of the Government, the integrity of the administration of public justice, demand that these men shall be tried according to law and acquitted, unless the Government can make out a clear case against them. On the other hand, if there be evidence against them, the honor of the country is concerned, the honor of the administration of public justice is concerned, the honor of every man in that jury-box is concerned, in seeing that they are convicted.

That is what I am here for. You have been told in very peremptory and positive terms, almost offensive in their tone, that my presence here was an intrusion. I heard and have read but a day or two since, that it was beneath the dignity of the great office that I hold, to appear before a judge in an "inferior criminal tribunal," and that no such thing had ever been heard of in the history of this Republic. This is not an inferior criminal tribunal; it is a tribunal of great dignity. Before this case was called on, this room was filled with crowds upon crowds of people for several months to hear the trial of an assassin of the President of the United States. Can that tribunal be called an inferior criminal tribunal that tries a man for assassinating a President of the Republic? All the process that should be issued against the Government and its officers within its jurisdiction must come here. Who

could call this an inferior criminal tribunal? That affront that was put upon the dignity of this tribunal is in keeping with the whole conduct of the defense here from the beginning. The case has been festering with lies against everybody who stood up here and cried out merely for the administration of the law. "Inferior criminal tribunal!" And "no such thing had ever been witnessed in the history of this Republic as that an Attorney-General had appeared under such circumstances!" And that I was "the subordinate of the district attorney, who represents this District!"

It is no derogation to my office to say that I was subordinate to any officer who aided in the administration of public justice. From the hour, forty-five years ago, when I became a member of the profession that I have honestly followed from that hour to this, I have felt myself bound as a point of professional and personal honor to be ready at all times to appear wherever justice was administered if my services were required, and there is no magistrate's office so humble that I would hold myself degraded to appear in if the necessities of my client, the Government, required my presence. Wherever justice is administered the place is sacred. And there is no officer in this case who could feel himself diminished or belittled by appearing in the presence of the humblest magistrate who administers justice within this District. What an idea of justice such men have. Pretty much the same idea they had of honesty when they conducted the transactions that are here complained of. Never heard of it? Do they read their books? These trials of what would be called the assizes in New England, or, if in London, the Old Bailey, or in some of the States the quarter sessions—these trials, no matter how important, are seldom if ever published in the books of reports. There is not one in five hundred that ever reaches the court of last resort, so it is a difficult thing to trace the history of this method of conducting criminal investigation, and to know who appeared and who did not. But notwithstanding all that, if they had read their books they would find the case of the *United States vs. Swartwout & Bollman* in the preliminary proceeding before the judge of this court, or of the court that existed before this court. They would find there that *Cæsar Rodney*, the Attorney-General of the United States, did appear when the judge sat only to hear an interlocutory application. And yet it was never heard of in the history of the Republic.

Further, if they will take the trouble to examine their books and trust to them more than to declamation and "drawing the verbosity of their discourse finer" "than the staple of their argument," they will find in Wharton's *State Trials* that an illegal privateer in 1793 was tried in the circuit court of the United States for the district of Pennsylvania, and Attorney-General Randolph, the first Attorney-General of the United States, appeared then and conducted that case.

Again. They will find in Wharton's *State Trials*, in the trial of the western insurgents in the United States district court of Pennsylvania, that Attorney-General Bradford appeared for the Government in that case and prosecuted for high treason.

They will find in Francis Villato's case, in 1797, in the circuit court for the district of Pennsylvania—the charge was treason (entering on board of a French privateer)—that Attorney-General Lee represented the Government and prosecuted.

They will find in Frie's case, the North Hampton insurgent, in the United States circuit court of Pennsylvania, that Attorney-General Bradford appeared.

They will likewise find that in the preliminary hearing before Chief

Justice Marshall, sitting as a committing magistrate when Aaron Burr was charged with treason, that Cæsar Rodney appeared!!!

Now, that was never heard of before in the history of the Republic!! Never!! And yet it is pretty much like everything else you have heard. I caused further investigation, and I hold in my hand, and it was done in a hasty way, on the spur of the instant, running through the English state trials rapidly, case after case, where the attorney-general appeared—and I had a brief made of it—beginning with Sir Edward Coke, that monarch of the common law; Sir Francis Bacon, afterwards Lord Verulan, that master of philosophy, including Lord Walsingham; the great De Gray, Sir William Jones, chief justice of the king's bench in Ireland, and J. C. P. in England; Sir Thomas Trevor, Sir Phillip Yorke, the great Lord Hardwicke, Spencer Perceval, the premier; Sir Vicary Gibbs, lord chief justice of both the benches; Sir John Somers, lord chief justice and lord chancellor; Sir John Scott in seven cases appearing—and he was the great Lord Eldon, as to which it may be well said no better equity judge ever sat in Christendom, or ever will; Edward Thurlow, afterwards Lord Chancellor Thurlow, was twice found; Sir Dudley Ryder, lord chief justice of the king's bench; Alexander Wedderburne, afterwards Lord Loughbourn, lord chancellor and lord chief justice of the common pleas; Geoffrey Palmer, and Sir Edward Law, Lord Ellenborough.

There were thirty-five instances of these great names that I have recited and thirty-two other attorneys-general in England, making in all sixty-seven cases that I found just upon the instant. And yet you are told that it is beneath my dignity and the dignity of my office to come before you [the court], to come before you [the jury], in this inferior court, and that it was never heard of before in the history of the Republic: Sir, if my place is anywhere, and ever will be anywhere in the performance of the functions and duties of the high office that has been bestowed upon me, it will be here as it is here *now*, NOW, NOW. My place is here. Why? Because I wish to see justice done, and as far as I am concerned I am determined to see it done or else surrender my office. There shall be no lack of performance of duty in me. The day I flinch here I will lay down my commission and walk away. Why? I began this case, I started with it, understood all about it, had learned it from beginning to end, knew what was to be done and what ought to be done. I arranged and methodized the conduct of this case. The gentlemen who are in it, with the exception of Colonel Bliss, I invited into it. I was determined that this case should not have an element of that vulgar thing called politics in it. I was determined that every side of public sentiment, as represented by honorable men, should be here—Republican and Democrat—that the prosecution should be *pro bono publico*. I was determined that the citizens of this community, who were called upon to pass in judgment upon foul acts done in this community, in derogation of the honor of this community as well as the honor of the Government, should be satisfied by being represented here by a responsible and eminent lawyer.

When the case was before the grand jury, Colonel Bliss, who had been in it from the first, displaying that wonderful skill, that power of persistence which is his gift—I never saw it equaled, sir, in any but one man, and he no more than him equaled it, and that was William L. Hirst, of the Philadelphia bar, the man who tried Dr. Dyott, you remember, and Eldredge, and those great cases—Mr. Bliss, I say, who displayed that wonderful ability which he possessed to organize and arrange and methodize a

case like this was without help. The burden of the case was upon him. Upon conference with him, having in view the fact that I was obliged to withdraw from the active conduct of the case by a necessity that was official in its character and could not be slighted, it was agreed that others should come in, and others were invited in, and it was understood, and I made it understood, that I would be present and consulted in this case, assist in this case, and, if it were possible, be present every day at the trial. But it was not possible. Sometimes we were five days in the week engaged in Cabinet duty, and since the Department of Justice has been created the Attorney-General is no longer the advocate of the Government. Much of that pleasant and almost heroic duty of his position has to be passed over to others. Indeed, the law, in view of that, has provided a substitute in the Solicitor-General, and has also conferred upon the Attorney-General the power of selecting whom he pleases, and when and where he pleases, to assist in conducting all the business of the Government, and his time is occupied in administrative and executive duties which hinder him from doing that which of all things a lawyer most loves, the open advocacy of facts and principles in a court of justice.

As I was adverting to the fact that my presence here is not irregular, let me remind the court that it is not illegal. There is a statute upon the subject that gives me absolute power to appear whenever I please and supersede whomever I please, and let me also state a little fact which would not enlighten you, sir, but might enlighten those who have been saying these rash things—I will not say ignorant things, but rash things, that after the judiciary act was passed, and the statute was enacted with reference to the Attorney-General, he was authorized to appear and argue cases before the Supreme Court, and nothing was said upon the subject of his appearing in other tribunals. But notwithstanding that, Lee, Randolph, Bradford, Cæsar Rodney, all appeared and there was no statute conferring power upon them. They appeared by the very power of the Attorney-General, which was one of the functions of his office. But in view of that, Mr. Madison, in Congress, Mr. Boudinot, Mr. Sedgwick (there are no better and greater names) agitated the subject whether or not there should not be a statute commanding him and requiring him to appear, and Attorney-General Randolph, at the instance of Congress, made a report in which he advocated the enactment of such a statute, and Congress, according to the fashion in those days, ordered such a bill to be prepared. The difficulties that arose out of our political affairs at that time occasioned the passing by of that bill, and it was not enacted, but with all that Attorneys-General did appear and constantly appeared in trials like this before courts like this.

Now, so much for that, gentlemen. You may ask yourselves why I have taken the time to enlarge upon this. Because much time was taken to detract from me and put me personally and officially in a false position behind my back. You were told that I did not understand the case. What was that to them? All the better for them. That I did not understand the case? Look at that [placing his hand upon a large pile of notes]. Night by night and day by day have I traveled hand in hand with all these gentlemen in this case, and there is the fruit of my labors. What I had pledged myself to do I did. I know this case, and, gentlemen, it is because I know the case I come here. It is because I know this case that I do not ask, like the remark made about Turner, that the indictment should be withdrawn as to all of them.

And if I may be permitted to express a regret, I have beheld Turner sitting here assisting these men after he behaved as he did. It may not

have been with a guilty knowledge of the conspiracy. It may not have been that he was to reap any gain or profit except the possession of his office. I saw him here and did not know who the man was, and had to ask. His conduct directed my attention to him. After I witnessed what I saw here, whenever I came into court, and especially here recently, the eagerness with which he assisted these defendants, how he sat at their elbow counseling and advising them, encouraging them—after I saw that I almost repented that Mr. Merrick had said what he did. I felt as Mr. Merrick did that it would do him good if he would hear the grating of the penitentiary doors. I felt as if it would have been better if we had waited awhile and not suffered him to feel so secure. It was a scandalous thing—a man who came into court here indicted and evidently guilty of some kind of misfeasance or malfeasance (though not of conspiracy), in the manner in which he discharged his duty, and of the way in which knowingly, willfully, he made written misleading misrepresentations upon those jackets that contained the records. It was, I say, a scandalous thing for a man who had enjoyed the benevolence and the clemency of the Government by the generous concession made to him by Mr. Merrick, that he should dare sit there as he now sits marshaled with these defendants aiding and assisting them. But, sir, it is in keeping with the whole thing. They know no shame, they have no gratitude.

What do I want. I want fair play here. I agree with what Mr. Ingersoll said when he concluded. If you can on your conscience and your honor under the oath you have taken, “So help you God, a true verdict to render according to the evidence,” say that these men are innocent, acquit them—acquit them. As Mr. Bliss concluded, “We want no victims.” We want men to be punished for offenses they have committed, for scandals and reproaches they have brought upon the Government, for disgraceful calumnies on the civil service of the Government they have been the cause of creating. We want them acquitted if they are innocent, but we want them punished if they are guilty. For is it not a terrible thing to believe for one minute that one important branch of this Government, the only branch, as Mr. Ingersoll says, that is of any benefit to the people at large, which is so useful and beneficent, should be so shockingly abused and managed with such corruption. And if it be not true, is it not a horrible thing that there should be a scandal as to the management of that branch.

The post-office is a grand function of the Government. It is one of the great products of civilization. There is no civilization in any country where there are no roads, no communication—there cannot be. They may be semi-civilized and that is the best of it. Think for a moment. Here is this great function of the Government, so beneficent and so useful, to support which large sums of money are expended, and to which people point with gratification as one of the greatest evidences of our advancement. It is but one hundred years ago since John Palmer first started the present system of mail delivery, the improved benefit of which we now enjoy, after Sir Roland Hill improved it. It is just about one hundred years ago, 1783, that a man who kept a play-house, but a man of considerable cleverness and intelligence, observed that the mail that came from Bath to Bristol was never delivered until the day after the passengers in the stage-coaches arrived. He then conceived the thought of expediting the mail, but not expediting it as Brady did.

The COURT. That is the case now in this country, is it not?

The ATTORNEY-GENERAL. Yes; it is in this instance. Oh, in some of the places expedited by Brady, no mail arrived at all; nothing but the

pouch. John Palmer went to merchants and people and got up a system of parcel-deliveries, and then he went to William Pitt. All the officials around the post-office resisted Palmer's plan, but Pitt was a brave man, an able man, and he employed Palmer, and the product of that employment was this system of mail-delivery which we have had improved. It is just one hundred years ago since it began in England.

Gentlemen, here is this great institution, which I say is one of the greatest evidences of our civilization, which we are bound to protect for the sake of that civilization. What is to be said of the men who will undertake to abuse the funds raised for that purpose, and under color of transacting and expediting the business corruptly put money into their own pockets? What is to be said of such men? You have heard a great deal said upon the subject of giving the mails to people in remote regions; that the poor man, the hard-handed man, the farmer, the miner, the pioneer, had as good right to have his mail as the rich man. That is true. We do not dispute that. You were told the argument was that it must be productive, otherwise the mail could not be sent, and ought not to be sent. That is not true. The propriety of having a delivery or a post-office does not depend upon the fact whether or not, according to our system, to use the vulgar phrase, it will pay. That is not the point. But we look at this productiveness as a test of how much is needed; how often it is needed; whether expedition is needed, and frequent service is needed. Where there are no letters, gentlemen, there are no men to read them or write them; and is it an improper thing for brother Merrick here to say, and is he to be criticised for saying it, that when the mail did not pay it ought not to go? Why, certainly, it should not go; that is, when it did not pay in that way. If there were people there who had letters, and required to have letters once a week, once a month, let them have them; but no expedition at the rate of \$50,000, no increase of expedition and trips and supply to a place that had nothing but an empty pouch. Supply what? Suppose you [the judge] or you [jurymen] were Postmaster-General. What would you do if an application was made to you to increase and expedite—to increase the number of trips, to expedite the mail, to increase the expense; and that, too, in a wild region of country where the expense might be great? What would you do? Why, you would ask the first thing, "How many letters are delivered there, and how much correspondence is there, and where is the necessity for it?" What is the test of the necessity? The amount of correspondence. You were told Lead-villes sprang up—was there one on any of these nineteen routes? I am not going to travel over all this case. I am not here for that purpose. I am here in a general way just to allude to those facts that you are saturated with. You know, as well as I do—and I have them here in my papers and presently I will advert to some of them—you know as well as I do that there were cases there wherein it was testified (as in one instance, the man said they drew a line on the map and called it a post-route) that mail-bags went time and again empty; that there were a few letters only a week, and those routes were expedited and supply increased and large sums of money expended. These men say that was done honestly and with an honest intention. The law which is the rule for the post-office and binds it just as your oath binds you, provides for the manner of granting these contracts. It provides for the manner in which they shall be paid, to whom they shall be assigned, when and under what circumstances they shall be given.

Was that law conformed to? What was the object of the law? It is on the surface of the thing. The object was to have fair play; that

the Government should tell the world what it wanted, and express what it wanted by advertising. The law required before the Government should contract there should be advertisement, and particularity in the advertisement; the details set forth fully. Why? That the men who bid should know; that the Government should declare what it wanted. The bidder was obliged to give a bond, and if the contract was awarded to him he was obliged to give another bond. See the care with which the law guarded the Government, which is the fountain of law, and guarded itself from being deceived or cheated. By the method Mr. Brady adopted the law was trampled under foot. Where was the necessity of all this formality, this publication, these bonds, and all that is requisite, and considered wisely requisite, and the product of the experience of the administration of the office? Where was the necessity for it after the contract was granted and the parties had entered into it, if the Postmaster-General, at his will and pleasure, by the Second Assistant, consulting nobody, could advance it from seventeen hundred or two thousand dollars to thirty, forty, fifty, or seventy thousand? Where was the fair play between the bidders if that could be done? You could safely bid to carry the mail for nothing if you knew you were going to have that advantage. You could safely say, "I will carry that mail for nominally nothing, because, no matter how low I take it, there is the Second Assistant Postmaster-General who will advance it so that I shall make a profit. Indeed, I will run no risk. I can sell my contract to another man, and he will take something, and I will take all the profit." I do not propose to address myself to the case in a rigidly methodical and orderly manner, for you have been talked almost deaf, but I am rather now standing here in the position of one who is passing on the whole case in a general review.

It is said that Brady knew nothing of this deception. Was he deceived? Were not those contracts put upon record, and did he not know that a portion of the money went to the contractor, and not all to the man who did the work; the man who had his money in it; the man who owned the horses; the stock and the material; the man who really took the responsibility, and was subject and liable to punishment for negligence? Why he knew there were men in this town who were pocketing thousands upon thousands of dollars for doing nothing. Can he call that fair play to the Government? Should not that have warned him? The policy of the Government is that a contractor shall take his contract at a fair living rate, and there is the end of it. He must do his duty. If he fails to live up to his contract, fines are imposed upon him, and penalties for the sake of the public, so that there shall be regularity. That is the purport of the law. A man shall get a fair living in return for the risk he takes. And yet Mr. Brady knew that here in all these nineteen routes—he must have known and did know, for it was his place to know—that frequently nineteen, twenty, and thirty thousand dollars of the increase went into the pocket of a man who lived here, never saw the route, and did nothing but get up the scheme for expedition and supply and sell out the contract. Was that fair to the Government? I say nothing of the men who did the work; but was it fair to the Government? And yet he was innocent! He was innocent! Do you believe it? "*Credat Judæus Apella! Non ego, non ego.*"

Let me speak of this case as it presents itself in its technical form. The law belongs to the court. Whatever you may see fit to do regarding the judgment of the court I will not meddle with. The court will tell you what your duty is. I will not stand here and protest that a juror is bound to obey the court upon questions of law except where his

conscience comes in, and then he is to kick the court and the law and everything else to pandemonium and go there himself. Look at it for a minute, gentlemen. I do not propose, now, to interfere with you ; but look at the practical working of that rule. The judge sits here responsible for the law that he gives, responsible to God as you are, responsible to public sentiment as we all are, responsible to the profession, and responsible to the court above for the law that he utters. He tells you the law one day with reference to my case and you disregard it and walk right over the dead body of the law to effect what you conceive to be your duty. To-morrow my friend Merrick has a case identical with mine ; the same judge tries it and propounds the law, the jury obeys it and Mr. Merrick has the benefit of the law. Where is the equality in the administration of such justice ? My client is convicted. His client is acquitted. Is that a fair administration of the law ? Is that equality ? Is that justice ? Confidence must be given somewhere, gentlemen. I really shudder sometimes when I hear a lawyer talk about courts in that way to juries. A lawyer that does not respect the court does not respect himself. The lawyer that flouts at the law as propounded by the court one day may to his sorrow and shame find the next day that he has to seek that same law from the hands of the same judge for the protection of another client. The duty of a lawyer is to respect the court. He then respects himself. Every atom of thought or word that he utters in derogation of the dignity of the judge is in derogation of himself. He belittles himself in the eyes of all men. If the judge is not to be respected he, the lawyer, is not to be respected. He is nothing but an idle, vapid declaimer, or a sophisticating scoundrel. As Judge Coulter finely said, speaking of just such a case as this :

If such views are to be adopted and encouraged, every honest man will shudder when he meets a lawyer in the street.

Let us all act together here in support of that civilized, social order which we enjoy as no people on the face of God's earth ever did enjoy, and which is the product of obedience to law. When the Pilgrims were about to land in the Mayflower the first act they did was to assemble in the cabin of that ship and to sign a solemn covenant binding all to obey the law. The American people from that hour have obeyed the law. Let us have no turgid appeals to you ; no breezy verbiages, no flatulent facilities uttered here for the purpose of sweeping you away from the performance of your duty. Respect yourselves, respect the law, respect those who administer it. Remember the law that the court propounds will be your rule some day. It is not a transient and arbitrary order. It is a fixed principle, established, adjudicated, ascertained, or enacted. The judge does not make the law. He merely declares the law as it is known to exist.

I have not been here during the discussion of the law, but I have read it all. Such law I never heard before ; and if I were obliged to practice it I would quit the practice of law in such cases. A good deal of it is like the story of the irregularity of my presence here. It is law for the occasion. This is a prosecution for conspiracy. It is a very peculiar offense—a very peculiar offense. There is a great deal of nicety in the preparation of an indictment for conspiracy of this character. It requires learning. It requires legal, logical skill to set it forth in clear and orderly words.

To convict of a conspiracy is a very difficult thing. You were told to-day that it is a difficult thing to convict a man of anything. That is not so. It is an axiom of the profession that must be accepted that it is a difficult thing, and, when men have gone through the ex-

perience you have had here, that axiom will be adopted even by laymen as an accepted fact, that to establish a conspiracy, particularly one of this kind, is a difficult thing. I have had experience in these matters and can speak by that experience. Judges themselves in trying conspiracies, as in this, as the case progresses from day to day, get restive. They cannot see the pertinency of the evidence. They cannot see that the conspiracy is being made up. But the lawyer, who understands his case, goes on, and the enemy he is combating knows full well the danger that is ahead. As Mr. Ingersoll told you to-day, he cannot escape from himself. He knows, within himself, that he conspired and cheated, and therefore every inch of ground, every item or atom of testimony that can be adduced which he knows, goes to make up the sum total of his guilt, and the evidence of it he stimulates his counsel, as guilty men do, to fight and resist. These cases are made up by here a little and there a little, here a little and there a little, until finally, like the falling of the snow, it is as high as a mountain, and the guilt is as palpable as the whiteness of that snow. That you saw in this case. You, yourselves, sat here day after day and heard this proof given, and that paper offered, this letter, and that document, and could not see where the conspiracy was. Here a little and there a little, here a little and there a little, and by and by you woke up to a consciousness of what? Of what the court told you:

There is, gentlemen, something for this jury to pass upon. I will not entertain your demurrer to the evidence. I will send this case to a jury.

Here a little and there a little, here a little and there a little, and suddenly the whole thing is apparent to you. There is something for the jury to pass upon.

This system of prosecuting for conspiracy is old. We are in the habit of using the word conspiracy in the ordinary vernacular to indicate something of a political character. When we speak of the conspiracy to kill Julius Cæsar and the other conspiracies that fill a place in history here and there through the course of time, and that produced great results, the members are called conspirators because they met together and because they combined and acted together. The offense of conspiracy was known in the English law by statute as far back as the twenty-eighth year of Edward I, and that was about 1285 or 1295. Then it came on down and was extended. It was instituted for the purpose of punishing men who combined together to prosecute people, and the statutes multiplied and the decisions multiplied and the propriety and fitness of applying these statutes and these principles to criminal combinations became more apparent. It was a remedy that society needed to protect it against these conspiracies, against the rights of individuals and against society itself, against sometimes the holy religion itself that we profess, against sometimes the dignity and honor of the administration of public justice. Men have been prosecuted for conspiring to detract from the dignity of the administration of public justice and defaming it, until finally it came down to Lord Denman's time, when that beautiful antithesis was adopted which defines the crime to a certain extent, and sufficiently for all practical purposes. It is an agreement between two or more to do an unlawful thing or to do a lawful thing in an unlawful way. Men do not sit down and write papers to do such things. Men do not meet in a room as the conspirators are represented in the play of Julius Cæsar to have met together to conspire. Men do not conspire as they did in the tragedy of Ion where you see the conspirators meeting together and Ion on whom the fatal lot falls taking the weapon to kill his father. Men who wish to carry out this kind of

conspiracy come together by that common bond of scoundrelism, greed for money, a desire to get what does not belong to them and without work. That is what degrades men; their desire to get along without giving an equivalent. That is at the bottom of larcenies. Lazy, idle men are just traveling on the edge of a thief's life. They want to get something out of somebody without giving an honest equivalent for it. That is the common bond of scoundrelism. Now, I say to you that men do not come together combining deliberately and methodically, organized like a company of soldiers, like a body of police, or like a court of justice. Oh, no. Some one man, some great organizer starts it just as some thief or robber projects the robbing of a bank or breaking into your house. He determines that it is a good thing. That is what they call *good*. That is where Mr. Ingersoll got his "good" from. It is a good thing to go and break into this bank. Some one starts the suggestion that money can be made, and then he calls A, B, C, and D, and they go at it. That is a conspiracy, but they are generally indicted for burglary or for robbing a bank. You never catch the men all together. There is not one conspiracy in a hundred thousand in which you are able to bring them all together and prove a conversation in which they in effect and in fact explain their conspiracy to each other and acknowledge that it is a conspiracy. We seldom if ever catch them together as we do in S. W. Dorsey's house in this case; rarely so. It is not the happy fortune of a prosecution to often catch men as they are here caught all together in S. W. Dorsey's house. Innocent men! Lambs! Colonel Kid's lambs! You remember, sir, he took Tangiers and murdered everybody.

The COURT. Kirk's.

The ATTORNEY-GENERAL. It was Kirk; yes, sir. You are true to your blood, sir, you know the name, all Scotchmen know the Kirk. It is Kirk. He was not a kid, either, nor a lamb. You remember his lambs; lovely babes of grace! Were they not? They murdered everybody, right and left, men, women, and children.

Now, let us return to our conspirators. There they were altogether in S. W. Dorsey's house. We rarely get such evidence in a criminal case. I have rarely had it in my experience. I will read you presently from a most excellent little book, which I will have the pleasure of handing you, written by one who is a lawyer. It is entitled *The Law of General Conspiracy*, by Wright; a recent book, and a very small book. But, oh, how thorough it is; how well arranged and systematized; like the systematic arrangement of the civil law. He has gathered it all in. Here it is. He gives a case here wherein a conspiracy is proven—but let me read it to you; it is better than reciting it:

In Cope's case—

The COURT. [Interposing.] That is 1st Strange.

The ATTORNEY-GENERAL. It is; yes, sir.

it was ruled that an agreement between members of a card-maker's family to procure a rival's apprentice to spoil the master's cards, a conspiracy might be inferred from proof that each had separately given money, and were all members of the same family.

It might be inferred from proof that each had separately given money, and all were members of the same family. There was a case wherein the law went to that extent, and it is the law yet, that where each one of the family had separately given money to an apprentice to persuade him to injure the cards that his master was printing and selling, they might assume that all had agreed to do it, and had conspired to do it, because it was for the same end and the same purpose. They did not

come together in a room, like Dorsey's people did when they went to his house. They did not do that, but yet they were held guilty. How must it be with him and his visitors?

A moment or two ago I was discoursing to you upon the subject of the orderly way in which the law required these contracts to be made, and I pointed out to you how the law was trampled under foot and rendered a nullity, although it was made for your protection and for mine, and for the protection of everybody. It was trampled in the dirt by this system. Let us go on. I will give you here a little and there a little. How are these contracts generally entered into? Are they entered into generally by ignorant men who know nothing about post-routes? We all know that men follow the business of carrying the mail, and make it a special study just like any other business, like the business of a farrier for instance. I will take a different and better illustration, and one more applicable to the point, for I have an abundance of them. Take a contractor for building railroads, a contractor for building canals, for making aqueducts, viaducts, and all these great public works. Suppose I am president of a railroad company and am deputed by the directors to issue proposals to build that road; what kind of men do I expect to come forward to contract for the work? Men who know nothing about a road and who have to employ a man like Boone to send out thousands of circulars to learn something about it; men who never had anything to do with contracting for railroads? No. Who are the men that present their bids? Experienced men. Men who follow the business. Suppose you want to erect a building like the Capitol, and you advertise for proposals, who comes and makes the bids? Men who never built a building and know nothing about it? No. Suppose you want to give a contract for public printing, who offers? A butcher, a baker, or a printer and a publisher? Is it not a little remarkable that whilst around this department have clustered year after year a class of men who are expert in this business and understand it fully, and make great gains by it, and oftentimes great losses, that of all the men named in this indictment, there is not one, except Vaile, who ever had anything to do with this business? Against the tricks of such men laws were enacted that required the two bonds. In all the details and circumstantialities the law has provided safeguards against the tricks of these men. What men? The experienced and cunning contractors who wish to take advantage of the Government and make the most they can out of it. But they never had a Second Assistant Postmaster-General! Oh, no! They were a vulgar race of ignorant creatures, were they not? What an easy way it would have been. What fools they were. Innocents! I shall have to call them innocents! They are lambs, too! The men who followed this business went by the direct way, and now and then tried to take advantage by some maneuver, but always within the law and never with the aid of an assistant postmaster-general, never. The Government has never been disgraced before by the presence of such a man.

The COURT. Never that you know of.

The ATTORNEY-GENERAL. Of course, the law assumes that unless a thing is known, it has never happened. God forbid that we should even suppose that there was any one who could do it. This man undertook to do it, and did it. Sir, I say here, and I deny the right of any lawyer to contradict it, that when we show that a man who held that high office, and had that discretion vested in him by proof sufficient to go to the jury, entered into a conspiracy, and there is a conspiracy established for the jury to pass upon, the burden of proof is

upon him, and the law demands of him something more than such an explanation as he has given here by the mouth of his counsel. As was said here by Mr. Ingersoll, when he argued this case upon the information:

The citizen is a crowned monarch.

Yes; the citizen is a crowned monarch; but the man who takes office uncrowns himself; he abdicates his throne.

To whom much is given of him much shall be required.

When a man takes a sacred public trust like this and enters upon it, negligence such as this will by the law be construed to be criminality. The law will not tolerate such negligence. It is criminality in the officer to stand by and see such things done in the face of the law and aid them, and then to say, "Oh, I exercise a discretion, and the law protects me." The day that the law would protect a man in so doing there would be no law. It would be anarchy. There would be an end of all government and social order. You heard only here the other day a gentleman arguing who said:

The necessities of this case obliged him to do it.

Desperate men will do desperate things.

It is even doubtful where an executive officer exercises a discretion criminally whether he can be pursued by criminal proceedings.

That is the desperate step that men have to take to protect such desperate bad men. The law is absolutely to be insulted here in the presence of its ministers. We are told that because a man has a discretion and he exercises it criminally, yet inasmuch as it was a discretion he is protected from criminal prosecution. I say it is not the law, and I deny the right of any lawyer to contradict me. The day that is the law there will be no law except the law of anarchy, bloodshed, rapine, and murder.

Let us look at this case. Who were these men? Were they men who understood this business and followed it as is customary? John W. Dorsey was a tinsmith up in Vermont. What does he know about routes away out in the remote West, in the wilderness? Did you ever hear of a case like that, where a public building, a railroad, printing, or any other great enterprise that was subject to competition was offered by public authority, and a man like John W. Dorsey, a tinsmith all the way from Vermont, coming in by a kind of inspiration to follow that business? Maybe the spirits told him. So with the rest of them. Who was Stephen W. Dorsey? Was Stephen W. Dorsey a mail contractor? I believe he was a house-painter originally. He passed from painting into politics. He has frequently been called Senator Dorsey here, and Mr. Brady has been called General Brady. We have no Senators and no generals here. We are all men—plain Stephen W. Dorsey, plain Benjamin Harris Brewster, plain Richard T. Merrick. There are no generals, no Senators here—nothing here but men and women to confront the law. These titles are given to attach an artificial importance to these men. When you come into a court of justice take away your epaulets and your trash. Face it as you said you would when the information was presented. Face it, as you have boasted you would, with evidence, when the case was opened by Mr. McSweeney. Prove it, if you can, and I say now, if you dare. They dare not. Stephen W. Dorsey, a house-painter and a Senator! How came he to call John W. Dorsey here? How came he to call his brother-in-law Peck here? How came he to call Miner here? How came Rerdell to be here? What were the relations of these people to this man? Were they all mail contractors? Had they any experience in mail contracting? Yes; Stephen W. Dorsey had. He

had an intimacy with Brady. He was the best mail contractor they could have anything to do with. He ought not to be called a mail contractor. He ought to be called a mail expander. [Laughter.]

Look at it as it is. You had a beautiful illustration given to you here to-day by Mr. Ingersoll, with which, no doubt, he has amused other audiences on previous occasions when he has lectured, showing you how crystals fit, no matter where they come from, and how lies will not fit. He ought to know, for he has been dealing in them here for these people; not personally, but such as they furnished him. Lies do not fit. He told you to look at things naturally, to consider them naturally, and to see what the natural consequence of facts would be. I would like you to exercise a little of this kind of natural philosophy with me. Here were these men. Were they strangers to each other? Who were the people that conspired to bribe the apprentice to spoil his master's cards? Why was it that it was admitted as evidence in the case? Because they were all of the same family, and from the fact that they did the same thing to the same result. The law said it was evidence of a conspiracy. Now, were these men strangers to each other? Did they meet accidentally here? What did the tinsmith in Vermont know of mail contracting? What did Peck and Rerdell know? What did the others know? They had to get Boone. Who got him? Stephen W. Dorsey. To do what? To concoct this conspiracy. To arrange this thing. One man would not do. It would not have done for Stephen W. Dorsey to have arranged this thing alone. Rerdell could not have done it alone, or Dorsey alone. They had to have many bids made for many men. For what? For something they understood and knew about? No, gentlemen. We have all seen that these men were ignorant of the subject, and entered an enterprise which they admitted in their opening is a hazardous one, and which they undertake to allege was a losing one. They come from the different quarters of the compass to enter into this arrangement, they tell you honestly and by a kind of divine impulse! I say it was a diabolical impulse. Their object was conceived in corruption and executed in the same wicked spirit. Their object was plunder; *plunder*! Would this thing have happened if Stephen W. Dorsey had not discovered something when he was on the Post-Office Committee in the Senate? Would this thing have happened if Stephen W. Dorsey had not known of Brady? Would he have sent for his brother in Vermont and for his brother-in-law in Ohio, and for Miner, and would he have employed Rerdell—who, by the by, they have betrayed and surrendered. Would Stephen W. Dorsey have sent for Boone if he had no interest in it? Why did he have him in his house? Why did he ask him to correspond upon the subject, and Rerdell to correspond upon the subject? What had they to do with mail contracts? Would they have been gathered together from such remote points to establish a pie bakery or to sell a quack medicine? They would have laughed at the thought. Why should men be picked up from remote points of the country and brought together in Stephen W. Dorsey's house, a Senator's house, too, for the purpose of transacting a business which not one of them understood? Even Boone had to write to learn the circumstances connected with these routes so as to give the appearance of regularity in their bids. Gentlemen ask why should they have taken the pains to get information in this way? There must be some appearance of regularity. The record must appear square and fair. There must be something on the record. It would not do boldly to put in blank papers. It might do to forge petitions. It might do to alter letters and affidavits. It might do to fill in affidavits and petitions. It

might do for Mr. Turner to indorse upon the back of these jackets what was a lie and what was intended to mislead. That might do ; but it would never do to undertake to bid without having the appearance of some knowledge. These were the men free from guilt ; innocent men ! I put it to you one and all, away down in the depths of your conscience, upon your honor, and on your soul do you believe that those men assembled in Stephen Dorsey's house innocently ; that they entered into this enterprise innocently, ignorantly, rashly ; and that Brady made these allowances with no intention to do wrong and in the exercise of honest discretion. Do you believe it ? Such belief passeth human comprehension. That is the way to put these things naturally. They could explain it. They promised to explain it. You have the evidence before you. The court said it would warrant you in considering whether or not a conspiracy had been organized ; whether they agreed together. Then their counsel, a generous man (I never had the honor to hear him, but I judge by what I read), Mr. McSweeny, said :

Oh, yes ; this will be all cleared up. You shall have books, and papers, and people, and everything.

Where are they ? Walsh, who followed a business in which a man does not like to keep books, wherein he made hard bargains for people and took usurious interest from them, told you where he left his books. These people cannot tell you where they left their books. They haven't them. Vaile says his books were kept upon grave-yard principles.

Mr. HENKLE. No, Mr. Attorney-General, Mr. Vaile did not say that.

Mr. MERRICK. Boone said so.

The ATTORNEY-GENERAL. Boone. Very well.

The COURT. Boone said that Vaile's books were kept on that principle.

Mr. HENKLE. No, your honor, Mr. Vaile had no connection with it at that time. Mr. Vaile came in in 1878 ; that was in 1877.

The COURT. Appeal to the record.

The ATTORNEY-GENERAL. I do not care. I had rather it would be Boone.

Mr. MERRICK. Vaile said he kept no books ; and yet he was doing a business of a half a million dollars a year.

The ATTORNEY-GENERAL. I say this, sir : I would rather it would be the books of the other people than Vaile's. Their books were kept on the grave-yard principle. What principle is that ? That is the star-route principle. You were told here to-day, and have been told, and I have heard it repeated again and again, and read it as in detraction of the truth of what Walsh said, "Where are his books ?" Where are their books. They promised them. Did they not come here into court when this case began and say, "You shall have everything. Give us a chance before a grand jury of our fellow-citizens, and if they see fit to find an indictment against us then we will go gloriously before a traverse jury and triumphantly show the truth and justice of all we have done." Now, where are the books ; *where are the books ?* Mind they have them ; we have not, and the principle of law is that where a man can establish a fact by books, or documents, or persons, and ought to establish it for the purpose of maintaining the position he stands in in a litigation, and he does not produce them, every presumption is against him. That is an elemental and fundamental principle, and it is common sense, too—that where a man ought to do it, and the necessities of his case require him to do it and he does not do it, the presumptions are against him. Then he goes exactly where he said—to the grave-yard.

Down among the dead men, down among the dead men.

Dead forever, among honorable men. Oh, gentlemen, an acquittal to these men would be a wretched gift. They had better hide themselves in the penitentiary to escape the public scorn that will follow them. Among the ancient Scythians, when a man and a woman were caught in adultery, the woman was killed, and they chained her dead and festering body to the man, and he went about crying, as St. Paul says when he speaks of the man afflicted with sin—

Oh, wretched man that I am! who shall deliver me from the body of this death?

So will these men go about. Acquit them, and the festering body of this atrocious crime, that they have committed against the whole community, will hang to their necks, and they will cry out aloud—

Oh, wretched man that I am! who shall deliver me from the body of this death?

Acquit them. Who would take life upon such terms? Mr. Ingersoll described it to-day, with graphic force and power, such as his gift of language enables him to do. He never can escape from himself, and the consciousness of his baseness. You may give him a certificate that this thing was not proved; but he knows, and we who have read this testimony and considered it, and understand it upon natural principles, know that the body of this death will hang around him while life lasts.

Let us come back to it. Do you believe, does any one of you believe, that these men gathered together in S. W. Dorsey's house for an honest purpose, in the pursuit of an honest design? Do you believe that? If Dorsey had not been upon that committee of post-roads, and had not known this man Brady as he knows him, and as we all know him, would that meeting have ever been held at S. W. Dorsey's? We have heard appeals made here to you [the court] and to you [the jury] about the enormity of this charge. It has been called an infamous charge. We have been told that it would bring desolation and bitter tears and grief and groans and wretchedness to honorable people. We were told to-day, in language such as we seldom hear used in court, and with an effect such as we seldom witness, of the horrors and terrors that hang around these people while they are here accused, and all these things are said as an inducement to persuade you to acquit them. And yet while this was going on whenever there was any ribaldry and joking Brady sat there laughing. Right on the edge of the penitentiary, with these books that ought to be produced, these explanations that ought to be given, with these intendments and presumptions, *all*, *ALL*, around him he could sit here and laugh at the ribaldry and jokes that were uttered. Can you understand such a man? He has the hide of a rhinoceros. When Mr. Ingersoll burst forth in his grand peroration, Miner put his hand to his face and Vaile, too, and oh, how they blubbered, and when it was all over they got up and not a tear. That man Brady had not even the sensibility to affect what the hypocrisy and terror of the others prompted them to do. He would sit and laugh and laugh and laugh on the edge of a penitentiary. Laugh while he is charged here as the Second Assistant Postmaster-General of the United States with having violated in the most atrocious way a most solemn duty, and outraged his office and disgraced the country, and you are asked to let such things go unpunished.

Gentlemen, again come back, and I never will cease to bring you back to it. Do you believe that these men collected there in Stephen Dorsey's house? But he was the organizer of this thing. He not guilty? That I will show you presently. He not guilty? He not connected with this? How came they in his house? Who gives shelter to me under such circumstances and takes part in their transactions except

one who is himself complicated with it? Do you believe that these men gathered together there innocently? *Do you?* Now, call again to mind the men, who they were; what had they to do with such things, unless they went there satisfied that they were enjoying an advantage that others could not enjoy, and the object of their assembling was to obtain and secure to themselves the benefit of that enjoyment?

To pass a little from this, rather by way of relieving myself than for the purpose of a methodical and orderly discussion, I would like to address a few words to you [the court] upon a question of law.

I saw when I was away from town for a day or two that there had been some discussion here upon O'Connell's case; that it had been cited to rule a proposition which was submitted to you, which is not law, never was law—not law in England. I was astonished that it should be cited. We all know O'Connell's case, those of us who know anything about the law. In the first place it has no authority here anyhow. It was a decision of the House of Lords in England in the year 1844. What have we got to do with England? Then is it persuasive to a result because of the reasoning of the thing? No. Why not? That case in 11 Clarke and Finnelli—there is where it is—was this kind of a case: O'Connell was a political agitator, a man of great genius as a demagogue, a patriot, a man who wished his country well, but resorted to extraordinary means for attaining his purpose; a man who loved notoriety and liked to be conspicuous and prominent. He was called the great agitator. As one of the results, and it was the climax of his career, he began to have large monster meetings in combination with other men. The crown of England had occasion to fear that the result of such meetings would be public tumults. He was seized and charged with others with conspiracy, tried, and convicted. The matter was appealed to the House of Lords. It was a political case, and like all political cases, it made its own law, it was a law unto itself. Political cases like hard cases make bad law. In the first place, even in England, it is not authority. You will find, sir—I had the books of reports by me, but I preferred to bring this text book—the cases were in Vernon, and in Vesey, and Maddox. The book I read from is Ram on Legal Judgment:

Circumstances may sometimes render a case in the House of Lords to be not of much weight. Thus *Peacock vs. Spooner*, 2 Vern., 43, 195; 2 Freem., 114, "has undergone considerable observation," the judges, whose opinions were taken by the House, being six against two.

So that it was a judgment contrary to the opinion of a great majority of the judges. It was a determination with great variety of opinion among the judges that no peer in the house was of the profession of the law. These are quotations from the judges who passed upon that case. Lord Hardwick was one of them:

It has always appeared to all judges a very strong determination.

Now, sir, let us see about this case. The law lords present in O'Connell's case were, Lord Chancellor Lyndhurst, Lord Brougham, Lord Cottenham, Lord Campbell, and Lord Denman. Denman was lord chief justice, but he was also a peer, therefore he was a peer as well as a judge. Out of those five men two voted against reversing the judgment of the court below and three voted for the reversal. It was made the rule in the House of Lords, but those three were all what? Liberals—Campbell, Denman, Cottenham. Why did they vote so? Why, it was the tory administration of Sir Robert Peel that was seeking to convict O'Connell, and it was on that very subject subsequently that Sir Robert Peel was turned out as prime minister—his proceedings against

Ireland. Chancellor Lyndhurst was a tory and Brougham had left the Liberal party. It was politics that determined it.

Let us see how it was with the judges. The judges who were called upon to give their opinion were Chief-Justice Sir Nicholas Cunningham Tindall, Justice Patteson, Justice Williams, Justice Coleridge, Justice Coltman, Justice Maule, Baron Park, Baron Alderson, Baron Gurney, and of these—there were nine of them—seven of them voted against the reversal, and the law of England was and is as it was declared by the seven judges. In the case condemned by Lord Hardwick under just such circumstances the law of England as declared by the judges was against this political decision. Legal authority was against what they undertook to establish in violation of law to maintain, political authority to drive the party in power out of power and to establish the authority in the hands of the Liberals or the Whigs, who wished to obtain office, and every lawyer who knew anything about it at the time knew that the case was decided in the House of Lords by politics, while the judges, irrespective of political consideration, seven out of nine—and those two who decided the other way were Liberals, and the others were indifferent either way as to politics—decided in favor of the law as it was understood and had been declared by the court that tried O'Connell. So much for that.

I wish to say a word or two before the time of adjournment comes upon the law of conspiracy. I only read it because I have read such terrible things as have been said here upon this subject, and I have heard such misapplication of established and known principles, and furthermore to show these gentlemen that I have studied the case.

Mr. HENKLE. I never said you did not.

The ATTORNEY-GENERAL. No, sir; you did not, but others did, and you are all in the same indictment, and that is your overt act.

Mr. HENKLE. I hope you will not hold me responsible for what others do.

The ATTORNEY-GENERAL. No, I will let you off as we did Turner.

Now, sir, I refer to Burns's Justice. Let us take some wholesome law from wholesome old books. It is a comfort to get these old things. How the new-fangled stuff looks along side of them. When we want to establish principles we have to come back to them. In Burns's Justice, he says:

Conspiracy is when two or more combine together to execute some act for the purpose of injuring a third person or the public.

That is stated in simple, straightforward hornbook style.

A conspiracy to injure public trade, to affect public health, to violate public policy, or to insult public justice—

Or to insult public justice. You remember a little while ago I alluded to that—

or the like, is indictable.

In *The King vs. Parsons et al.* Lord Mansfield said that there was no occasion to prove the actual fact of conspiring, but that it might be collected from collateral circumstances.

Can you find a higher authority in the law anywhere than Lord Mansfield?

Now, Taylor, in his *Law of Evidence*, says—and when I read some of your honor's rulings I thought it would have been so comforting to you if one of these gentlemen had given it to you as an authority for themselves, as some of the cases were cited here yesterday. When this au-

thority in Campbell's *Nisi Prius* was cited against us, your honor persistently put it, "Well, what became of the other conspirators?"

The same principles apply to the acts and declarations of one of a company of conspirators in regard to the common design as affecting his fellows. Here a foundation should first be laid by proof, sufficient, in the opinion of the judge, to establish *prima facie* the crime of conspiracy between the parties, or, at least, proper to be laid before the jury, as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them.

Again:

It is necessary to prove the existence of a conspiracy, and to connect the prisoner with it in the first instance where you seek to give in evidence against him the declaration of a coconspirator; and having done so, you are then at liberty to give in evidence against the prisoner acts done by any of the parties whom you have connected with the conspiracy; but when a party's own declarations are to be given in evidence, such preliminary proof is not requisite, and you may, as in any other offense, prove the whole case against him by his own admissions.

Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy—

That was attempted, sir, and might have been when MacVeagh was offered here an authority for you to have allowed it at the time, but it was within your discretion, and I was so glad that the discretion was exercised as it was—

the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this mode of proceeding rests in the discretion of the judge, and in seditions or other general conspiracies is seldom permitted, except under particular and urgent circumstances; for, otherwise, the jury might be misled to infer the fact itself of the conspiracy from the declarations of strangers. Still, as a conspiracy need not be established by proof which actually brings the parties together, but may be shown, like any other fact, by circumstantial evidence, the detached acts of the different persons accused, including their written correspondence, entries made by them—

Where are the books?

and other documents in their possession relative to the main design will sometimes, from the necessity, be admitted as steps to establish the conspiracy itself. On this subject it is difficult to establish a general, inflexible rule, but each case must, in some measure, be governed by its own peculiar circumstances.

Now, sir, in that celebrated case read by Mr. Merrick in his very able argument, and I defy the wit of man to make a better, I am satisfied with what he did in this case, and take great pleasure here in publicly proclaiming it. If ever he did achieve a great fame, as I have always understood and know he did, he has added to that fame by his efforts in this case. Day after day he stood here in a manful and chivalric way, almost alone, fighting this phalanx of men, these poor, miserable, cheap lawyers, for these poor men employ men like Mr. Ingersoll, and Mr. Henkle—men who can be had for nothing. Mr. Henkle alluded to a man's being paid for his opinion. The chicken has come home to roost. I say when Mr. Merrick stood here fighting this phalanx of men, who fought him inch by inch, foot by foot, I never saw such intrepidity and bravery, and the renown that he once enjoyed is increased by that which he has done heroically in this case.

Sir, in that celebrated case in McLean's Reports, cited by my brother, Mr. Justice McLean says:

Two or more of the defendants must be found guilty—

Two or more—not all, but two or more—

or the conspiracy charged will not be established. To consummate the offense, under the statute, it is not necessary to prove that the boat was burnt, or that the insurance

offices were injured. It is enough to show that the defendants conspired to destroy the steamboat, with the view of injuring those offices.

A conspiracy is rarely, if ever, proved by *positive testimony*. When a crime of high magnitude is about to be perpetrated by a combination of individuals, they do not act openly, but covertly and secretly. The purpose formed is known only to those who enter into it. Unless one of the original conspirators betray his companions and give evidence against them, their guilt can be proved only by *circumstantial evidence*.

How about Rerdell's confession and Walsh? It is a recognized fact in the books of law, and in the experience of the law, the wisdom of the law, that you can rarely, if ever, bring home the proof directly; and you must establish it by circumstantial evidence unless the conspirators are betrayed by some one of their coconspirators, their confederates, their associates, their confidants.

This kind of evidence often satisfies a jury of the guilt of the accused—

That is, circumstantial evidence—

but in such a case the circumstances must be so strong as to be inconsistent with the innocence of the accused. It is said by some writers on evidence, that such *circumstances are stronger than positive proof*. A witness swearing positively, it is said, may misapprehend the facts or swear falsely, but that circumstances cannot lie.

The common design is the essence of the charge; and this may be made to appear, when the defendants steadily pursue the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result. And where *prima facie* evidence has been given of a combination, the acts or confessions of one are evidence against all. This rule of evidence is founded upon principles which apply to agencies and partnerships. And it is reasonable that where a body of men assume the attribute of individuality, whether for commercial business or for the commission of a crime, that the association should be bound by the acts of one of its members, in carrying out the design.

So if it appears that the bills of lading were false, it shows a combination to injure the underwriters.

How about these papers that were false—these letters, these petitions?

Stephens, Nicholson, and Chandler are included in the indictment, but they are not parties to this proceeding, still, if they entered into the conspiracy with the defendants their acts and confessions while carrying out are evidence in this case.

I refer to Carrington & Payne's Reports, vol. 8, pp. 397, 404. *Regina vs. Murphy & Douglas*:

If on the charge of conspiracy it appear that two persons, by their acts, are pursuing the same object often by the same means, one performing part of an act, and the other completing it, for the attainment of the object, the jury may draw the conclusion that there is a conspiracy.

COLERIDGE, J. * * * On the other hand, I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracy there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object.

And, finally, sir, in *Commonwealth vs. Judd*, 2 Massachusetts, you will find:

A solitary offender may be easily detected and punished.

And yet we were told to-day that one crime was as easily detected and punished as another. The law-book, in its wisdom and in one of the highest courts known in this country, acknowledges and recognizes what we all know.

A solitary offender may be easily detected and punished; but combinations against law—

As in this case—

are always dangerous to the public peace and to private security. To guard against the union of numbers to effect an unlawful design is not easy, and to detect and punish them is often difficult.

You remember what was told you this morning about that. Was this authority ever read to you by the gentleman who talked to you upon that subject?

To guard against the union of numbers to effect an unlawful design is not easy, and to detect and punish them is often difficult. The unlawful confederacy is therefore punished to prevent the doing of any act in execution of it. Of this principle the adjudged cases leave no doubt.

By your leave, sir, I will resume to-morrow morning.

Whereupon (at 3 o'clock and 5 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

THURSDAY, SEPTEMBER 7. 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

The ATTORNEY-GENERAL. [Resuming.] Gentlemen of the jury, I have a few more suggestions to present to you in connection with this case. It is not a pleasant duty to me. If I could have avoided it I would gladly have done so. As I said to you yesterday, nothing but a sense of duty brought me here. I do not think it is my business at this stage of the proceedings to be answering everything that has been said. I am not here to pick up the chips and shavings of this case. I am here to give you a brief and concise series of reflections upon what has passed before you. I am to assume that you know something and remember what you have heard. I am to assume that when counsel will stand here and tell you things which are not strictly in accordance with the proof that has been given to you, that you are men of sense and have memories, and that you can recollect the facts for yourselves. A lawyer, to a certain extent, testifies to what he thinks of his case and what his client has instructed him to present. I shall endeavor in a very simple and direct way and in a moderate way to present to you the views which I have. When I entered the court day before yesterday in the morning, I heard counsel standing here appealing to you in very vehement terms, and telling you that if you were influenced by any considerations, by fear of public opinion, or by fear of the private judgment of any one, you were bribed; and he enumerated a catalogue of things that you should not consider or regard, and told you all the while that if you were so regulated you would be as base and bad as if you were bribed. I could not understand why a man should talk to a jury in that way. [Turning to the court.] Suppose I were to talk to your honor in that way. What lawyer dare to talk to a judge in that way? Would he not be reprimanded? Would he not be approaching to the very edge of contempt, and if he persisted in it would it not amount to contempt of court thus to address a judge? Why then should a jury be so offended and insulted? I cannot understand why twelve men, who are detailed from the body of society and drafted as soldiers are,

to do a public duty, unwillingly, but still to do a public duty, taken from their business to enter the jury box in good faith, and there taking a solemn oath and setting out to perform their duty, should be talked to in that way any more than a judge should. It occurs to me as if it were an indecent thing, and that, what would be contempt of the court, should be treated by the jury as an act of contempt to them.

You have been told here that the Government is pursuing these men. You have been told all the way through in the most violent terms, almost offensive, certainly unpleasant for those who are engaged in this case to hear, that the Government was persecuting these men and making victims of them. What motive can there be for that? What atom of truth can there be in that? How can it be true at all? What motive is there? Is there a political one? The men prosecuted are men who belong to the party of the Government. Why, sir, it has been one of the scandals of this case, and one of those very scandals and festering lies (that brought me here) cast abroad by evil-disposed people, that those who represented the people of the United States by popular will were disposed to disfavor this prosecution and to allow these men to go clear from party considerations. Oh, what a base thought! What a wicked thing to say! I come here to testify that the Government is in earnest, and that it is sincere. This prosecution is not asking you to do a vain and idle thing. We are in earnest, fearfully in earnest, and that these men know. Why should the Government, I say, be persecuting these men? What motive has the Government? What is the Government? The Government is composed of men who have been chosen by the people or selected by those who were chosen by the people to execute the law. That is what the Government is. Those men are the servants of the people, just as Brady was a servant. They suppose they dignify themselves by calling themselves officials and officers. They are servants! Servants! They are *more* to be honored when they accept the name of servant and do their duty faithfully like an honest servant and live up to the letter of their obligations. Now, what motive is there for persecuting these men? Is it not a wicked thing to endeavor to impress you with the fact that these men are persecuted? No man pursues another without a motive. Where can you find the motive here? I will find you the motive. The motive was in the fact that upon the records of the Post-Office Department were papers, and that on file were vouchers representing vast sums of money that were paid. Out in the West were tales circulating, scandalous tales of money wasted. The motive was in these records, in these sums of money paid wrongfully, paid wickedly, paid corruptly. That was the motive, and the law which obliges you to do your duty, obliged the officers of the Government to do their duty and to look into this thing; and when it was found to be the wretched, miserable thing that it was, it was their duty to bring it here, *here*, that it should be investigated. Ah, gentlemen, there is more than that. It was not only their duty for the sake of the public to do it, but if these men were innocent it was their duty to come here and ask that it should be investigated and encourage the Government to inquire. What soldier charged with that which touched his honor would hesitate to demand a court of inquiry; or if he did hesitate where would he be? How should a man hold himself who is in the civil service of the country? Should he not be regulated by the same sense of honor, the same nice point of delicate feeling as is a man who is in the military service? Why all this cry of persecution? Why are you implored to acquit these men because they are persecuted? Who persecutes them? Do I persecute them? I hardly know them when I see them. I know but three when

I do see them, and I had to learn who they were here in the court-house. Did Mr. James know them when he began this investigation? Did Mr. MacVeagh know them when he pursued this investigation? Did Mr. Bliss know them? Did Mr. Merrick know them? Nobody knew them except their associates in the Post-Office Department. Mr. James was a stranger to the Post-Office Department and to those who were in it. Mr. Bliss was a stranger to them, and Mr. MacVeagh was a stranger to them. What motive was there except the public good? Do men pursue strangers in that way without a motive? What is to be gained by it by any of us? Nothing. I inherited this case. First I was employed and then I inherited it. Why do I come here? It is my duty. There is not a man on that jury that does not know that nothing but my duty brings me here and persuades me to speak as I do.

You were told that there is nothing here but documentary testimony. I shall not enter into that at present. Have we no proof other than that accumulation of records that were produced here? Have we no evidence that amounts almost to a confession of guilt, was equivalent to a confession of guilt, and is an absolute confession of guilt? Where is the testimony of Walsh? Where is Mr. MacVeagh's testimony? Where is the testimony of James? Where is the testimony of Clayton? I shall not go over the whole of that. You have it. Where is the testimony of that publisher of the newspaper who was cross-examined and that they produced and after which they stopped; they halted? They were defeated in the outposts and that was the end of the fight. They lost their battle upon the skirmishing line. That was the end of the campaign. When that man was cross-examined and made the wretched, sorry exhibition that he did here, to witness which men hung their heads with shame that human nature gifted with intelligence could be so degraded and so lack moral sense. When that man was brought here and exposed himself in that way there was an end of the campaign. There was not a man in the court-house or out of it who heard or read what passed that did not say, "There is an end of that case." They virtually treated it as if there was an end of the case themselves. They virtually considered it so. When that man withdrew from the witness-stand every man, to use a vulgar and common expression, said, "There is an end of this thing. That cock won't fight. There is an end of the whole of it."

Now, I shall pass, gentlemen, from the consideration of that testimony. It is enough for me to remind you of it. I am only here to excite your memory, your recollection. I am not here to recite and to repeat all that has passed. I made some remarks yesterday with reference to those who have aided in this case. I tried to speak of them as they deserve, but I could not. I cannot fully explain to you how much I owe to those gentlemen who have aided in this case. I omitted one whose assistance was invaluable to us—Mr. Woodward. He is an experienced man, an independent man in his circumstances, an honest man, connected with the Post Office Department and familiar with the details of this business. Mr. Woodward investigated this matter thoroughly and conveyed his information to us. By that information and from the fruit of it we were enabled to learn the facts that we have placed before you. We owe him much and the public owes him much, and if after a full exhibition of all the facts and upon a fair trial these men are acquitted, they, too, will owe him much, for he has made out the worst case that can be made against them, and then they will have had an acquittal notwithstanding all that. But the public owe him much for the patient industry and the careful thought he has given to

this subject. He has worked up this case with deliberation and integrity, and arranged, ordered, and methodized it and put it in condition for Mr. Bliss to take hold of and use in a technical and legal way.

Now, another thought. We were talking here yesterday upon the subject of the obligation upon defendants or plaintiffs to produce a paper to establish a fact, or to produce a person to establish a fact, which is essential for the purposes of their case. I told you it was fundamental, elemental law that where an issue is raised as to a fact, and that fact is essential and material in the case, and it is within the power of a party to produce a paper or to produce a witness that can explain it, and he does not do it, his omission is at his own peril; for every presumption is against him. Perhaps you will remember that when we undertook to read to you a missing letter written by Rerdell that they promptly produced a letter-book which was in their possession. Why did they not produce it for other purposes and for other papers? They could have produced it. Why did they not produce the letter-book for other purposes, and other documents, and other letter-books? Where is the presumption of law when they do not? What is the presumption of law? Why did they not produce the people who can explain these things? They promised to. Mr. McSweeny promised to in positive terms when he opened. He knew all about this case and everything connected with it. It was as clear as the noonday sun, and nobody could doubt but that he could explain. He would call everybody, and explain everything, and you would be satisfied, just as soon as he got the chance. Why I was almost ready to rise up and shake hands with these people and beg their pardon, from the manner in which he put the case, and congratulate them and congratulate ourselves that the Republic was relieved of the infamous scandal. Now, gentlemen, Stephen Dorsey had nothing to do with this. His honor is not concerned in this. The gentleman who concluded the arguments upon behalf of the defendants yesterday, the especial champion of Stephen W. Dorsey, never laid his hand upon a fact connected with Stephen W. Dorsey except to deprecate the idea of convicting him, and pronounce in the most positive and violent way his conviction of his innocence. His conviction! It is your conviction that we want; not his. But he wants to impose his conviction upon you that Stephen W. Dorsey had nothing to do with this affair. He of all men, as Mr. McSweeny said, was the most innocent, and had gone into this thing from motives of pure personal benevolence to aid a brother, a tin-smith, sent for from Vermont to come here and meddle with a business he did not understand; to aid a brother in a transaction that he led him into, and invited him into; to aid a brother in a business wherein he himself got Boone to go, and subsequently shuffled Boone out and brought in Vaile; to aid a brother-in-law, Peck, an old friend, Miner, a clerk, Rerdell. He had nothing to do with it! Where is Mr. Bosler? Why did not Mr. Bosler come here and explain? Upon my word, sir, with a degree of effrontery—I want to use the word mildly; I wish somebody would furnish me with a milder term that would fit the subject, but it would be a little like that lie that Colonel Ingersoll was talking about yesterday, it would not fit—with unexampled effrontery I heard counsel stand here and tell this jury, and with brazen audacity tell the court that we were bound to produce Mr. Bosler, and if we did not the presumptions were against us. What presumptions? What did we want with Mr. Bosler? Was he essential for our case? What material fact that he could establish was it necessary for us to obtain from him to make out our case? Had we not made our case out

sufficiently for it to go to the jury? Had not your honor already told us:

Gentlemen, there is evidence of conspiracy to go to a jury.

What did we want with Mr. Bosler? Why are we bound to produce Mr. Bosler? Are not they bound to produce Mr. Bosler? Is not Stephen W. Dorsey, this organizer, this head conspirator with Brady, bound to produce Mr. Bosler? Mr. Bosler is a reputable man. Perhaps that is one of the reasons he did not want to be mixed up with a disreputable transaction. If Mr. Bosler had come here, being a reputable man and having a good feeling for some of his associates who were in trouble, he might not like to have told what certainly would not help them, or they would have had him here. He was here in this city. He only lives in Carlisle, in Cumberland County, Pennsylvania.

The COURT. He is on the bond of one of these men.

The ATTORNEY-GENERAL. Yes, sir; but I wanted him not on the bond but on the witness stand.

The COURT. I must correct myself. He is not on the bond but on the recognizance.

The ATTORNEY-GENERAL. Yes, sir. Now, gentlemen, as the judge reminds you, he is a recognizer here in this court, answerable for the presence of these people. He lives in Carlisle, Pennsylvania, and is an honest, reputable man. Why is he not here? Are they afraid of his integrity? As an honest, reputable man, he has a delicate feeling for these people because he has associated with them as other men have, although he did not know the secrets of this conspiracy. He was not trusted. Now he finds glaring him in the face these horrible charges, and can connect his crystal with the other crystals in the case that come from the north and from the south, and then comes the truth. It will not do to bring him. He did not want to come.

Gentlemen, it was audacious for a man to stand up here and tell you that we were bound to produce him. It was one of the most daring feats of criminal practice that I have ever witnessed in all my experience of forty-six years at the bar. Sir, the man who is a great criminal lawyer sometimes occupies a position where the space is very narrow between himself and a great criminal. Men who are engaged in the defense of bad men, enemies of society, are tempted to do things that bring them to the verge of criminality. How did they dare to stand up here and tell you and tell this judge, that we were bound to produce Mr. Bosler, and the non-production of him was evidence of their innocence! But enough upon that subject. It must be plain, to any thoughtful, honest, natural mind. The other day one of the counsel gave Mr. Wilson a hint on a piece of paper, and after Mr. Wilson propounded the proposition, walked away with a kind of turkey-cock exultation. The paper was written and passed over and Mr. Wilson bowed and acknowledged the compliment and the civility and the usefulness of the suggestion, and said that his brother McSweeney had suggested to him as an evidence of Mr. Brady's innocence that these letters were left here in the Post-Office Department and he did not steal them and take them away. That was rather a left-handed compliment to his client, to suppose that he would steal them. But, gentlemen, Mr. Wilson said, "Oh! that is valuable! Yes. Why didn't he take them away? It is an evidence of his innocence." It is? I would like to know whether you ever read of any case that has any complexity in it where some criminal act has been committed and the criminal has not by

just some such foolish oversight left evidence available to convict himself? He puts away something that conveys conclusive evidence of his guilt where it is found. He carries something upon his person which, when he is examined, reveals the truth. He leaves a scrap of a letter, a piece of paper, a weapon, a key, a crow-bar, a vial that has contained poison, a piece of his coat that will fit his garment, either intentionally or unintentionally, and thus his guilt is revealed. The first time that you have a man arraigned here, your honor, charged with some grievous offense, and they go to his drawers and produce paper, or search his person and find some evidence of guilt upon him, if this doctrine is to prevail, you will be told that it is the most pronounced and palpable evidence of his innocence that he did not destroy those things, and then they will quote *in re* Brady. A charming authority, sir, for people who wish to let thieves and scoundrels escape. Establish a principle like that, destructive of all such evidence that goes to establish guilt, and we will close the court-houses. What a Saint Valentine's day it would be for villains! I was amused, and amazed, too, that counsel could get up and say exultingly, "There now! that settles this case." My brother Wilson accepted the suggestion and said, "Thank you; that is a grand thought;" and then he gave it to you. Now, what does it amount to? Trash. That is all it is. Why did he not destroy them? He destroyed enough. He took pains to write as little as possible. He wrote, "DO IT—BRADY." AND THEY DID IT. You are told that Mr. Brady was regulated by the advice of eminent men. Was he put there and does the law allow him to be regulated in transactions like those by the advice of eminent men? Congressmen may importune and Senators may importune. They know nothing about the cost that this is to be to the Government, and they never ask and never care. They have testified here on the stand that they did not know the cost of what they were asking for. Was it his duty to be guided by the member of Congress who came for the purpose of pleasing his constituents or pleasing another member of Congress whose vote he was anxious to get upon a bill of importance to him, or to please a contractor that may help to get him votes? Was he to be regulated in that way? The law points out the way that he should go, and if he wanted advice upon the subject whom should he consult? The men whose advice he rejected, the postmasters, the lawyer that wrote to him and told him that he would make a public complaint if this thing was persisted in. Did he regard that kind of advice? Of whom did he inquire? Had he not an army of inspectors, men like Mr. Woodward, intelligent, honest men, who know no rule of action but their duty, their simple, whole, naked duty? Why did he not consult the records of his office to know what were the earnings of these routes, not as a test for the purpose of determining whether or not the Government could afford it, but to ascertain whether the Government ought to grant expedition and increase of trips on a route that needed no mail and had none. If he had gone as he should have done and learned the receipts of these offices he could have readily answered, "What do you want with increase and expedition to the amount of \$70,000, or \$50,000, or \$20,000, or \$12,000, or any of these enormous sums? What do you want with it? To supply people? Why there are no people there who correspond." "How do you know it?" "The records show but one letter a week, or two letters a week, and sometimes a single postal card, and even frequently an empty mail-bag." Oh, gentlemen, the thing is so thin that the daylight shines through it. That is what he should have

consulted. Did he so consult? No. He consulted his own arbitrary, selfish, corrupt will, and wrote, "Do it—BRADY." That is what he did.

As I said to you yesterday, one of these men testified, "I suppose they drew a line upon the map and called it a post-route," and Brady was the man who exercised an honest discretion. He is the man who was deceived. Let us look at that for a moment. I ask you to look at it with me. There is something fatally mean in this allegation. I say fatally mean, for it discloses the character of the man, and you are to be governed in your action in this case by your knowledge of his actions in other respects. How has he behaved on the trial of this case? What was the attitude he occupied here, and occupies to this minute for aught I know? It was an absolute surrender of everybody else who was indicted except himself. With a stolid, vicious, callous nature, he turned around and said, "Oh, I was cheated. These were a set of scoundrels, all of them." I agree with him. He is a good judge of a rascal. "These were a set of scoundrels, all of them." *I, I, Mr. Brady,* was cheated, just as his honor might be cheated. I exercised an honest discretion for the public good, and was cheated. Will you convict me for the exercise of an honest discretion in which I was deceived." I say that is a mean thing to do. He was willing to surrender them to you as they did Rerdell. They have handed Rerdell over to you, and if you can find any other man that you can convict they are willing and would rejoice to see Rerdell convicted. They have hardly said a shadow of a word to protect him. What was said was mere generality; that Rerdell had nothing to do with this; but they did not undertake to show it. So it was with this man Brady. He came here, and the whole of his defense was, "I am innocent."

Let the galled jade wince, our withers are unwrung.

"I acted judicially and exercised an honest discretion in an honest way. I am sorry I have been cheated." Poor, sorry man! Innocent man! He is one of these lambs. He is a lamb that never was shorn. If you undertake to shear him you would get more bristles than wool. Yes; he surrendered them all, and virtually sought by his acts to persuade you to convict them. He was virtually testifying against these very men in his attempt to escape himself.

Now, sir [to the court], permit me to say, that I propounded yesterday a few reflections upon the subject of the relation of an officer to the public under such circumstances, and I propose now to read you a few authorities that will bear upon this man's case as an officer. We have been told here that which I pronounce as a pestilent heresy in the law, that it is doubtful if a man in an executive office exercising a discretion and committing a criminal act in the exercise of that discretion can be indicted and punished. I hope never to live to see the day in a country like this when such a doctrine shall prevail.

THE COURT. Mr. Attorney-General, at an early day in the history of this trial that question was raised. The court decided it then and has seen nothing to call for a re-examination of that opinion since. That point may be regarded as settled and not open for argument.

THE ATTORNEY-GENERAL. Oh, that is very comforting to me.

THE COURT. It will probably save you some time.

THE ATTORNEY-GENERAL. I am glad to hear what you have said, for when that proposition was propounded I thought it was necessary to consider it.

MR. WILSON. If your honor please, the Attorney-General has referred to this subject twice in the course of his argument, and I want to set the

matter at rest if I can by reading what I said about it; it will save all trouble upon that subject. I did not insist upon any such proposition. I do not know that I can turn to it.

The ATTORNEY-GENERAL. It is unnecessary if the gentleman retracts it.

Mr. WILSON. I am sure the Attorney-General does not wish to misquote me. I did not say so.

The ATTORNEY-GENERAL. I have nothing to gain by misquoting. It would be a very base thing for me to do.

Mr. WILSON. I do not attribute it to you nor would I.

The ATTORNEY-GENERAL. I know you would not. I know you are governed by feelings of courtesy and propriety as every man knows who knows you at all.

The COURT. The reference was not as I supposed to what was said by Judge Wilson.

Mr. WILSON. It was to what I said.

The ATTORNEY-GENERAL. Yes, sir.

The COURT. Mr. Henkle in the course of his argument—

The ATTORNEY-GENERAL. [Interposing.] I was not present and had not the pleasure of hearing that; I am speaking as to what I heard.

The COURT. I supposed you were referring to what Mr. Henkle said.

The ATTORNEY-GENERAL. No, sir.

The COURT. Mr. Henkle, in his argument, undertook to maintain that the business of the Second Assistant Postmaster-General was executive in its character, and that the judiciary of the country had no authority over his acts. The court did not interrupt that argument; but I intended to say that that was a point that had been settled so far as this case and this court was concerned.

Mr. WILSON. What I said was this:

Every act done by an executive officer in the nature of the decision of a question that comes before him for decision is assumed to be right and just. It is only when corruption intervenes that the court can make any inquiry with reference to the act of the executive officer and even that is disputed by some of the highest and best authorities.

But it is conceded that it can be done for the purposes of this case.

The ATTORNEY-GENERAL. Now, sir, where are those authorities, highest and best?

Mr. WILSON. Oh, well; I do not propose to discuss it. I can give you some of them if you want them.

The ATTORNEY-GENERAL. I would like to see them for my instruction. As Lord Coke says, "Hereafter let us disport ourselves."

Mr. WILSON. I will give them to you hereafter.

The ATTORNEY-GENERAL. I shall be obliged. So much for that, gentlemen. As Colonel Ingersoll very elegantly said: "Another child washed!" [Laughter.]

Mr. WILSON. Unfortunately for the Attorney-General, there was no child to wash.

The COURT. [Referring to the laughter caused by the Attorney-General's remark.] I must insist upon order. This is not a second-class theater, nor shall we allow the disorder that prevails in institutions of that kind in this court-house. The officers of the court will exert themselves, and be vigilant and determined in keeping order. If anybody in the court-house commits a breach of order I want that person brought to the bar of the court. The court will exclude all such offenders from the room.

The ATTORNEY-GENERAL. I owe an apology to the court for what I

said, that caused laughter; but it was said once before, and having heard it said I thought I might repeat it. That is all. I did not think it was very nice when Mr. Ingersoll said it. We do not come here to wash children, or dirty linen. We come here to do public duty in a proper way and with proper words.

Now, gentlemen. I come down to some of those facts that you know about and to which I shall call your attention. With a great deal of care I have had prepared, and with equal care have investigated to see that the work was properly done, some tabular statements that it will not be amiss for you to be reminded of or rather to have presented to you so that you may have the prominent and salient facts in the case with reference to these allowances. I have no doubt that the foreman of this jury, who has been taking notes, has upon his notes all that I now propose to read, and probably the knowledge of that fact may persuade me not to read them. I intended to give you the increases subsequent to May 20, 1879, for trips and expedition. If you have that already I will not read it.

The FOREMAN. Not in that form, sir.

The ATTORNEY-GENERAL. Then I will give it to you:

<i>Route.</i>	<i>For trips.</i>	<i>For expedition.</i>
36113.....	\$6,800 00	\$, 1,475 00
34149.....	1,122 41	2,200 00
35015.....	1,635 60	3,680 10
35051.....	7,050 00	29,850 00
38134.....	2,328 00	5,432 00
38135.....	438 40	2,630 40
38140.....	-----	2,758 05
38145.....	6,633 60	11,277 12
38150.....	986 57	-----
38152.....	-----	-----
38156.....	4,259 12	10,549 51
40104.....	11,928 00	17,805 33
40113.....	3,136 00	9,408 00
.....	6,272 00	9,878 62
44155.....	16,576 00	24,864 00
44160.....	11,552 00	17,114 66
46132.....	2,376 00	5,346 00
46247.....	11,976 00	11,976 00
44140.....	4,649 86	14,486 10
41119.....	4,672 00	12,718 22
	<hr/> 104,391 56	Exp... 203,449 11
		Trips.. 104,391 56
		<hr/> Total.. 307,840 67

The indictment was filed May 20, 1882, and the date laid in the indictment is May 23, 1879.

Mr. BLISS. I do not know whether you stated from what period that was. I judge from the date of this indictment.

The ATTORNEY-GENERAL. I said subsequent to May 23, 1879.

Mr. BLISS. Subsequent to the date of the indictment.

Mr. TOTTEN. Allow me to ask if you count the \$29,733 allowed for expedition on the Pioche route? That order was made by French. Do you count all the orders?

Mr. BLISS. He counts all the orders.

The ATTORNEY-GENERAL. Yes; certainly.

Mr. MERRICK. "Do it—BRADY," was followed out by French afterwards.

The ATTORNEY-GENERAL. Oh, yes; Brady ordered it of course.

Mr. TOTTEN. We say Brady did not order it.

The ATTORNEY-GENERAL. You say you are innocent.

Mr. TOTTEN. We say the record shows that French made the order.

Mr. MERRICK. The record shows that "Do it—BRADY," preceded French's order.

Mr. TOTTEN. Not in this case.

The ATTORNEY GENERAL. I now have a table of the contractor's profits on twelve of the routes as they appear from the evidence. It is as follows:

Route	Termini.	Contractor's pay.	Subcontractor's pay.	Profit.
34149	Kearney to Kent, Nebr.....	\$4,302 65	\$1,587 40	\$2,715 25
38135	Saint Charles to Greenhorn, Colo.....	3,945 60	840 00	3,105 60
41119	Toquerville to Adairville, Utah.....	19,726 22	7,444 00	12,282 22
38145	Garland to Parrott City, Colo.....	31,343 76	18,666 64	12,677 12
38156	Silverton to Parrott City, Colo.....	16,512 28	9,400 00	7,112 28
46247	Redding to Alturas, Cal.....	35,928 00	21,000 00	14,928 00
38134	Pueblo to Romita, Colo.....	8,148 00	3,100 00	5,048 00
38140	Trinidad to Madison, Colo.....	4,290 30	1,500 00	2,790 30
38113	White River to Rawlins, Colo.....	31,981 25	20,000 00	11,981 25
38152	Ouray to Los Pinos, Colo. (Discontinued.).....			
40104	Mineral Park to Pioche, Ariz.....	52,033 33	28,000 00	24,033 33
44160	Canyon City to Camp McDermitt.....	50,166 66	20,000 00	30,166 66
44140	Eugene City to Bridge Creek.....	21,460 89	7,400 00	14,060 89
		279,838 94	138,938 04	140,900 90

RECAPITULATION, TWELVE ROUTES.

Contractor's pay.....	\$279,838 94
Subcontractor's pay.....	138,938 04
Profit.....	140,900 90

The profit to the men who did not own a horse or a wagon, who lived in Washington, and were the creatures of Brady's bounty, and his confederates was a hundred and forty thousand nine hundred dollars and ninety cents.

The FOREMAN. [Mr. Dickson.] Allow me to ask what were the total fines and deductions?

The ATTORNEY-GENERAL. I will get that for you presently, sir.

Now, gentlemen, here was a man acting upon his discretion, an ignorant, innocent man who increased this pay deliberately, and yet knew by what was before him upon the record that \$140,900 of this money went into the pockets of people as clean profit. Now, was he ignorant and without notice of what he was doing? Did he need the benefit of the advice of General Sherman or Mr. Teller or any other man? Was it not his duty to turn around and say to those men, "Why, here I find that in making the advances that I have been asked to make in many of these cases the advances I have made were absolute bargains amounting to speculation, to the advantage of men who have nothing to do with the business. They come here and make a contract and they agree to perform certain postal duty." This was the way in which he should have talked to these public men who came to him. "We advertise a route from one end to another. We set forth all the law provides that we shall set forth, and they put in their bid competing with A, B, C, D, and everybody in the whole community. The contract is awarded to them and they enter into it. They agreed to carry this mail for such a sum from such a point to such a point and in such time. Now, Mr. Teller, these men go out and they get up petitions, and they file affidavits.

They have agreed to carry out a contract in a given way and now they want that contract altered and I have altered it, and when I come to look into it I find that they are making here in one instance at the rate of \$12,000 a year, the very men who stay here in Washington and never go out of the city except for their pleasure and amusement, while the men who are out in that wilderness doing this duty and exposed to the winds that come sweeping across four thousand miles"—as you were told day before yesterday—"are the men who get no pay. The profit and the advantage to the injury of the Government is all for these contractors. I will make no more such bargains. I will make no more such expeditions. I will direct no such additional service. I am asked to give more than I ought to give and I am cheated and liable to be cheated." Why what kind of an officer was he? During the whole of his term he continued thus to be absolutely cheated and he knew it. Yet you are told here and earnestly told with an appearance of sincerity that the man is an innocent man and did what he did under a desire to do his duty and with the honest conviction that he was doing it. Such things are absurd.

Now, gentlemen, a word or two more. The remainder of the remarks that I have to make will be like those that have just preceded, directed to a very short, dry detail of facts. You were told here that there was no proof of overt acts, and you were told constantly for three days that there was a fatal variance, a fatal variance. What was meant by that I did not understand. It was very amusing to see counsel occupying the whole of his time in endeavoring to trample under foot an indictment, and the proof existing of the charges in it, after the defendants had challenged an investigation and desired that there should be full proof. Now they want to escape upon the ground not that they are not guilty but that there is a variance between the proof and the indictment. Let me read you some of those overt acts:

On route 38113, from Rawlins to White River, there was a subcontract of Stephen W. Dorsey, there was an order for an increase, and there was a claim for pay for the third quarter of 1879.

On route 34149, from Kearney to Kent, there was an order for increase and expedition, there was an oath of Peck, written by Miner, dated February 1, 1879, inclosed in the jacket upon which Brady made the order for increase, and a petition with the words, "schedule thirteen hours" written in inclosed in the same jacket, and a claim for pay for the third quarter of 1879. I shall not recite all of them, but will only give you a few.

On the route from Bismarck to Tongue River there was an order for increase made by Brady, and there was a petition for increase written by Miner found in the jacket upon which the order was made. There was a claim for pay for the fourth quarter of 1879 also.

On the route from Pueblo to Rosita there was an order for increase and expedition, and there was an oath of J. W. Dorsey, and that is found in the jacket upon which Brady made the order. There is another oath in the same jacket dated the same day and giving a different statement. Both of those oaths were sworn to be false by the testimony of Puttle and Hull. There were petitions for increase found in the jackets which did not ask for an increase over that route. There was a letter written by Kerdell, and signed by Governor Pitkin, dated April 25, 1879, and a letter written by Kerdell, signed by Judges Thatcher and Stone, dated April 26, 1879. There was a claim for pay for the fourth quarter of 1879.

On the route from Saint Charles to Greenhorn there was an order for

increase and expedition by Brady, and there was an oath by John R. Miner, dated April 17, 1879, found in the jacket, and the falsity of the oath is shown on pages 344, 573, and 576. Three petitions were found in the jacket which were altered by Rerdell. Brady orders Agate embraced on the route, and Stephen W. Dorsey files a subcontract. Brady orders Agate omitted and pay for fourth quarter.

On the route from Ouray to Los Pinos, Brady orders the route discontinued, and there is a claim for pay for service never performed.

On the route from Silverton to Parrott City, Colorado, there is an order for increase and expedition of time, and the oath of John W. Dorsey. The falsity of that oath was testified to by Connell. Dorsey files his subcontract, and there is a claim for pay for the third quarter.

Tres Alamos to Clifton. Brady orders increase of service and reduction of time, and the oath of J. W. Dorsey, dated April 27, 1879, is filed. Rerdell made alterations in the oath, and petitions are found in the jacket with a letter from J. W. Dorsey, dated May 23, the petitions all in the same language. There is a claim for pay for the third quarter.

Canyon City to Camp McDermitt, Oregon. Brady orders an increase of four trips. Petitions found in jacket with Postmaster Hall's and other names forged, and with names of people residing in Utah. A claim for pay for the fourth quarter.

Julian to Colton, California. Subcontract of Vaile filed. Brady orders increase of trips and reduction of time. The oath of Peck, dated December 30, 1878, written and interlined by Miner, and found in a jacket upon which the order for increase was made. The falsity of that oath was testified to by Burgman. There was a claim for pay for the third quarter.

Eugene City to Bridge Creek, Oregon. Brady ordered increase of trips and reduction of time. The oath of Peck, dated January 22, 1879, is marked filed May 24, 1879, and found in the jacket upon which the order was made. The oath was written and signed by Miner, and erased and written over by Rerdell. Petitions for increase were found in the jacket with a letter from S. W. Dorsey, dated May 21, 1879, one of the petitions written by Rerdell. There is a claim for pay for the third quarter of 1879.

Toquerville to Adairville, Utah. Oath of Peck filed, written and signed by Rerdell, dated January 22, 1879. Brady orders increase of trips and reduction of time. Petitions are in the jacket upon which the order is made, showing names of people not residing on the route. One of them is altered from six to seven. There is a claim for pay for the third quarter.

Now, they have been telling you in the most emphatic way that Stephen W. Dorsey had nothing to do with this. I think I have demonstrated to you by reference to the manner in which these contracts began, and by my explanation of the relation between Stephen W. Dorsey and these people, and the knowledge that he acquired when upon that Post-Office Committee in the Senate, and his association with Brady and the manner in which he collected these people in his house and transacted the business, that he was the originator and organizer of the whole affair. I shall soon be through, gentlemen, and I want your especial attention at this stage of the proceeding. I do not say it because I have not your attention, for you have given it to me patiently and kindly from the beginning. But what I am about to say will be dry, and I therefore invite your attention reluctantly because it is so dry. It occurred to me that it would not be amiss to take the evidence and go through it and see how often Stephen W. Dorsey had transac-

tions in this affair of which he was wholly ignorant and had nothing to do; how many items of fact and circumstance he was connected with. Sir [to the court], ninety-six times this man appears to have been engaged in those transactions. It is in evidence that upon ninety-six different occasions, connected with ninety-six different facts and circumstances, this innocent and ignorant man was concerned in the matter. You were told emphatically that he had nothing to do with it; that it was a monstrous thing to drag him in here. What motive had the Government to drag him in here? What motive had the law and its officers to bring him here unless there was evidence which satisfied them of his guilt; evidence which you have had here under oath? Was it because he was a Senator of the United States? Sir, I hope the day will never come when the Senate of the United States will be a sanctuary for scoundrels. There was a day when criminals fled to a sanctuary for protection. The day the Church ruled the world it had its sanctuaries where men might flee for protection. That day has passed. Is the Senate of the United States to be the sanctuary of this country for scoundrels? God forbid! I stand here and say I would rather have no Senate. I would rather change the form of the Government of the United States and substitute a monarchy than to see the highest body in a free republic converted into a sanctuary for scoundrels. What motive was there to include this man? Every motive was the other way; every inducement the other way. We all naturally respect a man who has advanced step by step until he reaches that high and exalted position, that position of power and dignity than which there is no greater upon the face of the earth. A Senatorial representative in the great Senatorial body of the greatest Republic that ever flourished in the tide of time, and over the greatest people and the grandest territory. What motive was there? Men naturally respect such men. It is with a knowledge of that fact that they come here and seek to shelter him upon the plea that he has been a Senator and could not do such a thing. Could he not? Aaron Burr presided over the Senate of the United States, as Vice-President, and yet endeavored to betray his country and was tried for treason. Other men who have been in that Senate have left it covered with shame and opprobrium, and in both bodies. It has been so throughout the world in all high offices. Vile reptiles will crawl in where men cannot walk or go. Vile things will enter everywhere. But there is a natural disposition to respect men in high position and it is a sentiment that is to be respected because when you respect a man in such a station because of its dignity and the sacredness of the trust imposed upon him you stimulate him to a certain extent to a consciousness of the elevation he occupies and a desire to do his duty. Give a man reverence and honor and he will try to live up to the standard of the reverence and honor given him. I have seen very inferior men, men whose moral tone was lax, whose sense of personal obligation was very shaky and not to be depended upon, by the accidents of public life advanced to positions of dignity and honor, and suddenly their character develops itself equal to the emergency, their moral tone changes. They feel that they live in a new atmosphere, that new duties are expected of them, and a higher standard of obligation required of them; and their pride and dignity of character and the conscience that is in them is all aroused and their career astonishes everybody. Hence it is that it is well that men thus give confidence to others by the respect that they pay them. You give a man notice of what you expect of him when you pay him respect. You give him respect because you say you expect that the position he occupies will prompt him to be worthy of the respect you pay him.

The other side know this. That is the reason they come here and say "What! a Senator do these things?" Yes; Senators have done these things, and this Senator has. Men who have enjoyed the company of the best, the best that ever walked this earth, have betrayed the trust imposed upon them. Arnold was the companion and military associate of Washington. Burr was the associate of the best men known to the early history of our country. He was a man of renown and ability as a public character, and he fell. I might go further and make an illustration that is not apt here. I do not believe in an allusion to holy things under these circumstances; yet I will say that the history of our religion starts with an act of treachery by one who enjoyed the presence and company of Him whose name we are not worthy to mention, the hem of whose garment we are not worthy to touch.

Stephen W. Dorsey was in the Senate and he had nothing to do with this matter; nothing to do with it? Now let us see:

	<i>Page.</i>
Novem., 1877. Met Boone at Post-Office Department.....	1423
Boone went to his house.....	1440
The arrangement was to put in bids on the next letting July 1, 1878.....	1443
On behalf of his brother-in-law and brother, and he wanted some one to handle the business....	1443
The thing to be done was to get up the information to bid upon, procure the necessary information and papers.....	1443
Boone got up a circular to send out to every postmaster on the routes asking for information...	1444
Boone met Miner at Dorsey's house about December 5, 1877.....	1444
J. W. Dorsey came to Washington some time in January, 1878.....	1444
Boone prepared blanks for proposals.....	1444
Boone had blanks printed.....	1444
Part of the blanks were filled up at S. W. Dorsey's house.....	1445
Boone was directed by S. W. Dorsey to send a number of proposals to certain postmasters, and the bonds would be furnished there.....	1447
Boone sent blanks to Postmaster Clendenning at Fort Smith, Arkansas.....	1448
Also to postmaster at Little Rock.....	1448
S. W. Dorsey furnished the security for all the contracts.....	1451
Vaile was at S. W. Dorsey's house in April, 1878..	2266
Boone met Rerdell at S. W. Dorsey's house; Rerdell helped to fill out the proposals.....	1453
April 20, 1878. Writes to General Rosser to give correct distance of route 35051, Bismarck to Tongue River....	1201
April 21, 1878. General Rosser's reply received and filed.....	1201
July 10, 1878. Indorsed two notes for \$1,500, each signed by J. W. Dorsey & Co., discounted by the German-American National Bank.....	1904
Aug. 8, 1878. Indorsed note for \$1,000, signed by Miner, Peck & Co. Also discounted.....	1904
Sept. 25, 1878. Indorsed note for \$2,500, signed by Miner, Peck & Co. Also discounted.....	1904
Nov. 27, 1878. Benjamin W. Keyser, the receiver of the German-	

Nov. 27, 1878.	American National Bank, received a post-office warrant for \$2,371.59, on account of Miner, Peck & Co. Out of this sum he credited S. W. Dorsey with \$410.84 to make up the account of S. W. Dorsey, which was overdrawn. S. W. Dorsey claimed the whole of this sum, and wanted Keyser to surrender to him the check, claiming that it belonged to him and not to Miner & Co.. Keyser testified in answer to the questions, "Who were Miner, Peck & Co?" and "Who he dealt with?" "I dealt with John R. Miner and H. M. Vaile and S. W. Dorsey"	Page. 1915 1904
Dec. 26, 1878.	Agreement signed by H. M. Vaile, John R. Miner, S. W. Dorsey, Vaile, Miner & Co., B. U. Keyser, as to certain notes held by Keyser as collateral security	1906
	S. W. Dorsey erased his name from this agreement because Keyser would not surrender to him (S. W. Dorsey) the check for \$2,371.59, recieved November 29, 1878, above mentioned	1908, 1915
	The witness mentioned the word "check" but he meant "post-office warrant," he says. "The technical name I am not familiar with"	1904
	Dorsey was a Senator from Arkansas up to March 4, 1879. What was his interest in a post-office warrant or claim for pay for carrying the mail in violation of sections 3739 and 1782, Revised Statutes?	
	Service increased to seven trips a week and schedule reduced on route 38145, Garland to Parrott City	810
Dec. 22, 1878.	Miner writes to Anthony Joseph, in the name of S. W. Dorsey, asking Joseph to carry the mail on route 38145, Garland to Parrott City	853
Decem., 1878.	S. W. Dorsey wrote to Joseph to carry the mail, and promising to be personally responsible. (Route 38145)	860
March 7, 1879.	Letter headed "Senate Chamber" sent by Rerdell to subcontractor Perkins, with a statement in blank for Perkins to swear to, on route 38113, Rawlins to White River	1121
April 9, 1879.	S. W. Dorsey wrote to Joseph, the subcontractor, that he was personally interested in the route; that he had written to General Hatch, and sent Joseph forms for petitions to be written out, signed, and returned, before he (S. W. Dorsey) left Washington. Route 38145, Garland to Parrott City	855-887
April 16, 1879.	S. W. Dorsey wrote to Wilcox asking him to get up petitions and have articles published in the newspapers, asking for an increase on route 44140, Eugene City to Bridge Creek	1558-1587
April 17, 1879.	General Hatch wrote an answer to letter of S. W. Dorsey, saying, "I shall be thankful for a daily line to Pagosa." The letter was filed. Route 38145, Garland to Parrott City	817

April 24, 1879.	Wrote to Brady, inclosing letter from General Hatch, also the petitions sent by Joseph, and stating, "I am personally familiar with the facts stated and know the necessity for this additional service; I simply write this to add my testimony to theirs. Route 38145, Garland to Parrott City.....	Page- 814
April 30, 1879.	Wrote to subcontractor Joseph notifying him that the service had been increased two trips, and the time reduced from ninety to fifty hours, and stating, "I think it will be made daily, July 1, 1879." Route 38145, Garland to Parrott City..	856
May 5, 1879.	Wrote to subcontractor Nephi Johnson that the firm had dissolved; that all contracts made in Peck's name are without his (Peck's) knowledge or authority, and asking Johnson to make a new subcontract with him (S. W. Dorsey). Route 41119, Touquerville to Adairville.....	623
May 10, 1879.	Received two letters from Springfield, Oregon, asking him to get increase on Route 44140, Eugene City to Bridge Creek	1521
May 10, 1879.	Petition sent to S. W. Dorsey for increase. Miner sent them to Brady. Route 38140, Trinidad to Madison.....	1101-2
May 20, 1879.	Signed the guarantee on a subcontract with Major & Culverhouse. Route 46247, Redding to Alturas.....	1854
May 23, 1879.	Wrote to Brady inclosing two letters sent to him (S. W. Dorsey) from Springfield, Oregon, on May 10, 1879, for increase, also a petition which had been written by Rerdell and signed in Eugene City. Route 44140, Eugene City to Bridge Creek	1522
June 22, 1879.	Wrote to subcontractor Joseph—fifty hours is not too fast—\$12,000 to run this service in fifty hours is absurd; that would be \$26 per mile. The average cost is less than \$5. Route 38145, Garland to Parrott City.....	857
July 10, 1879.	Signed the guarantee on a subcontract with Nephi Johnson. Route 41119, Toquerville to Adairville.	
August, 1879.	Paid subcontractor Joseph \$109.39, and said that he had not received a dollar from the Government for the service. (At that time he was receiving \$13,242.28 a year, and was paying Joseph \$5,160, leaving him a clear profit of \$8,082.28 a year.) Route 38145, Garland to Parrott City.	868, 857
Nov. 11, 1879.	Filed his subcontracts on the following routes:	
	38135, Saint Charles to Greenhorn	525
	38156, Silverton to Parrott City	957
	38140, Trinidad to Madison	1069
	38113, Rawlins to White River	1172
	40113, Tres Alamos to Clifton	1504
Nov. 25, 1879.	Signed the guarantee on the subcontract with Steineger. Route 38156, Silverton to Parrott City	959.

Jan. 21, 1880. Withdrew his subcontract on route 38156, Silver-	<i>Page.</i>
ton to Parrott City	958
Oct. 19, 1880. Withdrew his subcontract on route 38113, Raw-	
lius to White River.....	1173
Dec. 6, 1880. Withdrew his subcontract on route 40113, Tres	
Alamos to Clifton	1504
Dec. 7, 1880. Withdrew his subcontract on route 38135, Saint	
Charles to Greenhorn.....	526
Dec. 7, 1880. Withdrew his subcontract on route 38140. Trini-	
dad to Madison, 1105, S. W. Dorsey received the	
drafts, or warrants, or drew the pay on the follow-	
ing routes:	
38135. Saint Charles to Greenhorn, Colorado:	
May 19, 1879	579
July 17, 1879	580
October 7, 1879	580
November 11, 1879.....	580
October 26, 1880	581
41119. Toquerville to Adairville, Utah:	
July 24, 1879	640
November 3, 1879	640
February 21, 1880.....	640
May 1, 1880 ..	640
38145. Ojo Caliente route:	
May 5, 1879 ..	937
July 7, 1879	937
October 7, 1879	937
38156. Silverton to Parrott City:	
November 10, 1879.....	974
March 1, 1880	974
46247. Redding to Alturas, California:	
July 21, 1879	1020
November 6, 1879.....	1860
May 17, 1880.....	1860
38134. Pueblo to Rosita, Colorado:	
July 25, 1879–October 27, 1879	1054
March 1, 1880. May 15, 1880.....	1054
38140. Trinidad to Madison, Colorado:	
July 25, 1879–October 27, 1879.....	1073
March 1, 1880–May 15, 1880...	1073
38113. Rawlius to White River, Colorado:	
August 1, 1879	1189
August 6, 1880.....	1189
October 7, 1879	1174
December 17, 1879.....	1174
40104. Mineral Park to Pioche, Arizona:	
May 5, 1879.....	1863
July 24, 1879	1345
January 30, 1880.	1345
40113. Tres Alamos to Clifton, Arizona:	
July 31, 1879	1509
October 31, 1879	1509
January 30, 1880	1509
44140. Eugene City to Bridge Creek, Oregon:	
July 7, 1879.....	1864
October 7, 1879	1865

S. W. Dorsey's name appears in connection with twelve routes.

S. W. Dorsey drew pay on eleven routes.

That is the man who had nothing to do with this matter. Here are the facts carefully sifted out of the testimony. I have page and place for every word I repeat. Twice has it been verified, and every word that I repeat is true. And yet you have heard an intelligent man stand up here and tell you there is no evidence against Stephen W. Dorsey. Ninety-six times! Ninety-six facts and acts connect him with these transactions in twelve of these routes, and in eleven of them drawing the pay! And yet he had nothing to do with them. Do you wish me to enlarge upon this on this hot summer's day, and we are all suffering from this protracted case? No. You do not lack recollection nor do you lack moral sense and intellectual force.

I thought that they might, perhaps, in the spirit of a little generosity towards poor Rerdell, give him some of that brotherly affection that Mr. Ingersoll talked about yesterday, wherein you were to love every rascal. It is that universal philanthropy of which Macauley speaks when he says that a part of the philosophy of Byron was a kind of universal philanthropy which resolved itself into hating your neighbor and loving your neighbor's wife. That kind of universal benevolence that confounds the scoundrel with an honest man does not please me, but thinking that in that exalted, lofty spirit of heroic philanthropy they might stand up for Rerdell, I prepared myself to show you wherein Rerdell was guilty. There are seventy-seven instances of Rerdell's acts and doings that I have collected. I will not read them to you. It is not necessary to waste your time. Now, gentlemen, I have come to the end of this case, as far as I am concerned.

The COURT. Mr. Attorney-General, before you close allow me to make a suggestion. It was contended yesterday with great confidence by Colonel Ingersoll that the overt acts in this case are not the overt acts set out in the indictment. I think he must have occupied two hours. Of course his observations upon that point could not have escaped counsel. I do not know whether you have anything to say on that subject or not. The argument might have made some impression possibly in some quarters. You do not know what impression it may not have made upon the court.

The ATTORNEY-GENERAL. Really, sir, it is a puzzle to me. I think this case is bristling with overt acts, and I think I have shown it. What were Brady's orders?

The COURT. It is a question of variance. He claims that the overt acts set out in the indictment are not the overt acts which have been proved.

The ATTORNEY-GENERAL. I think I did say to your honor what my colleague is inclined to think I did not say with sufficient emphasis. Leaving aside all other considerations in this case, the orders that were made by Brady he did not undertake to say were erroneously set out or that there was any variance as to them.

The COURT. No, but his argument was based upon the dates of the affidavits filed in the cause. I do not know that he contended that there was any variance between the face of the affidavits as filed and the averment on that subject contained in the indictment. But he did argue that there was a variance between the averment in the indictment as to the time of filing of those affidavits and the time when they were shown to have been filed by the evidence. Now, whether that be a variance of any consequence or not is a question which counsel seem to regard as of very great importance in this case. All these affidavits

have been set out as overt acts and you were bound to prove them as you have averred, that is if your proof is of any value at all in regard to them. There may be other overt acts set out which have been proved as they have been laid.

Mr. MERRICK. The Attorney-General asks me to make a single remark in reply to your honor, which I will do.

Mr. WILSON. And to which we will reserve the right to reply, your honor. We do not propose to have two closing arguments in this case if we can help it. That is a matter that was discussed and settled before this argument began. If there are to be two arguments at the close of this case we reserve our right to reply.

Mr. MERRICK. I am not going to argue, but simply to call your honor's attention to the fact.

Mr. WILSON. I simply want to give notice in advance that we will claim that right so that there may be no misapprehension about it hereafter.

The COURT. It is not every claim that is valid, you know.

Mr. MERRICK. Let them have it; I do not care.

The COURT. The Attorney-General seems to be about to close his argument and the court has called his attention to a single matter. He seems to be exhausted by the labor that he has gone through and has requested his associate, Mr. Merrick, to fill his place upon that matter. If Mr. Merrick is heard at all I shall hear him as the *locum tenens* for the time being of the Attorney-General.

Mr. MERRICK. It will only be for a minute, and if he wants to reply he can reply when the Attorney-General is done; I do not care.

Mr. WILSON. I concede that the court has the right to grant any indulgence in this case that it thinks proper as a matter of discretion of the court, but I want to give notice in advance of an exception unless we are permitted to reply as we desire.

Mr. MERRICK. I freely consent that the gentlemen may reply to my answer to the court's inquiry.

The COURT. The court does not consent. I would rather forego hearing you than to have a reply.

Mr. MERRICK. It is only a single answer.

The COURT. Your argument for a minute might be like a minister's text; it might be the foundation for a two or three hour sermon.

Mr. WILSON. We got rid of his other argument and we think we can get rid of anything he gives us.

Mr. MERRICK. We will see what the jury say about it.

The COURT. I do not know but that I am so far convinced on this subject that I may stop from arresting Tongue River until it gets to its end.

The ATTORNEY-GENERAL. Now, sir, when you propounded your question to me I paused not so much from exhaustion, although I am very tired. Perhaps you supposed I was exhausted because I had exhausted you. But I paused because there were questions of dates connected with the matter, and I desired not to stand upon myself entirely, for my own knowledge was acquired by reading through the eye, and not by the ear or by handling the papers. I had some hesitation in answering where dates were concerned, and so I appealed to my brethren to turn to the dates and give them. Now I answer thus: These affidavits were dated on certain dates, but they were laid in the indictment as of the date when the order was issued based upon them.

Mr. MERRICK. That is it.

The ATTORNEY-GENERAL. My learned brother says that is it. That is the whole of it. That is a text that will not require a long sermon

The COURT. I have escaped the sermon by——

The ATTORNEY-GENERAL. [Interposing.] By the allusion to Tongue River.

The COURT. By affording the Attorney-General the opportunity of making this short explanation.

The ATTORNEY-GENERAL. Thank you. I will say as to Tongue River——

Man may come and man may go,
But it rolls on forever.

Now, gentlemen, I will not go on forever. I will be through in a minute. I am very thankful to the court for stopping me, for it gave me a little rest, and then there was a question not to be cleared up in the mind of the court, but to be explained to you, which in its judgment and discretion it thought proper to direct my attention to. So it was my duty to accept that suggestion and do the best I could to answer the court. I said a moment since that this was no pleasant duty. It is a painful, a very painful, and it has been a very exacting duty upon me. I am the only one of the Cabinet in this city. In January I assumed the functions of an office that was new to me, and had to take up upon the instant the vast details of the Department of Justice. I had my own practice weighing upon me at home where men had paid me to attend to their business. All that I have carried, and here I am still laboring at the oar. I have not come here from any desire to be heard. I have come here from a sense of duty. I never would have been here in this case holding the position I hold if I had not determined in the outset of life to face my duty wherever it came and *perform it* like a man. Now you can understand that I have not come here for the purpose of exhibition and display or to gratify any other sentiment than the moral obligation that is upon me. I do not come here to persecute men and to pursue them. I feel it a part of that duty of which I speak to tell you that if you have reasonable and manly doubt as to the guilt of these men or any of them, acquit them. This Government only wishes you to understand through me that it is in earnest, in earnest for the sake of the Government, and in earnest for the sake of these men. They are our own citizens, as dear to us as any other citizens; and the Government, like a parent, does not wish to see a citizen disgraced and punished any more than a parent would a child. The Government wants equal, even-handed justice to its citizens. They are all dear to it. I do not wish the annals of this court to be stained with a false judgment. I do not wish any man to be punished unjustly. I wish no family to pass through this vale of tears that was described to you yesterday. I would have no wife shed tears, no child covered with shame. I only ask for justice in the name of the public, and you are part of that public. I ask for justice, and if that justice be the acquittal of these men, give it, give it, and those I represent, the people of the United States, and the Government created by the people of the United States, will be satisfied. What has been done here by the prosecution that is irregular or improper? Are not the odds against it? How often have you seen Mr. Merrick standing here all alone confronting the whole of the summit of the Washington bar and men chosen from other places for their eminence and ability? Where is the force that has been brought to bear, to persecute and tread these men down? The force of numbers is with them. The knowledge of the facts is with them, their witnesses that they did not produce and their books and papers that are not here, their grave-yard transactions that are not disclosed. The Government was at a disadvantage from the be-

ginning and they knew it, yet they came into court and cried out aloud as Tweed cried out in New York, "What are you going to do about it? What are you going to do about it?" The Government has told them what they are going to do about it, as the men in New York told Tweed and his friends. What we are going to do is to go before a court of justice, have it thoroughly investigated, and take the consequences. That is what we are going to do, and here we are face to face with them. Some things have been done in this case—I will not say said, for that I will all pass by—yes, some things have been said, too, that ought not to have been said. Your honor knows Judge Butler, the district judge of the United States for the eastern district of Pennsylvania, one of the oldest and best judges in that commonwealth, for long years the presiding judge of that very populous and prosperous county of Chester, presiding at West Chester with eminent dignity, and promoted to the district court of the United States. Only a month ago he had a case tried before him which was within the jurisdiction of the United States court. A man was indicted for violating the law in connection with the currency, and that man brought his wife into court and sat her along side of him to produce an impression. Judge Butler said to that man and his counsel and to the jury that such things should not be, that the criminal courts were no place for a wife.

A man who has the sensibility of a man will not bring his wife into court and will not permit her to come where foul and evil things are said of him. "Gentlemen of the jury," said Judge Butler, "such a thing is an assault upon your integrity through your sympathy. It is not a proper way to administer justice, and I reprehend it and condemn it."

Yesterday you heard an appeal made, and a reference made, to an occasion that never should be referred to in a court of justice—to the crucifixion of our Savior. The object was to affect your sympathies by alluding in words that were fine and grand to utter, and in tones that were noble to hear, to an event that touches the heart of every man. It appalled me to contemplate the introduction of that great and terrible occasion for purposes such as were in view, and by a man, as to whom I will have to ask, What has he to do with the crucifixion? Did he believe in it, that he used it for the purpose of influencing your judgment? When a man appeals to an occasion as an illustration he should believe in what he says. Of what use was this reference to that occasion, if not true? Of what value was it as illustrative of the subject, if not true? I say that such things should never be referred to in a court of justice and such appeals should never be made. We should do exactly what that same gentleman told you before—stick to the natural statement of the facts and the natural conclusions from those facts. All I want here is fair play, fair play to these defendants and the Government. Let us have nothing foul in a court-house.

Over two thousand years ago old Æsop tells a story in one of his beautiful fables, the moral of which applies now in this court-house. A swallow had built her nest beneath the eaves of a court-house, and there were her little fledglings. She went out to seek food, and when she came back the fledglings were gone and the nest was gone. As she sat upon the eaves of the court-house and wept and cried, another bird came along and said, "Why do you cry? You have lost your fledglings and you have lost your nest, but another year will come, spring again will be here, and you will have another nest and other fledglings, and you will enjoy that happiness which you have now lost." Then the swallow answered, "Oh, it is not that. I know all that. That is not why I

grieve. I know that another year will bring me another nest and other little swallows. But I built my nest under the eaves of the court-house, a sacred place, where I thought no crime, no corruption, and no wrong could enter, and I have been disappointed. It is that which grieves me."

Now, gentlemen, what I ask of you is that which I confidently, like the swallow, bring to you and trust you with. I ask of you that you shall do nothing that is corrupt or base, or allow others to do it, through the means of the forms of justice as administered in this sacred place.

The COURT. The counsel for the Government some days ago submitted certain propositions of law upon which they desired the instructions of the court. It has been intimated on several occasions that it was the intention of the counsel for the defense to submit certain instructions which they desire the court to give in their behalf. I will inquire now whether those instructions are prepared?

Mr. WILSON. They are prepared, your honor.

The COURT. Do you desire to submit them before the court charges the jury in its own way?

Mr. WILSON. Yes, sir; we do.

The COURT. Now is the occasion then.

Mr. WILSON. [To Mr. Merrick.] Have you any prayers on the part of the prosecution other than those already submitted?

Mr. MERRICK. We have not, I believe, just at present. We will have yours first.

Mr. TOTTEN. We are entitled to have the prosecution's prayers first.

Mr. MERRICK. You have got all my prayers. When I hear what yours are, I will see further.

Mr. WILSON. I will read those I have before me.

The defendants ask the court to charge the jury as follows:

FIRST.

The indictment charges that the defendant, John R. Miner, had five contracts; the defendant, John M. Peck, seven contracts; and the defendant, John W. Dorsey, seven contracts, for carrying the mail on and over certain post-routes; that these defendants, together with defendants Henry M. Vaile, Montfort C. Kerdell, and Stephen W. Dorsey, became mutually interested in said contracts, and being so mutually interested therein, they, together with the defendants Brady and Turner, conspired to defraud the United States by means of false petitions and other papers to be filed in the Post-Office Department, and by means of false affidavits as to the number of men and horses, and by means of orders to be made, &c., and that pursuant to this conspiracy, and to effectuate it, they did certain overt acts.

It charges that the moneys of the United States to be derived by the conspiracy were to be for the joint benefit of all of the defendants.

SECOND.

You are to presume the defendants innocent of this charge. You are to indulge in that presumption until it is driven from your minds by proof of guilt, as charged by the evidence adduced in the case.

The defendants are not required to prove their innocence. The prosecution must prove their guilt. Every material fact charged in the indictment necessary to constitute the offense must be proven.

You cannot be governed by suspicions, by conjectures; but there must be proof. There must be evidence which establishes the facts necessary to constitute the offense.

They are not bound to disprove any charge made or any fact alleged, but the Government must prove such charge or such fact.

THIRD.

To sustain this indictment the Government must prove, beyond a reasonable doubt, that the defendants did enter into a conspiracy as and for the purposes so charged. The proof must show that the defendants, John W. Dorsey, Stephen W. Dorsey, John M. Peck, Henry M. Vaile, and Montfort C. Rerdell, were, at the time of the alleged conspiracy and within three years before the filing of said indictment, mutually interested in the contracts named in the indictment. If the evidence fails to so prove, the prosecution cannot be maintained, and you must find for the defendants. In other words, if the proof shows that the defendants, except Brady and Turner, were not mutually interested in said contracts at the time of the alleged conspiracy, or at any time within three years prior to the finding of the indictment, you must find the defendants not guilty.

FOURTH.

This indictment further charges that the conspiracy was to procure money, &c., for the joint benefit of all the defendants. This is a material averment, and must be proved as made, and hence if you believe from the evidence that for a period of more than three years before the date of the finding of the indictment the defendants, excepting Brady and Turner, were not mutually interested in the contracts as alleged in the indictment, and that the moneys to be derived by reason of the alleged increase or expedition of service and the other matters and things specified and charged in the indictment were not for the joint benefit of all the defendants, but that the moneys derived from some of the routes were for the benefit of some of the defendants, and from other routes for the benefit of other defendants, this would be a fatal variance, and you could not find a verdict of guilty.

FIFTH.

There must be proof of a conspiracy as charged in the indictment, and while this charge need not be proved by direct testimony, but may be proved by circumstances, yet it must be proved. To prove it by circumstances those circumstances must be such as to satisfy your minds that the parties did, in fact, agree together that they would defraud the United States, and by the reasons set forth in the indictment.

If the evidence fails to prove that they did so agree, you must find the defendants not guilty.

The fact that a conspiracy may be difficult to prove does not lessen the degree of evidence requisite to justify a conviction. Whatever may be the character or quality of the evidence, it must amount to proof beyond a reasonable doubt of the fact that the parties *agreed* together. If it falls short of that your duty would be to acquit.

SIXTH.

The jury must keep in mind that the essence of this case is the charge

of conspiracy, the agreeing together of these defendants; that, as has already been stated, must be proved.

In determining whether or not the alleged conspiracy has been proved you are not at liberty to consider any statement, declaration, or confession of any one of the defendants as against others than himself unless made in the presence of the others sought to be affected thereby.

If Brady made a statement to Walsh, not in the presence of the other defendants, it cannot be considered by you as evidence tending to prove the conspiracy charged; nor can the statements made by Rerdell be considered by you for any such purpose.

The existence of the conspiracy must be proved by other testimony than such declarations or confessions; and if independent of such declarations there is not sufficient proof of the conspiracy as charged in the indictment, you must acquit the defendants.

SEVENTH.

You cannot in this case find one or more of the defendants guilty of a part of the charge; as, for example, of a conspiracy to defraud as to part of the routes charged, and others guilty of another part. Each must be guilty of the whole charge in the indictment, and if not guilty of the whole cannot be found guilty at all.

EIGHTH.

The defendant Brady was the Second Assistant Postmaster General at the time named in the indictment. As such he was subordinate to the Postmaster-General. It is charged in the indictment that, by the regulations of the department, he had authority to make orders for the increase and expedition of the service. The law authorizes the service to be increased and expedited, and the duty of deciding upon increase and expedition, or either, devolves upon the Postmaster-General. The law commits that to his judgment and discretion. His acts in those respects are official acts, and when made within the limits of the law they must, for the purposes of this prosecution, be presumed to be right. It is not within your province to decide whether they were wise or not. You cannot be permitted to conclude that they were unwise, and to draw an inference of guilt therefrom, and hence the proof of orders for increase or expedition, or both, which you might deem unnecessary or unwise would not in and of themselves be evidence proving or tending to prove the conspiracy charged. The prosecution must prove that there was a corrupt combination to make them, and that they were made pursuant to and in furtherance of that corrupt combination, and failing in this proof you must acquit.

NINTH.

To prove that the defendant, Brady, made these orders set forth in the indictment will not satisfy the requirements of the law in this case. The proof must go much beyond that. It must establish that he *agreed*, as a part of the conspiracy charged, with the defendants to make them, and it must go still further, it must satisfy you that he so agreed for the *corrupt purpose* as charged in the indictment.

It is not sufficient to show that he had taken a bribe from any one or more of these defendants, or from somebody else, for that is not the offense with which he is charged. He is charged with conspiracy; an agree-

ment with these defendants to defraud the United States, and you cannot consider whether he has been guilty of any other offense than that so charged. If it is claimed that he has been guilty of such other and different offense, then before his guilt of it can be considered he must be specifically charged with it, according to the forms and requirements of the law, so that he may have an opportunity to meet it. No charge can be tried or considered in this case except the one set forth in this indictment—the charge of conspiracy. If that is not proved you must acquit.

TENTH.

Guilt may be proven by circumstances, but when proof is sought to be made by such testimony the circumstances relied upon must be wholly inconsistent with innocence. If they are, in any reasonable view, consistent with innocence of the charge, they are insufficient to prove the charge.

In this case it is alleged that Brady's acts were agreed to be made to appear to be based upon petitions, &c., which were to be falsely gotten up, &c. But if you find that in cases where it is charged there were false petitions there were also genuine petitions and other recommendations, that Senators and Members of Congress, and civil and military officers of the Government were urging orally and in writing the expeditions and increases complained of in the indictment, and if under the evidence submitted to you you can attribute his acts in making such orders as he did make to these instead of to the false petitions, if there were any such, then it is your duty to attribute them to the genuine petitions and recommendations.

In determining whether Brady is guilty of the conspiracy charged, it is your duty to look to the circumstances of the case as detailed by the testimony; the only acts of his that have been brought to your notice in this case are the official orders mentioned in the indictment.

The prosecution claims that in making these orders he was carrying out a previously-formed combination or agreement with the other defendants. Now, if you find that he was being urged by Senators and Members of Congress, by civil and military authorities, and by citizens to make these increases and expeditions, and if so far as the making of increases and expeditions may be attributable to petitions and recommendations at all, they may be attributed to genuine petitions and recommendations, it would be your duty to so attribute them.

ELEVENTH.

If, under the facts and circumstances of this case, you are left in reasonable doubt as to whether he made the orders in pursuance of a corrupt agreement, or made them in good faith upon petitions and recommendations upon which he might fairly rely, the law will not permit you to find that they were made pursuant to a corrupt agreement, but you must find the contrary.

TWELFTH.

To make the offense of conspiracy complete under the statute, there must not only be a combining together of two or more persons, but some act must be done by some one of the alleged conspirators in furtherance of the common design. The act done here referred to is in

law called an overt act. Without an overt act there is no offense, and it is therefore necessary that at least one overt act shall be charged in the indictment, and the proofs in the case, as to overt acts, must be confined to the overt act or acts set forth in the indictment, and you cannot consider any overt act that is not charged in the indictment.

THIRTEENTH.

The overt act must be specifically and distinctly set forth in the indictment, so that the accused may be fully advised what he is required to answer, and no overt act charged can be considered by you unless it is proved as charged.

FOURTEENTH.

For illustration it is charged as an overt act that Brady made an order to expedite service on the 23d of May, 1879; that charge would not be sustained by proof that he made the order on the 9th of May, 1879. This would be a fatal variance.

FIFTEENTH.

Or if it is charged as an overt act that Brady made an order, and the proof shows that it was in fact made by French while he was acting as Second Assistant Postmaster-General, this would be a fatal variance between the proof and the charge, although it might appear that Brady had in writing or orally advised French to make such an order.

In such case the overt act is alleged to be the *making* of the order, not *advising French to make it*, and hence if the proof should show that he advised French to make it, it would not sustain the charge that he made it; there would in such case be a fatal variance, and such overt act must be excluded from the case.

SEVENTEENTH.

And so with reference to the allegations of the presentation of false and fraudulent claims for the payment of the moneys referred to in the indictment. The prosecution has stated specifically in the indictment the amounts of the false claims presented and must prove them false as charged. If the evidence shows that a part of any claim presented was not fraudulent but honest and the charge is that the whole was fraudulent, this would be a fatal variance as to such an overt act.

EIGHTEENTH.

The principle stated in these illustrations is applicable to each and every overt act charged in this indictment, and you will look to each and the evidence in regard to it, and wherever you find a variance such as is here referred to between the charge of the overt act and the proof in regard to the charge, you must exclude such overt act from your consideration.

And if you find such a variance as to each overt act set forth in the indictment it is fatal to the case because even if you should believe that the parties conspired, still there can be no conviction without proof of an overt act.

NINETEENTH.

In determining as to whether or not increase or expedition shall be granted, productiveness is not the sole nor the paramount consideration. The law provides that in determining as to increase or expedition the Postmaster-General shall have due regard to productiveness and other circumstances, and if a route was expedited and the cost exceeded the productiveness, that fact does not *per se* prove that the increase and expedition should not have been made. There may have been other circumstances that were paramount to the consideration of productiveness.

He has the right to determine whether the productiveness should prevail, or whether other circumstances should have paramount consideration, and you cannot in this case try the question whether he decided properly in such a case. He was the judge of that question, and his judgment must be presumed to be right, and you cannot infer corruption or a conspiracy from the fact that they were made.

The evidence must prove not only that it was not an honest exercise of judgment, but was the result of a combination or conspiracy to defraud the Government by means of such orders.

The Government must therefore prove such unlawful confederation.

TWENTIETH.

You are the exclusive judges as to the facts, and it is for you exclusively to determine what the evidence proves, whatever may have been said by the court during the progress of this trial at any time with reference to the facts is not to be permitted to influence your judgment in regard thereto. What this evidence proves, or fails to prove, it is your exclusive province to determine, and you are likewise the exclusive judges as to the credibility of witnesses. You are not lightly, and without reason, to reject the testimony of any witness, unless you are convinced that it is not true. To impeach a witness or destroy the credibility of his testimony it is not necessary that other witnesses shall be called to dispute what he may have testified to. There may be that in the testimony of the witness itself that would warrant you in determining that it is not such as that you can rely upon it and act upon it in making up your verdict. It is your right and your duty to consider the probabilities and the improbabilities of the testimony given by any witness. If there is that in it which renders it improbable, or if he has made contradictory statements as to matters with reference to which he may reasonably be presumed to know, you may and you should take such contradictions into account in determining whether or not his testimony can be safely relied upon. If he has sworn differently at different times, with reference to the same matters involved in the matters with reference to which he has testified, and no reasonably fair explanation is given of why he thus contradicted himself, you may and you should take that into consideration in determining whether his testimony is entitled to credit.

You have a right to take into consideration, and you should take into consideration, all the circumstances as detailed by him, and from these you must determine whether or not his testimony is true as given before you; and if by any of these means it is contradicted or rendered improbable or unreliable you should reject it wholly unless what he has testified to before you has been sustained by other testimony.

And in determining as to the credibility of a witness, and as to the weight you will give to his testimony, you have the right to consider, and should consider, the motive by which the witness may be actuated as the same may be disclosed by the evidence.

If he is to gain any personal or pecuniary advantage directly or indirectly, by means of or as the result of his testimony, you have the right and it is your duty to take that into consideration in weighing his testimony.

And so, too, if it appears that he is actuated by motives of revenge or passion, it is your right and your duty to take these into consideration in determining what weight shall be given to his testimony.

Each and all such considerations, so far as they appear, are proper for your consideration, and you should consider them in estimating the value of the testimony and the credit you should give to it.

TWENTY-FIRST.

In proving a case by circumstantial evidence, each circumstance relied upon must be proved with that degree of certainty which excludes every hypothesis other than that of guilt. If the circumstance relied upon is consistent with innocence, you must adopt that hypothesis. In other words, the evidence must prove to you that that circumstance is wholly inconsistent with innocence. If it is consistent with innocence, you must exclude that circumstance from your consideration. The law requires that a party accused shall be proven guilty of the charge imputed to him beyond a reasonable doubt; and, until the evidence removes from your minds every reasonable doubt of guilt, you cannot find a defendant guilty, and this rule applies to each circumstance in the case, when circumstances are relied upon for the purpose of proving the party's guilt.

TWENTY-SECOND.

Again. The offense is complete when the conspiracy is formed and an overt act is done in furtherance of the object of that conspiracy. As soon as the offense is complete the statute of limitations begins to run, and although the parties may have gone on afterwards in doing acts in furtherance of the objects of the conspiracy, such acts do not change the time when the offense was complete, and therefore if you believe from the evidence that the conspiracy charged was entered into, and that an overt act was committed in furtherance of that conspiracy, and that that overt act was committed more than three years prior to the commencement of this prosecution, the prosecution must fail.

TWENTY-THIRD.

Again. The law requires that this prosecution shall have been commenced within three years after the offense is committed, and the commencement of the prosecution is the filing in this court of the indictment. The indictment was filed on the 20th day of May, 1882, and therefore this offense, if committed at all, must have been committed within three years prior to the 20th of May, 1882, or since the 20th day of May, 1879. The indictment is found upon a statute approved on the 17th day of May, 1879, and to sustain this indictment it must be proven that the offense was committed since that statute took effect and within three years prior to the finding of the indictment. The statute is in substance,

that if two or more persons shall conspire, &c., and one or more of them shall commit an act in pursuance of the alleged conspiracy, the parties shall be deemed guilty of an offense. The indictment being under the statute of May 17, 1879, and that statute providing that an overt act must be committed for the purpose of carrying into effect the conspiracy, no act that was committed prior to the passage of that act can be of any avail in this case, and you must reject it from your consideration. To prove this case the prosecution must establish by the evidence beyond a reasonable doubt that within three years prior to the finding of the indictment, and since the enactment of the statute mentioned, the defendants, or some of them, did combine, conspire, confederate, and agree together to defraud the United States for the mutual benefit of the defendants, as charged in the indictment, and unless the evidence shows such an agreement within the three years alluded to this prosecution cannot be maintained and you must acquit the defendants.

Mr. HENKLE. Had we not better take a recess now, your honor?

Mr. MERRICK. Let us have the instructions first.

Mr. HENKLE. I have a large batch of them. It will take an hour to get through.

The COURT. From the survey I have just made of the field, I think it is very likely the reading of the instructions may occupy the whole afternoon.

Mr. MERRICK. I am glad that they appreciate the necessity for hard praying.

The COURT. Gentlemen of the jury, the discussion of these prayers is to take place in the presence of the court alone, and not in the presence of the jury. That discussion will probably occupy some time. I cannot foresee how long. I should suppose from the inspection I have taken of the manuscript in the hands of the counsel, that it will take an hour more to listen to the reading of the instructions. To-day is Thursday. It is very probable that the discussion of these instructions will occupy the whole of to-morrow.

Mr. WILSON. Oh, no, your honor.

Mr. TOTTEN. The discussion of the questions of law, your honor, has already been largely disposed of. It will not take us an hour to read our prayers.

The COURT. I am happy to be corrected.

Mr. HENKLE. Do not let us lose a day, your honor.

The COURT. As this is a moment severed from the trial of the case I have made up my mind to make use of it with reference to some matters that have come to my ear. Several members of this jury have come to me with information that they had been approached with proposals most manifestly of a corrupt kind. The first intimation I had of that kind was several weeks ago. And there have been several more. I cannot call them intimations either; it is square and direct information given to me privately for the purpose of asking what should be done. My advice to those members of the jury was to say nothing about it. The court did not want to interrupt the progress of the arguments or the hearing of the case by any such side questions as this. But this thing has grown, and within the last twenty-four hours it seems that these wolves who have been around this jury have become fiercer and more determined. I felt so much indignation that I was almost ready to advise the jurymen to shoot these men on the spot. That is the way I felt about it. But I gave no such opinion. Villainy of that kind, scoundrelism of that degree, deserves no mercy. I do not know in what in-

terest these suggestions have been made. I do not wish to convey any intimation upon that subject, but I wish to advise this jury to repel with scorn and indignation any base attempt of this character upon their virtue and integrity. The insult is of the very last intensity, and I do hope that when we get through with this trial we will have information enough to enable the court to lay its hand upon these men who have approached the jury in this way. I have called your attention to this subject with another view: To give warning to men of that kind of what they are about and that the officers of the law will do their duty, and if it is possible to ferret out these scoundrels it shall be done. Give them no quarter. Spurn them with the end of your toe. No baser vermin infests the earth than men who are engaged in that kind of business. The insult to you is that they suppose that you are just as base, just as low as they are themselves. No man on the jury or anywhere else should allow a whisper of that kind to be made to him without spurning it with the utmost scorn and contempt, if he goes no further. I do not, of course, advise violence at any time, but next to the insult that is given a man's wife is an insult of this kind to a jurymen. His honor should be as sacred and as carefully guarded as he would guard the honor of his wife. Now, gentlemen, I have said this much as collateral. At this point we will take our recess.

The FOREMAN. [Mr. Dickson.] I would say, your honor, that after the disposition of this case I shall lay the full facts before you for action.

Mr. HENKLE. I want to say before the court adjourns, your honor, on behalf of myself and my clients, that I demand an investigation of the charge that has been made.

The COURT. We will see about that afterwards. Perhaps you will have it.

Mr. MCSWEENEY. So do I.

The FOREMAN. [Mr. Dickson.] Shall we report again this afternoon?

The COURT. You need not report until to-morrow morning; the afternoon will certainly be occupied with the law.

At this point (12 o'clock and 45 minutes p. m.) the court took its usual recess.

AFTER RECESS.

Mr. CHANDLER read the following prayers for instruction:

FIRST.

The court charges the jury that the defendants are indicted for an alleged conspiracy to defraud the United States in a manner alleged to be condemned by the act of May 17, 1879, of Congress; and it is in said indictment charged that said alleged fraud was intended by said defendants to be accomplished by the following means, to wit:

By means of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell, *then and there fraudulently to write and sign, and cause and procure to be written and signed*, a large number of fraudulent letters and communications, and false and fraudulent petitions and applications to the Postmaster-General, for additional service and increase of expedition on and upon each of the hereinbefore mentioned, numbered, and described post-routes, as aforesaid, *the said petitions* and applications then and there

falsely to purport to be made and signed by people and inhabitants of the said States and Territories residing upon and in the neighborhood of the said post-routes, and the said petitions and applications then and there to be signed with fictitious names, and the names of persons not residing upon and in the neighborhood of the said post-routes, and the said fraudulent letters and communications, and false and fraudulent petitions and applications then and there to be placed and filed in said office of the Second Assistant Postmaster-General, among the papers relating and pertaining to the said several post-routes as aforesaid; and by means of said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell, then and there fraudulently to make and sign, and cause and procure to be made and signed for the said post-routes, false and fraudulent oaths and declarations, and fraudulent written declarations and statements, falsely purporting to be statements made and signed under oath, the said oaths and declarations then and there falsely and fraudulently to state and describe the number of men and animals required to perform the service of carrying the said mails on and over each of said post-routes on and by the schedule of time then existing for carrying the said mails on and over each of the said post-routes, and falsely and fraudulently to state a greater number of men and animals than would be necessary and required to carry the said mails on and over each of the said post-routes, with increased speed on and by a schedule of a less number of hours, and the said false and fraudulent written declarations, oaths, and statements, then and there to be placed and filed in the said office of the Second Assistant Postmaster-General, among the papers relating and pertaining to each of the said several post-routes, as aforesaid; and by means of the said William H. Turner then and there falsely and fraudulently to mark, write, and indorse upon the said fraudulent letters and communications, and false and fraudulent petitions and applications, false and untrue dates, as and for the true dates of the filing of the said letters, communications, petitions, and applications in the said office of the Second Assistant Postmaster-General as aforesaid; and by means of the said William H. Turner then and there to wrap and inclose letters, communications, petitions, and applications received and filed in the said office of the Second Assistant Postmaster-General, relating and pertaining to carrying and transporting the said mails on and over the said post-routes, in envelopes, covers, and jackets, as aforesaid, and to write and indorse upon the outside of such envelope, cover, and jacket, false and untrue brief statements and descriptions of the subject-matter and contents of such papers so to be inclosed as aforesaid, and to write and indorse upon the outside of such envelope, cover, and jacket false and untrue brief statements that the said letters, communications, petitions, and applications so to be inclosed as aforesaid, were then and there in favor of and requests for increased and additional service and increase of expedition of the said mails on and over said post-routes, as aforesaid; and by means of the said William H. Turner then and there fraudulently to write and prepare fraudulent written orders for allowances to be made to the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, for carrying and transporting the said mails on and over the said post-routes, the said fraudulent written orders then and there to be approved, made, and signed by the said Thomas J. Brady, and to be filed in the said office of the Second Assistant Postmaster General, among the papers relating and pertaining to each of said post-routes, and to be certified to the said Auditor of the Treasury for the Post-Office Department, as afore-

said ; and by means of the said Thomas J. Brady then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to make, sign, and file in the said office of the Second Assistant Postmaster-General, written orders for increased and additional service in carrying the said mails on and over the said post-routes, and for the increase of the number of trips each week on and over each of the said post-routes to a number greater than mentioned and specified in each of said contracts and agreements as aforesaid, he, the said Thomas J. Brady, then and there well knowing that the said additional service was not lawfully needed and required, and was not necessary and required for the proper and lawful conveyance and transportation of the said mails on and over the said post-routes, and was not necessary and required for the just and lawful benefit and advantage of the people and inhabitants of the said States and Territories residing and living upon and in the neighborhood of the said post-routes, and was not necessary and required for the just and lawful benefit and advantage of the said United States of America, and to cause and procure the said unlawful and fraudulent orders then and there to be certified to the said Auditor of the Treasury for the Post-Office Department; and by means of the said Thomas J. Brady then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to make, sign, and file in the said office of the Second Assistant Postmaster-General, written orders for large additional compensation and allowances of money and pay to be made to the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors as aforesaid, for increased and additional service in carrying the said mails on and over each of the said post-routes in accordance with the said orders for the said fraudulently increased and additional service on each of the said post-routes, so to be made by the said Thomas J. Brady as aforesaid, and to cause and procure the said unlawful and fraudulent orders to be certified to the said Auditor of the Treasury for the Post-Office Department, as aforesaid; and by means of the said Thomas J. Brady and then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to make and file in the said office of the Second Assistant Postmaster-General, written orders for the increase of expedition in carrying the said mails on and over the said post-routes, and for reducing the time for carrying the said mails from the place of departure to the place of arrival, on each of said post-routes, to a schedule and number of hours less than mentioned and specified in each of said contracts and agreements as aforesaid, he, the said Thomas J. Brady, then and there well knowing that the said increase of expedition was not lawfully needed and required, and was not necessary and required for the proper and lawful conveyance and transportation of the said mails on and over the said post-routes, and was not necessary and required for the just and lawful benefit and advantage of the said people and inhabitants of the said States and Territories residing and living upon and in the neighborhood of the said post-routes, and was not necessary and required for the just and lawful benefit and advantage of the said United States of America, and to cause and procure the said unlawful and fraudulent orders to be certi-

fied to the said Auditor of the Treasury for the Post-Office Department as aforesaid; and by means of the said Thomas J. Brady then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to make and file in the said office of the Second Assistant Postmaster-General, written orders for great, excessive, and fraudulent additional compensation and allowances of money and pay to be made to the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, as aforesaid, for the increase of expedition in carrying the said mails on and over each of the said post-routes in accordance with the said orders for the said fraudulent increase of expedition on each of the said post-routes, so to be made by the said Thomas J. Brady as aforesaid, the said allowance of additional compensation then and there to be made at the rate of and in accordance with the said false and fraudulent oaths and statements of the number of men and animals required for carrying the said mails on and over the said post-routes on a schedule of a less number of hours, then and there to be made and signed, and caused and procured to be made and signed by them, the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell, and filed in the said office of the Second Assistant Postmaster-General, as aforesaid, and to cause and procure the said unlawful and fraudulent orders to be certified to the said Auditor of the Treasury for the Post Office Department as aforesaid; and by means of the said Thomas J. Brady then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to make and file in the said office of the Second Assistant Postmaster-General, written orders for extending the service on the said post-routes so as to include other and different stations and places on the said post-routes than the stations and places mentioned in the said contracts, and for fraudulent allowances of large and excessive additional money, pay, and compensation to the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, for the said extension of service, he, the said Thomas J. Brady, then and there well knowing that the said extension of the service was not lawfully needed and required, and was not necessary and required for the proper and lawful conveyance and transportation of said mails, and was not necessary and required for the just and lawful benefit and advantage of the said United States of America, and to cause and procure the said unlawful and fraudulent orders to be certified to the said Auditor of the Treasury for the Post-Office Department; and by means of the said Thomas J. Brady then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to make and file in the said office of the Second Assistant Postmaster-General, written orders for the decrease and curtailment of the service on the said post-routes, so as to discontinue the service of carrying the said mails to places and stations on the said post-routes, and for the fraudulent allowance to the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, as an indemnity, one month's extra pay on the amount of service so to be dispensed with, he, the said Thomas J. Brady, then and there well knowing that the said decrease and curtailment of service was not necessary and required for the proper and lawful conveyance and trans-

portation of the said mails, and was not necessary and required for the just and lawful benefit and advantage of the said United States of America, and to cause and procure the said unlawful and fraudulent orders to be certified to the said Auditor of the Treasury for the Post-Office Department; and by means of the said Thomas J. Brady then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to make and file in the said office of the Second Assistant Postmaster-General, written orders for the allowance of pay and compensation to the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, without the said John W. Dorsey, John R. Miner, and John M. Peck having performed the service of carrying and transporting the said mails on and over the said post-routes for which the said pay and compensation was so to be allowed as aforesaid, and to cause and procure the said unlawful and fraudulent orders to be certified to the said Auditor of the Treasury for the Post-Office Department; and by means of the said Thomas J. Brady then and there fraudulently, and for the benefit, gain, and profit of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to refuse to make deductions from the pay of the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, for failures of them, the said John W. Dorsey, John R. Miner, and John M. Peck, to perform the said service of carrying and transporting the said mails on and over the said post-routes in accordance with the said contracts and agreements as aforesaid, and according to the said orders for increased and additional service and increase of expedition so to be made by the said Thomas J. Brady as aforesaid, and then and there fraudulently to fail and refuse to impose fines upon them, the said John W. Dorsey, John R. Miner, and John M. Peck, for other delinquencies and failures of them, the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, in carrying and transporting the said mails on and over the said post-routes as aforesaid, and then and there fraudulently to fail and refuse to certify to the said Auditor of the Treasury for the Post-Office Department the said failures and delinquencies of them, the said John W. Dorsey, John R. Miner, and John M. Peck as such contractors as aforesaid; and by means of the said Thomas J. Brady then and there unlawfully and fraudulently, and for the benefit, gain, and profit of them, the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and William H. Turner, to make and file in the said office of the Second Assistant Postmaster-General, written orders for additional pay and compensation to them, the said John W. Dorsey, John R. Miner, and John M. Peck, as such contractors, for additional service in carrying the said mails on and over the said post-routes, the said orders to take effect at dates and times before the making and issuing by the said Thomas J. Brady, the said orders for such additional service and additional pay and compensation, and to cause and procure the said unlawful and fraudulent orders to be certified to the said Auditor of the Treasury for the Post-Office Department; and by means of fraudulent subcontracts then and there to be made and signed between the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell for carrying and transporting the said mails on and over the said post-routes, the said subcontracts to be filed in the said office of the Second Assistant

Postmaster-General, among the papers relating and pertaining to the said several post-routes, and to be certified to the said Auditor of the Treasury for the Post-Office Department; and by means of the said false and fraudulent petitions and applications for additional service and increase of expedition on and over the said post-routes, so to be made, signed, and filed in the said office of the Second Assistant Postmaster-General as aforesaid, and the said false and fraudulent oaths and statements of the number of men and animals necessary and required to carry the said mails on and over the said post-routes with increased speed and by a schedule of a less number of hours, so to be made, signed, and filed in the said office of the Second Assistant Postmaster-General as aforesaid, and the said false and untrue dates so to be marked upon the said petitions and papers as aforesaid, and the said false and untrue brief statements and descriptions of the contents and subject-matter of the said papers to be inclosed in the said envelopes, covers, and jackets, and so to be indorsed and written upon the outside of the said envelopes, covers, and jackets as aforesaid, thereby fraudulently to deceive the said Postmaster-General, as such head of the said Post-Office Department and superintendent of the business of the said Post-Office Department as aforesaid; and by means of the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell, as such contractors and subcontractors, as aforesaid, then and there, and thereafter during the continuance of the said contracts and subcontracts, unlawfully and fraudulently to claim, ask, demand, receive, take and acquire unto themselves of and from the said United States of America, the said several large and excessive sums and amounts of money, of the money and property of said United States of America, so to be by the said Thomas J. Brady unlawfully and fraudulently ordered, allowed, and certified to the said Auditor of the Treasury for the Post-Office Department, as aforesaid, and unlawfully and fraudulently to be allowed and ordered to be paid by the said United States of America to them, the said John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell, as such contractors and subcontractors, by reason of the said unlawful and fraudulent orders for additional service and increase of expedition in carrying the said mails on and over the said post-routes as aforesaid, and by reason of the said unlawful and fraudulent extension of the service as aforesaid, and by reason of the said unlawful and fraudulent decrease and curtailment of the service as aforesaid, and by reason of the said service so unlawfully and fraudulently to be dispensed with as aforesaid, and by reason of the said unlawful and fraudulent failures to perform the service as aforesaid, and by reason of the said unlawful and fraudulent failures and delinquencies as aforesaid, and by reason of the said unlawful and fraudulent orders and allowances for additional service and additional pay and compensation, to take effect at dates and times before the making of the said orders for the additional service and the additional pay as aforesaid; and in manner aforesaid, unlawfully to defraud the said United States of America; and then and there, in manner aforesaid, and by the means aforesaid, unlawfully to defraud the said United States of America; and then and there, in manner aforesaid, and by the means aforesaid, unlawfully.

SECOND.

The United States in this case are limited to proof of the means set

out in the indictment, as the instrumentalities by and through which the alleged fraud against the United States was to have been brought about and consummated by the defendants. The Government in this prosecution must stand or fall by the proof, or failure of proof, which it has made of the means set forth in the indictment to accomplish said alleged fraud, and if the alleged means so set forth in said indictment, whereby the alleged fraud against the United States was to have been accomplished by defendants have not been proved as charged, then there is a failure of proof in the case to the extent of the failure to establish said alleged means.

The fraud described in the indictment alleged to have been intended by the defendants as the object of the alleged conspiracy consists in depriving the United States of the amount of the cost and expense to the United States to be paid for carrying the United States mails over the respective mail routes mentioned in the indictment, more frequently in trips and in shorter time than said mail was contracted to be carried by the terms of the original contracts described in the indictment, said increase of trips and said decrease of time in carrying said mail over each and every of said routes being charged in said indictment to have been unnecessary and not required for the public good.

The jury in this case are the judges of the law and the fact, and though the law of the case is declared to the jury by the court, and it is to be received by the jury, yet the law has reposed in the jury the right and duty, on their oaths, to finally determine the guilt or innocence of the defendants.

THIRD.

The jury are instructed that in order to find that the United States was defrauded by the transactions complained of in the indictment, they must find from the evidence the following facts:

First. That the means described in the indictment were used as alleged.

Second. That said means were used by the defendants in order to influence the conduct of the Postmaster-General as alleged.

Third. That the Postmaster-General, relying upon the truth of the representations so made was deceived, and thereby the money was obtained from the Government of the United States of which it is complained in the indictment.

Fourth. That the said means described in the indictment were false and untrue, as therein charged.

Fifth. That the United States suffered damage by such action of the defendants, and that such damage followed proximately the deception alleged, and unless all these facts and conditions are established by the evidence, beyond a reasonable doubt, there is no fraud in law sufficiently proven against the defendants to authorize a conviction in this case. (Cooly on Torts, p. 475. Bayard vs. Holmes, 34 N. J., 296. Tryan vs. Whitmarch, 1 Met., 1.)

FIFTH.

The jury are charged that whether or not the public good or welfare required the increase of trips and the decrease of time in carrying the mail over the several routes mentioned in the indictment (which increase of trips and decrease of time is complained of in the indictment) was and is a question by the laws of the United States, primarily and

exclusively confided to the judgment of the Postmaster-General to determine, and it is wholly immaterial for the purposes of this trial whether the jury believe said increase of trips and decrease of time ought to have been ordered or not.

SIXTH.

The jury are instructed that the defendants are on trial on the charge of conspiracy in the indictment contained and none other, and said offense so charged in the indictment cannot be established by proving any number of other distinct offenses of the individual defendants.

SEVENTH.

The jury are charged that the existence, if such be shown, of a mutual interest by any two or all of the defendants, exclusive of Brady and Turner, in the subject-matter of the contracts, subcontracts, and property and property-rights involved in and growing out of the carrying of the mails on the routes described in the indictment is in and of itself lawful, and proof of such mutual business interests and relations between the said defendants is no proof of conspiracy to defraud the United States, as charged in the indictment.

EIGHTH.

The jury are instructed that the indictment charges that defendants conspired to defraud the United States by means, among others, that defendants, John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell, then and there fraudulently wrote and signed and caused and procured to be written and signed a large number of fraudulent letters and communications and false and fraudulent petitions and applications to the Postmaster-General for additional service and increase of expedition on and upon the mail routes mentioned in the indictment. To the extent that the evidence has shown in this case that the increase of service and expedition on said routes was procured and ordered upon letters, communications, and petitions not written or signed or procured to be written or signed by said defendants, there is a failure of proof of the allegations of the indictment in that respect.

NINTH.

The crime of conspiracy, like all other crimes, may be proved by circumstances, but no circumstance can affect a defendant in this prosecution which does not arise out of his own conduct or admissions connected therewith; guilt cannot be fastened upon a defendant by the declarations or statements, oral or written, of others, and when circumstantial testimony is relied upon to establish the conspiracy or the guilt of a defendant, it must be so strong and convincing as to exclude every other hypothesis but that of the existence of such conspiracy and the guilt of said defendants of the offense imputed to them. In other words, the facts proved must all be consistent with and point to his guilt not only, but they must be inconsistent with his innocence.

If the evidence can be reconciled, either with the theory of innocence or of guilt, the law requires the jury to give the accused the benefit of the doubt, and to adopt the theory of innocence. The burden of proof

does not shift in criminal cases. It is on the prosecution throughout to establish the guilt of the defendants by the evidence beyond a reasonable doubt.

The term "beyond a reasonable doubt" means that the evidence of defendant's guilt, as charged, must be clear, positive, and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient to justify a verdict of guilty that there may be strong suspicions or even strong probabilities of guilt, nor, as in civil cases, a preponderance of the evidence in favor of the truth of the charges against defendants.

The law requires proof, by legal and credible evidence, of such a nature that, when it is all considered by the jury, giving it its natural effect, they feel a clear, undoubting, and entirely satisfactory conviction of defendant's guilt.

TENTH.

The court declares the law to the jury to be, that a crime cannot be shown or proved against one defendant in a criminal prosecution wherein he is charged or joined with other defendants by the separate and disconnected acts or declarations of any or all of the other defendants, not done or uttered in his presence; and that in this case the fact of conspiracy between and among some or all of the defendants cannot in law be made to appear by the separate and disconnected acts and declarations of any of the defendants, done or made in the absence of the other, and no separate act or declaration of one defendant can, in this case, be evidence of conspiracy as charged in the indictment, unless such declaration was known and approved of at the time it was made, or such act was participated in by the defendant or defendants to be affected thereby.

ELEVENTH.

The jury are instructed that corrupt motive cannot alone make a crime, and that if defendant Brady had the legal authority to make all the orders complained of in the indictment, and that in making them he did not pass beyond the limits of his official authority in so doing, the motive with which he acted in making said order, or either of them, for the purposes of this trial is immaterial.

TWELFTH.

The allegations in the indictment, made of the dates of the filing of the respective petitions and communications mentioned in the indictment in the office of the Postmaster-General, are descriptive of the said petitions and communications, and the alleged dates of the orders set forth in the indictment is also descriptive of said orders, and must be proved as charged in the indictment, and unless proved as charged there is a fatal variance.

THIRTEENTH.

The court declares the law to be that to constitute the admission or admissions of the defendant a confession of crime, such admission or admissions must be that the facts which constitute the offense with which said defendant is charged, exists and are true. In order therefore that any admission or confession of any defendant introduced in evi-

dence in this case shall have weight with the jury against the defendant making the same, such admission must be that said defendant did some act or acts charged against him in the indictment.

FOURTEENTH.

The jury are instructed that the defendant Brady, in the official management of the Post-Office Department, was an officer subordinate in authority to that of the Postmaster-General, and the orders made by defendant Brady, read in evidence in this case, were subject, under the operation of the laws of the Post-Office Department, to the approval or disapproval of the Postmaster-General, and if the jury believe from the evidence in this case, that the Postmaster-General signed and approved the orders read in evidence, signed D. M. Key, relating to the increase and expedition of mail service on the routes mentioned in the indictment, then such signing and approval of said orders by said Postmaster-General Key, was an official confirmation of said Brady's orders, and constituted said orders, the orders of the Postmaster-General.

FIFTEENTH.

The jury are instructed that under the Constitution of the United States the law-making power of the Government is the supreme judge of the propriety and proper occasion and of the extent to which the money of the United States may or shall be appropriated and expended for transporting the United States mails on and over the post-routes mentioned in the indictment, and of the value to the public, and to the United States of carrying said mails over said routes; if therefore the jury believe from the evidence in this case that after the increase of mail-service complained of in the indictment, on the routes therein mentioned, the said law-making power appropriated money to pay, for the said increase of service, then to the extent of such appropriation, and the payment thereof for that purpose said money was paid, it was lawfully paid, and the defendants cannot be held liable under this indictment for any such increase or expedition of service so sanctioned by Congress.

SIXTEENTH.

The jury are instructed that it is their peculiar province, right, and duty, to form for themselves a verdict upon the facts of the case; that whatever remarks have been made by the court, as to the facts during the trial of this case, they were not intended to fetter or control in any way the exercise finally of the independent judgment of the jury, for to them is committed by the law the supreme power to interpret, weigh, and settle the facts of the case.

SEVENTEENTH.

It is not sufficient to establish the charge of conspiracy to defraud the United States, made in the indictment against the defendants, to show that the defendants, exclusive of Brady and Turner, had a mutual and common pecuniary interest in any number, or all, of the contracts, sub-contracts, and the property and property rights thereto appertaining or springing out of or connected with the mail-routes mentioned in the indictment, for such mutual interest in, and joint ownership of said con-

tracts, subcontracts, and property and property rights by defendants is permitted by law.

EIGHTEENTH.

The jury are instructed that the alleged official acts charged in the indictment to have been done, or to have been intended to be done, as a part of the alleged conspiracy set forth in the indictment, by defendant Brady as an officer of the Government of the United States, are not in the indictment charged to have been corruptly done or intended to be so done, and therefore in that respect there is no sufficient charge of corruption against said defendant Brady, and the jury will acquit him.

NINETEENTH.

For the purpose of this trial it is immaterial to inquire whether the amounts shown by the evidence in this case to have been paid to certain of the defendants as a result of the increase of trips on the routes mentioned in the indictment, and a decrease of time in carrying the mail over said routes, were extravagant or not, and the jury are instructed that with that question they have nothing to do.

TWENTIETH.

The jury are instructed that the body of the offense in this case as charged is conspiracy to defraud the United States, and an overt act charged to have been done by one of the defendants to effect the object of the alleged conspiracy; it is not competent, therefore, for the prosecution to use or the jury to receive the facts and circumstances and testimony introduced to prove the conspiracy, and also to prove by the same testimony the alleged overt act to effect the object thereof the conspiracy must first be proved by the evidence, before there can be perpetrated an overt act to effect the object thereof, so that the testimony which is necessary to establish the alleged conspiracy cannot at the same time prove the alleged overt act to effect its object.

TWENTY-FIRST.

The indictment in this case charges that one of the means alleged to have been by the defendants employed, to promote and carry into effect the alleged conspiracy to defraud the United States, was to deceive the Postmaster-General by the alleged false petitions, letters, affidavits, and other means, &c., in said indictment mentioned; the jury are instructed that there is no evidence in this case that the Postmaster-General was deceived, or was by defendants conspired to be deceived about and concerning the matter in said indictment complained of, and they will acquit the defendants.

TWENTY-SECOND.

The jury are instructed that the indictment charges that the defendants Vaile, Peck, Miner, J. W. and S. W. Dorsey and Rerdell were mutually interested in the contracts and business of transporting the mails over the routes described in the indictment at the time complained of therein; it is not sufficient to establish that allegation to show that some

of said defendants were connected with said business, only in the capacity of agents or representatives of the other defendants, or some of them.

TWENTY-THIRD.

The Second Assistant Postmaster-General, at the time or times mentioned in the indictment, possessed no lawful power to make an order for either expedition or increase of service on any post-route, and no money could have been lawfully paid out of the moneys in the Treasury of the United States appropriated for the Post-Office Department, by reason or on the authority of such an order, if made by the Second Assistant Postmaster-General.

TWENTY-FOURTH.

The court instructs the jury that the alleged official orders set forth and complained of in the indictment made by defendant Brady in relation to the increase and expedition of mail service on the routes described in the indictment were preparatory and preliminary to the action of the Postmaster-General on said orders. And if the jury believe, from the evidence in this case, that the then Postmaster-General, afterwards and before any money was paid to any of the defendants by reason in whole or in part of said orders, signed them, then said orders, when so signed and approved by the said Postmaster-General, became and were the orders of the Post-Office Department of the Government of the United States, and not in law the orders of said defendant Brady, and the jury will acquit all the defendants.

TWENTY-FIFTH.

This indictment having been found on the 20th day of May, 1882, it must rest upon the act of May 17th, 1879, and no conspiracy formed prior to that date, even if one were proved, can avail to sustain this prosecution.

No conspiracy can be inquired about in this proceeding not formed subsequent to the passage of said act, and if circumstances are relied upon to prove such conspiracy, such circumstances must have occurred after said act went into effect.

TWENTY-SIXTH.

The jury will exclude from their minds in making up their verdict all the testimony of witness Walsh.

TWENTY SEVENTH.

The jury are instructed that the charge in this case being conspiracy, the testimony of the witness Walsh, even if believed by the jury, being in the nature of a declaration or confession of Brady alone, and in the absence of all the other defendants, cannot be considered by the jury for the purpose of proving the conspiracy, but the conspiracy which is the offense charged in the indictment must be proven by evidence independent of the alleged declarations of defendant Brady to said witness Walsh, and the same principle applies to the alleged confession of defendant Rerdell.

TWENTY-EIGHTH.

Though the jury believe from the evidence in this case that the defendants in the indictment named, who were and are contractors and subcontractors with the Government, entered into a mutual business arrangement to advance their business interests with the Government in respect of the contracts and subcontracts shown in evidence, and the carrying of the mails thereunder, over the routes mentioned in the indictment, yet such fact, if it existed, is no evidence of conspiracy between said contractors and subcontractors and defendants Brady and Turner, charged in the indictment.

TWENTY-NINTH.

The jury are instructed that the crime charged in the indictment is indivisible, and that some of the defendants cannot be convicted for doing a part of the acts complained of in the indictment, and others of the defendants convicted for doing other acts in the indictment complained of.

THIRTIETH.

The court charges the jury that, in order to convict defendants of the crime of conspiracy, it must appear from the evidence in this case that the conspiracy of which they are found guilty was formed and entered into within three years previous to the filing of the indictment under which they are being tried, and such conspiracy cannot be the continuation of a conspiracy formed more than three years prior to the filing of said indictment, but all the acts constituting the offense of conspiracy mentioned in the indictment must have happened and been done within the three years next before the filing of said indictment in court.

THIRTY-FIRST.

The fact, if such be the fact, that certain words were written in the petitions, or any of them, read in evidence, which words were in a different handwriting from the other parts of the petition in which they appear, and that said words were written in different ink from the other writing therein, does not alone *prima facie* show that said words so written were for a fraudulent purpose.

THIRTY-SECOND.

No act or declaration of any one or all of the defendants in this case is evidence circumstantial or otherwise to show or prove a conspiracy among the defendants under the indictment, which act or declaration happened or occurred prior to the 17th day of May, 1879, when the law under which this proceeding is pending went into effect.

THIRTY-THIRD.

The court instructs the jury that it is not their province, nor within their power, to inquire into or determine whether fines and penalties shown to have been remitted on the routes mentioned in the indictment were properly remitted or not.

THIRTY-FOURTH.

The jury in making up their verdict in this case will exclude from their minds the testimony of witness Walsh so far as the same relates to the interview which said witness testifies he had with defendant Brady at the house of Sheridan, in the city of Washington, on the 28th day of December.

THIRTY-FIFTH.

The jury are instructed that the law bestows upon the Postmaster-General, and upon the Second Assistant Postmaster General when acting in that behalf under said Postmaster-General, the power to increase the number of trips on the mail routes described in the indictment, and to decrease the time of carrying the mail over said routes, when, in his judgment, it is proper and expedient that the same be done; if, therefore, the jury believe from the evidence in this case that to pay for such increase of trips and decrease of time as has been shown by the testimony in the case to have been ordered on the routes in the indictment mentioned was not in excess of what the officer making the said orders had the power to order to be paid, then the motive of said officer making said orders is wholly immaterial so far as this prosecution is concerned.

Cooly on Torts, 688.

Jennerys *vs.* Fowler, 24, page 310.

THIRTY-SIXTH.

The jury are instructed that the particular crime charged in the indictment is a conspiracy alleged to have been entered into by all the defendants to defraud the United States in the manner and by the means charged in the indictment in and about procuring pay for carrying the United States mails on and over the nineteen mail routes in said indictment mentioned; it is necessary, therefore, for the jury, before they can find a verdict of guilty in this case to believe from the evidence in the case beyond a reasonable doubt that all the defendants are guilty as charged.

THIRTY-SEVENTH.

The indictment against these defendants does not charge fraud against the defendants or either of them in the procuring or entering into the nineteen contracts, or either of them set forth and described in the indictment, but the alleged fraud in said indictment complained of consists in an alleged conspiracy of the defendants. The defendants J. W. and S. W. Dorsey, Peck, Miner, Vaile, and Rerdell being alleged to be mutual owners of said contracts, to fraudulently procure by the means set forth in the indictment payment for the increase of trips on said routes and the decrease of time of carrying the mails thereon, the same increase of trips and decrease of time being alleged in said indictment not to have been needed for the public good; the jury are therefore instructed that unless all the evidence in the case when taken together show the defendants Dorsey, Vaile, Miner, Peck, Dorsey, and Rerdell to have been, at the time of the alleged conspiracy in said indictment charged, or within three years prior to the filing of the said indictment in court, mutually interested as owners thereof in all the said nineteen

Contracts described in the indictment, then there is a fatal variance between the allegations in the indictment and the proof in support thereof, and they will find for defendants.

THIRTY-EIGHTH.

The jury are instructed that one of the defendants in this case cannot be affected in showing the conspiracy alleged in the indictment by the separate and disconnected act or declaration of any other defendant done or made in the absence of the defendants not making said declaration or doing said act.

THIRTY-NINTH.

The defendant Brady is not on trial at this time for the crime of bribery, but is being tried for an alleged conspiracy with the other defendants in the indictment named to defraud the United States by the means alleged in the indictment. Any corruption, therefore, testified to by any witness on the part of defendant Brady while exercising and discharging the duties of Second Assistant Postmaster-General which is not shown by the testimony to extend to and involve other defendants in the indictment, is immaterial to the issue herein being tried and must be disregarded by the jury.

FORTIETH.

In this case the jury must convict all the defendants on trial under this indictment or acquit all of them.

FORTY-FIRST.

The jury are instructed that on the indictment and evidence in this case they will acquit all the defendants.

FORTY-SECOND.

The court instructs the jury that so far as defendant Brady is concerned he cannot be bound or affected by any fact or circumstance happening along or upon or about any of the routes mentioned in the indictment, which fact or circumstance was not proved to have been brought to his notice at the time of or before its occurrence.

FORTY-THIRD.

The statute under which this prosecution is in progress condemns only a conspiracy by two or more persons to commit some offense against the United States or to defraud the United States by doing acts which, by some other statute of the United States are defined to be unlawful, and does not condemn in terms a conspiracy to reach a lawful end by illegal or criminal means.

FORTY-FOURTH.

The court instructs the jury that they will not consider as evidence in this case, to establish either the alleged conspiracy charged in the indictment, or the overt acts charged in said indictment to have been

done to effect the object of said alleged conspiracy, any letters, petitions, communications, or affidavits made, signed, and executed more than three years previous to the filing of the indictment in court.

FORTY-FIFTH.

If the jury believe, from the evidence in this case, that the orders complained of in the indictment for increase and expedition of service on any of the mail routes described in the indictment, were made by reason of the influence of petitions, letters, or communications, written or oral, made, written, spoken, and presented to the Post-Office Department by others than the defendants, then such orders so procured to be made, were not the result of the alleged conspiracy in the indictment charged. And to the extent that said orders were so procured, there is a failure of proof. Against defendants the jury will not consider them in making up their verdict.

FORTY-SIXTH.

The court instructs the jury that the indictment in this case does not charge against the defendants, or any of them, a conspiracy to violate either the act of May 17, 1879, or section 5438 of the Revised Statutes of the United States, and they will acquit all the defendants.

FORTY-SEVENTH.

The jury are instructed that the Postmaster-General, in carrying into effect his supervisory power over the branches of the public service committed to his department, is not subject to review or control by the courts in matters involving the exercise of his judgment and discretion. If the jury believe from the evidence in this case that in the increases and expedition of the service complained of in the indictment, the Postmaster-General acted in his official capacity and approved of the same, they will not discuss or consider the propriety of his action, or of such increase and expedition of said service, and will acquit the defendants.

FORTY-EIGHTH.

Unless the jury believe, from the evidence in this case, that the Postmaster-General was at the time of making the orders, read in evidence, signed D. M. Key, and at the time of his signing the same deceived about and concerning the facts upon and because of which said orders were made, they will acquit the defendants.

Mr. HENKLE. If the court please, I have some prayers here. We have drawn our prayers up without any concert or correspondence, and sometimes they may cross each other a little.

Mr. BLISS. The conspiracy has ceased.

Mr. HENKLE. Yes, it ceased before it began. [Reading.]

FIRST.

A conspiracy may be formed by the separate acts, and declarations accompanying acts, of the several persons charged with conspiracy, but such acts must all tend to the accomplishment of a common purpose,

and the purpose must be that set out in the indictment—acts of individual defendants, in the prosecution of their own business, although the jury may believe their object to have been to defraud the Government, or other individuals, are not to be considered by the jury, unless they find from the evidence the existence of such conspiracy, and that such acts were done in pursuance of the common purpose set out in the indictment, and for the joint benefit of the members of the conspiracy.

SECOND.

If the jury find from the evidence, that the defendants John W. Dorsey, John A. Miner, and John M. Peck were contractors under the lettings of 1877, of the star mail routes set out in the indictment, and that they had been unable for want of credit or means to put service upon their said routes on the 1st day of July, 1878, as required by their contracts; and that on the 16th day of August, 1878, for the purpose of enabling them to procure the means to put the service upon said routes, they associated with themselves the defendant Vaile, and that thereupon with the aid of said Vaile the service was commenced upon the said routes in the fall of 1878, and the early part of the winter of 1878-'79, and that they carried on said business under said contracts as partners until the latter part of March or fore part of April, 1879, when their partnership was dissolved and a new agreement was made, by which the said routes were divided into three parts, the said S. W. Dorsey taking one part for the said John W. Dorsey and John M. Peck, the said John R. Miner taking one part and the said H. M. Vaile taking one part, and that they have never since had any joint interest in said routes, or either of them any interest in the routes belonging to the others, except that after said division the defendants, Miner and Vaile, formed a partnership in the routes taken respectively, and S. W. Dorsey became interested in some of the routes taken by him for the said John W. Dorsey and John M. Peck. In forming their verdict they will not consider any affidavit or affidavits for increase or expedition of service upon any of the said routes, nor any letters written or petitions filed with reference to the business upon said routes, nor any other act or thing done by any one of these defendants above named prior to the dissolution of the copartnership, and the segregation of their interests in the latter part of March or fore part of April, 1879, unless they further find from the evidence that these defendants had formed the conspiracy with Brady set out in the indictment prior to the dissolution of said copartnership as aforesaid, and before the said affidavits were made, or letters were written or petitions or other acts or things were done, and that such conspiracy had continued down to the 23d day of May, 1879, notwithstanding the dissolution and separation of their interests as aforesaid.

THIRD.

If the jury find from the evidence, that there was a conspiracy, such as that set out in the indictment entered into by the defendants, S. W. Dorsey, J. W. Dorsey, John M. Peck, John R. Miner, and M. C. Rerdell, with the defendants Brady and Turner or Brady, and that afterwards in the fall of 1878, they took into their combination the defendant Vaile, who became jointly interested with the said John W. Dorsey, John M. Peck, and John R. Miner, in said routes, and that about the 1st of April, 1879, they divided the said routes into three parts, the

said S. W. Dorsey taking one part for John W. Dorsey and John M. Peck, the said Miner taking one part, and the said Vaile taking one part, and that thereafter they had no interest in common whatever, and that neither had any interest in the routes of the other, except that Miner and Vale combined their routes and carried them on as partners, and the said S. W. Dorsey became interested in some of the routes of the said J. W. Dorsey and John M. Peck, the scheme of the indictment has failed, and they must find for the defendants.

FOURTH.

It is totally immaterial whether the affidavit or affidavits as to the number of men and animals necessary to perform the service upon any route or routes named in the indictment overstate or understate the number of men and animals actually necessary to perform said service, unless the jury find from the evidence that said overstatement or understatement was known by the affiant or affiants to be false at the time of the making of said affidavit or affidavits, and that the defendant Brady knew of the falsity of said affidavit or affidavits when he acted upon the same; and unless they further find from the evidence that said false affidavit or affidavits was or were made in furtherance of the conspiracy set out in the indictment and for the common and joint benefit of the conspirators.

FIFTH.

It is not criminal or unlawful for a contractor for carrying the mails upon the star routes to write or cause to be written and circulated petitions and recommendations for the increase and expedition of such rates; or to write or cause to be written and published newspaper articles advocating such increase or expedition of service; but on the contrary such acts are lawful and legitimate; provided, such contractor does not himself write or publish, or cause or procure to be written or published, false statements for the purpose of unfairly or dishonestly influencing the Post-Office Department to allow such increase or expedition.

SIXTH.

If the jury should find from the evidence that any one or more of the defendants has or have been guilty of acts which were intended to enable him or them to obtain money from the Government dishonestly or fraudulently, they should not consider such fraudulent or dishonest act or acts in forming their verdict, unless they should further find that such acts were performed in pursuance of the conspiracy set out in the indictment, and for the common benefit of the conspirators.

SEVENTH.

While any act done with the purpose of obtaining money from the Government fraudulently is morally wrong, and in many cases is criminally indictable, yet no number of such fraudulent acts performed by one or more of the defendants will justify a verdict in this case against the defendant or defendants perpetrating such fraudulent act or acts; unless the jury shall find from the evidence the existence of the conspiracy set out in the indictment, that such defendant or defendants belonged to said conspiracy, and that said fraudulent act or acts was or were performed in pursuance of said conspiracy.

EIGHTH.

Brady had a legal right to make orders for increase of trips and for expedition of service, subject to the approval of the Postmaster-General, and where such orders were made the legal presumption is that they were made honestly and for the public good; and the jury is not at liberty to presume that they were made for the benefit of the contractors unless they are satisfied thereof from the evidence in the case beyond a reasonable doubt.

NINTH.

Petitions for increase of trips or for expedition, or both, accompanied by the recommendations of Members of Congress and Senators, found on the files of the Post-Office Department in the absence of evidence to the contrary, are presumed to have been filed by the Members or Senators whose recommendations they bear, and they have no right to infer they were filed by the contractors unless satisfied of it from the evidence in the case beyond a reasonable doubt.

TENTH.

Where petitions signed by citizens living along any of the routes named in the indictment, or by military officers stationed along any of such routes, for increase of service or expedition had been filed in the Post-Office Department, and the granting of the prayer of such petitions had been recommended by members of Congress representing the Territories and by Members and Senators representing the districts and States in which such routes were located by indorsements upon the backs of such petitions or oral recommendations, you will presume that the orders for increase of trips or for expedition of service were innocently and honestly made by the Second Assistant Postmaster-General in compliance with the prayer of said petitions and said recommendations; and this presumption can only be overcome by evidence sufficiently strong to satisfy you beyond a reasonable doubt that said orders were not based upon said petitions and recommendations, but that they were corruptly made by the said Brady in consideration of money paid or agreed to be paid to him by the other defendants.

ELEVENTH.

Unless the jury are satisfied from the evidence beyond a reasonable doubt that the defendant Vaile when he came into the combination with John W. Dorsey, John M. Peck, and John R. Miner was advised that false and fraudulent petitions and recommendations for increase of trips and expeditions of service was one of the means by which the above-named defendants, together with S. W. Dorsey and Rerdell, had agreed with Brady for the purpose of procuring such increase and expedition, or unless they find that after associating himself in interest in the routes described in the indictment, he became aware of that fact, or that he filed or caused or procured to be filed such false and fraudulent petitions or communications, or that such false and fraudulent petitions and communications were filed with his knowledge and consent, in considering the evidences of his guilty connection with such conspiracy they must eliminate all evidence of this character.

TWELFTH.

If the jury find from the evidence that the defendants S. W. Dorsey, John W. Dorsey, John M. Peck, M. C. Rerdell, and John R. Miner did enter into a conspiracy with the defendants Brady and Turner, or with Brady, before the biddings upon the routes set out in the indictment in 1877, and that the defendant Vaile did not become associated with the defendants S. W. Dorsey, J. W. Dorsey, John M. Peck, and John R. Miner until the fall of 1878, they cannot convict him unless they further find from the evidence that he knew the unlawful character of their combination when he joined them, or afterwards learned it, and assented to it by continuing to act with them in carrying into effect the objects of said conspiracy.

THIRTEENTH.

If the jury believe from the evidence that Harvey M. Vaile, on the 16th of August, 1878, had no acquaintance with John M. Peck, John W. Dorsey, M. C. Rerdell, and Stephen W. Dorsey, or they with him, this is a circumstance that the jury may consider tending to disprove a conspiracy of the defendants. Again, if the jury believe from the evidence that from December, 1878, the defendants Vaile and S. W. Dorsey were unfriendly, it is a proper subject for the jury to consider, in determining, whether they were parties to a conspiracy or not.

FOURTEENTH.

All affidavits made prior to July 1, 1879, not having been required by the regulations of the Post-Office Department, are mere statements of the party making them. Although they may have had an oath affixed to them, and are presumed to be the honest opinion of the party making them, unless the contrary is proved.

FIFTEENTH.

A subcontractor is merely a mail-carrier. He has no agreement with the Post-Office Department whatever—gives no bonds and assumes no responsibility or obligation, except what is assumed in his oath as carrier before the mails can be given to him. His compensation is to be the price agreed upon between himself and the contractor; and in case he files his subcontract the Post-Office Department agrees to are him paid to the amount of the contractor's pay, not more, and any money paid to him in the regular order of business cannot be considered in the light of presenting a claim against the United States, and cannot be considered as overt acts in this indictment.

SIXTEENTH.

The prosecution having proved the execution of the Peck affidavits, or statements, by the notary public Jacob S. Taylor, who saw said Peck sign the same, and who administered to him the oath, are estopped from proving the contrary, and the affidavits or statements must be considered as the affidavits or statements of Peck.

SEVENTEENTH.

The people have a right to petition for increased mail facilities—members of Congress have a right to urge the same in their behalf, and

there is nothing unlawful in their acts. The Postmaster-General has a right to favorably respond to their demands, and the contractors upon such routes should not be held responsible for their acts, unless the jury believe from the evidence, beyond a reasonable doubt, that such increases and expeditions were not had by reason of these agencies, but by the corrupt use of money used by these defendants or some one of them.

EIGHTEENTH.

The averments in the indictment charge that the conspiracy was in connection with nineteen routes; that they were increased and expedited for the gain and profit of all the defendants. Now, if the jury believe from the evidence that there was a separation on the 31st day of March, 1879, to take effect from the 1st day of April, 1879, or thereabouts, and that John W. Dorsey and John M. Peck, through S. W. Dorsey, took 30 per cent. of the routes and went their way, and Harvey M. Vaile drew out of the same 40 per cent. of the routes, and John R. Miner 30 per cent. of the same, and never afterwards joined their respective interests except the joining of the individual interests of Vaile and Miner with each other, the scheme mentioned in the indictment was dissolved, and if a conspiracy it no longer existed. If there was any conspiracy after April 1, 1879, it must have had two parts—one connected with the interest of Vaile and Miner, the other with S. W. Dorsey, or Peck and the Dorseys; and this is not the scheme of the indictment, and if the jury so find they must acquit the defendants.

NINETEENTH.

The mere making and filing of affidavits, as to the number of men and animals necessary to carry the mails on a given time, and the number necessary on a faster time, by either Miner, Peck, or Dorsey, for expedition on routes in which they had no interest after April 1, 1879, should not be construed as the continuing their joint interests, if the jury are satisfied from the evidence that the regulations or custom of the department required the making of such statements, or affidavits, by contractors.

TWENTIETH.

In the absence of positive or direct evidence a conspiracy may be proved by circumstances, but in that event every material circumstance must be proved beyond a reasonable doubt, and if the jury can account for the facts and circumstances proven upon any hypothesis consistent with the innocence of the defendants, or any of the defendants, they must acquit such defendant or defendants.

TWENTY-FIRST.

The jury is cautioned that they must not consider the testimony as to the confessions of Brady or Rerdell as having any application to the defendant Miner, and in forming their verdict as to him they will totally disregard said testimony.

And the same prayer is asked as to Vaile.

TWENTY-SECOND.

Unless the jury is satisfied from the evidence beyond a reasonable doubt of the existence of the conspiracy set out in the indictment, and that Miner was a member of such conspiracy, they must acquit him.

TWENTY-THIRD.

Unless the jury is satisfied from the evidence beyond a reasonable doubt of the existence of the conspiracy set in the indictment, and that the defendant Vaile was a member of it, they must acquit him.

Mr. HENKLE. If the court please, on behalf of my clients, I want it understood that I adopt and ask the benefit of the prayers that have been made by the other defendants.

The COURT. And so all say, I presume. They are to be interchangeable

Mr. WILSON. Yes, sir.

Mr. MERRICK. Just like the affidavits.

The COURT. Is there any discussion to take place as to these prayers.

Mr. MERRICK. I do not think, may it please your honor, from what we have heard of these prayers that we want to discuss them, unless there is something that your honor will direct to be discussed.

Mr. COLE. If your honor please, I have some few instructions here that were prepared by Mr. Williams and myself. The ground is all covered by the other instructions that have been read. I will pass them up to your honor.

The COURT. Whom do you represent?

Mr. COLE. Mr. Williams and myself represent Mr. Rerdell.

The prayers submitted on behalf of Mr. Rerdell are as follows :

FIRST.

The charge in this indictment is that the defendants are guilty of a conspiracy to defraud the United States in manner and by means set out in the indictment. No one of the defendants could be convicted under this indictment by proof that he had committed *any other* unlawful or criminal act. A conspiracy is an agreement or combination between two or more persons to commit an unlawful act, or a lawful act by unlawful means. And in order to convict the defendants or *any* of them under this indictment, the jury must believe from the evidence that some two or more of them agreed and combined together to defraud the United States, *as set out in the indictment*, and that some one or more of them did some act specified in the indictment subsequent to the 20th day of May, 1879, in pursuance of such agreement or combination. The alleged crime is of such a nature that one alone cannot commit it, and, therefore, one alone cannot be convicted.

SECOND.

The indictment charges the defendants with a conspiracy to defraud the United States out of large sums of money, and in doing this avers as the *final* means of the execution of the alleged conspiracy the increase of pay on the several routes mentioned in the indictment, and that this increase was the result *not only* of an early arrangement with the defendant Brady and the mentioned contractors, but of *subsequent action* by Brady as Second Assistant Postmaster-General. If a conspiracy existed, it must be *proven as charged*, *not only as respects the conspiracy itself*, but as respects the *persons* averred to have been connected with it, or at least two or more of them. And to affect Rerdell in this view it must appear that he was *originally* connected with Brady and the contractors or some of them, or had some arrangement with him or them, as charged, for the purpose of defrauding the United States; and if

this does not appear *the first* and ordinary fact to connect Rerdell with the conspiracy has failed.

THIRD.

If there is no evidence to show that Rerdell was *originally* connected with the alleged conspiracy as set forth in the indictment, he could not *afterward* be associated with it, unless it appears that with a knowledge of its true nature and design he voluntarily connected himself with it by some distinctive and corrupt act. *But* this cannot appear, unless there is evidence to show that he *knew* of the alleged arrangement to defraud the United States as charged against Brady as Second Assistant Postmaster-General, and to have been made with him, and that he designedly did something to promote that object. And *other* acts, clerical and otherwise (if done by him), whether right or wrong in themselves, in furtherance of his own interests, and without the knowledge of the asserted conspiracy, could not connect him with it, or render him in *any manner* responsible as a conspirator.

FOURTH.

Conspiracy, like all other crimes, may be proved by circumstantial evidence. But the circumstantial evidence must be of such character, force, or weight as to amount to as cogent and satisfactory proof of the alleged conspiracy as if it was established by positive testimony. The *one* must be as *full and conclusive* as the other; and every material fact going to make up the chain of circumstances relied upon by the Government must be fully and clearly established beyond reasonable doubt.

It is erroneous to suppose that because a conspiracy can be proven by circumstantial evidence, that therefore it may be by evidence less strong than positive evidence, which produces a full, satisfactory, and abiding belief of guilt.

FIFTH.

The presumption of innocence in favor of the defendant, *not only existed* at the commencement of the trial, but it must continue to exist, unless it has been overcome, by proof which not only *removes the presumption*, but shows *actual* guilt, to the exclusion of all reasonable doubt and reasonable theories of innocence. And in considering whether this presumption has been overcome, and this guilt established, no regard can be had to *conjectures, public opinion, real or assumed, comments in newspapers, the opinions of the present officials, or anything of the kind*. It is the admitted proof, or statements of witnesses, or papers, that can alone be looked at and regarded by the jury in forming a verdict. All else, from whatever source it may emanate, is irrelevant, and cannot be considered by the jury.

SIXTH.

The statements of Rerdell, as made in the presence of MacVeagh and others, and called a confession, is not proper evidence of a conspiracy, as against himself or any one else.

SEVENTH.

The so-called confession of Rerdell can only be looked at as proven. Its words and statements must be received as made, and cannot be ex-

tended or enlarged. If these do not amount to a plain and clear confession of guilt *as a conspirator*, they should not, by any forced or labored construction, be converted into an admission of wrong-doing on his part, so as to make him guilty as a conspirator.

EIGHTH.

The act of Congress allowing defendants to be witnesses expressly declares that no presumption shall arise against the defendant by a failure to testify. This is the *controlling* rule of the law, and the jury cannot in any manner consider the fact that Rerdell did not testify against him. That fact, in arriving at a conclusion of guilt or innocence, must be wholly excluded from the deliberation of the jury.

NINTH.

In criminal prosecutions the guilt of the accused must be made out by the Government beyond any reasonable doubt. The evidence must not only be altogether consistent with the guilt of the accused, but it must be inconsistent with any other reasonable hypothesis arising out of the evidence. And if the jury can reconcile the evidence with any other reasonable hypothesis than that of the guilt of the defendants, or with an innocent one, they are bound to adopt such hypothesis, and to render a verdict of "not guilty."

Mr. CHANDLER. I understand from the remarks of Mr. Merrick that our instructions are not objected to.

Mr. MERRICK. Not at all. I only ask that the rule of Taney be followed, which strikes out all the bad pleas and sends the case to the jury. I ask that all the prayers be stricken out and that the case go to the jury.

Mr. CHANDLER. There is one prayer that your honor sees is directed to the general issue and asks the court to instruct the jury to acquit.

Mr. MERRICK. That is the only one that has any merit in it.

The COURT. I inquire whether counsel has anything to say in support of or against these prayers?

Mr. TOTTEN. Your honor, I want to make a suggestion. We have submitted all these prayers for the consideration of the court, and we think they are all correct and should be allowed. If there are any of them that are not to be allowed, we desire to know which prayers they are, so that we may base an exception upon the denial of them. We desire the ruling of the court upon each prayer separately and distinctly.

The COURT. I shall not answer these prayers to-day. I shall not consider them until to-morrow. As at present advised, and if I were called upon to answer them now, I would, for the sake of economy of labor and the expedition of the trial, lay them all aside and, irrespective wholly of the merits of any of them, and without prejudice to any of them, give such instructions to the jury as I deem proper on the points involved in this trial. It is very likely that in treating the prayers in that way and giving instructions to the jury of that kind the court might overlook some points which ought to be answered. If I shall take that course to-morrow morning I think I may appeal confidently to the courtesy of counsel that in case any omission shall occur in the course of my observations to the jury they will call the attention of the court to the omission.

Mr. MCSWEENY. Will the court probably deliver the charge unwritten or write it?

The COURT. I am very much in the situation described in the indictment in regard to these conspirators. When the conspiracy was formed they did not know exactly how they were going to carry it out. I have had no knowledge or information as to all these instructions that have been submitted, and I have made no preparation.

Mr. MCSWEENY. Perhaps you might use a shorthand writer, and thus have your labor lightened.

The COURT. That would be double labor. I have reached that time of life when the indolence of old age admonishes me to spare my labors and take no more upon myself than is necessary.

Mr. TOTTEN. I suggest then that your honor would save labor by giving the prayers as we have invited your honor to give them. That would save all the work. We have done that work for the court.

Mr. MCSWEENY. We shall respond to the court wherein the court speaks of the courtesy of counsel. So far as we are concerned we will very cheerfully and willingly follow your honor's suggestion, and if there is any matter that we see that we think attention should be called to we will call your honor's attention to it.

The COURT. I am not disposed to go over all the facts in this case. I do not propose to commit any trespass upon the domain of the jury. So far as they will admit the court upon their premises, I may have something to say by way of friendly advice; but I give notice that it is not my purpose to traverse this case from one end to the other as to the facts. I will take up, probably, some features of the case and say what I have to say in regard to those features in connection with the law.

Mr. MERRICK. I understand brother McSweeney to respond very courteously to the suggestion of the court, and to say that if your honor in the charge omits to cover any point specified in the prayers he will call your honor's attention to it.

Mr. BLISS. Then I take it your honor could say that you grant or refuse, as the case may be, and if refused, then they can have a specific exception to the particular request made.

Mr. TOTTEN. No, your honor.

Mr. HENKLE. No.

Mr. MCSWEENY. I simply speak for our clients; and as I see there is some trouble about it, I repeat that as far as the Dorseys are concerned we will adopt the suggestion of the court, and call your honor's attention to whatever may be omitted that we deem to be law.

Mr. HENKLE. If the court please, I hope it will not be regarded as a discourtesy to the court, but there are points in our prayers, in which, as your honor sees, we differ from the views that have already been expressed by the court, and we simply desire to save our exceptions in case it should be necessary. We want them to go upon the record, and we want our prayers either allowed or disallowed, so that we may have the benefit of the ruling of the court upon them severally.

The COURT. The rule of law is this: That when prayers are presented and the court fails to answer any prayer the failure to answer it is a refusal of the prayer. If I should fail substantially to answer any prayer, whether purposely or inadvertently, it will amount to a refusal of the prayer and you will have a right to except.

Mr. HENKLE. That is all we want.

Mr. MERRICK. What I was about to suggest was this: That your honor might inadvertently in the course of the charge fail to answer something contained in any one of the prayers to which, if your atten-

tion was called, there would be a prompt response, and therefore the court would not be subject to the possibility of error by inadvertence. I take it for granted that in response to your request counsel on the other side will not hesitate to call your honor's attention to a point and say, "Was this inadvertence or was it design?"

The COURT. I have never failed to meet a favorable response in any appeal to the courtesy and kindness of counsel. I know that they will do everything in their power to further the wishes of the court in regard to this matter. The court has no wish except to cover every inch of ground contained in the case. The court is not bound to respond in the words of any counsel. The instructions to the jury are the instructions of the court. The court can use its own language, and in this case it seems to me the more desirable because there are three or four sets of instructions, and each set covers the whole ground in a great measure. If the court should substantially, in its own way, tell the jury what the law is or what its own views of the law are in regard to all of these points, it would be a great saving of labor in reading and answering these prayers. So that although it is your right to regard every instruction if not answered, as refused, yet if the general charge of the court is a sufficient answer to the instruction, and the instruction of the court should happen to be right, although you would have your exception in the record it would not avail you.

Mr. TOTTEN. Of course, your honor, we are aware of that. But if the court charges on a point and does not cover that point as fully as we have done we have a right to our exception. If we have stated the law fully upon a given subject and the court does not go into it as fully as we do we have a right to insist upon it that the law shall be put to the jury as we requested, and if the court denies our prayer then we go to the court above on appeal, and if the court above says the point has been substantially covered it avails us nothing. Still it is our right and privilege.

The COURT. Yes. The court will have to take the risk of covering the whole ground of the case.

Mr. MERRICK. Of the case; not of the prayers.

The COURT. And that will be a rejection of all these prayers. But still it is the announced purpose of the court to cover every point made in these instructions, and I shall feel very much obliged to counsel by whom these instructions have been drawn if they will call the attention of the court at the conclusion of the charge to any instruction which has not been answered fully.

Mr. TOTTEN. Your honor, we will undoubtedly undertake to do that as well as we can. I do not want your honor to think we are not willing to do it. You may rest assured we will call your attention to any errors you may commit.

Mr. MERRICK. If you limit the disturbance to that there will not be much interruption.

The COURT. Is there anything more to-day?

Mr. MERRICK. There was one thing which I proposed to call to your honor's attention to-morrow, but which I will speak of now. In reference to the operation of the bail in this case, the bonds operate to compel the party to be here and answer, and my brothers suggest that those bonds are not operative for what may take place after the case is given to the jury. I give notice to my brothers on the other side, in order that they may be prepared, that we will ask for further security to-morrow to supply the place of the security we now have, when the case is given to the jury.

The COURT. I think that the recognizances in this case, as well as in other cases in this court, oblige the defendants to appear from day to day during the continuance of the trial.

Mr. WILSON. And to abide the judgment of the court.

Mr. MERRICK. I do not think so.

The COURT. We may as well look at the matter now as we have a little time.

Mr. McSWEENY. Our Western bonds read, "To attend and not to depart without leave."

Mr. HENKLE. So far as my clients are concerned the court has in its possession the certified checks.

Mr. MERRICK. The court will hold on to them. There is no question about the certified checks.

Mr. HENKLE. So that you do not want any renewal there.

The COURT. I do not know. If the purpose of the checks has been accomplished the party is entitled to them.

Mr. McSWEENY. [To Mr. Merrick.] "I would that ye were as we are except these bonds."

Mr. MERRICK. [After examining the recognizances.] "To answer the charge against him, and not to depart without leave." Brother Ker and I thought that "to answer the charge" had been construed by decisions to be fully complied with when he appeared and answered the charge by pleading and by submitting to a jury.

Mr. HENKLE. That has not been the practice of this court.

The COURT. I think our practice has always been to hold the bail or recognizance up to the rendition of the verdict, and judgment in fact.

Mr. WILSON. I never heard of anything to the contrary before.

Mr. McSWEENY. "Shall not depart without leave," is as large a clause as you could have.

Mr. MERRICK. It is a very large clause.

The COURT. We will adjourn now.

At this point (2 o'clock and 40 minutes p. m.) the court adjourned until to-morrow morning at 10 o'clock.

FRIDAY, SEPTEMBER 8, 1882.

The court met at ten o'clock and ten minutes a. m.

Present, counsel for the Government and for the defendants.

CHARGE OF THE COURT TO THE JURY.

The COURT. Gentlemen of the jury: After a very protracted trial, you and I are now about to enter upon the performance of the important duty devolved upon us, respectively, in this case. I acknowledge the difficulty myself, and I suppose you find it to be your own experience, of bringing my mind down to the sober, calm, dispassionate consideration of the facts and the law in the case, after the great display of ability and eloquence of the most dazzling and extraordinary character which the occasion has brought forth. We must retire, as it were, to a mount by ourselves, and now consider the part that we have to fulfill.

I shall not presume to take upon myself the performance of anything like a professional lecture on the law. In the few observations

which I have to make it shall be my endeavor to travel with you over the case, so far as it is necessary to do so, in my judgment, taking care on my part not to trespass upon the domain of the jury. You are the exclusive judges of the facts in this case. It is your further power to be the ultimate, final arbiter of the law, too, in the case. Your power of rendering a general verdict gives you that power. At the same time, the traditions of the law and the practice of the courts from the beginning of jury trials has authorized the court to talk with you and to consult with you, even in regard to the facts. The jury may often be aided in that way. But the opinion of the court is not to be taken as obligatory upon the jury in regard to the facts, and I shall not insist regarding questions of law upon the difference between advice and instruction. I assume that the jury will listen attentively to the views of the court, even in regard to the facts, so far as the court may refer to them, and not feel themselves at all bound, but perfectly at liberty to exercise their own free judgment according to their consciences and their own views on that subject. You have heard what has transpired in this courthouse during this trial from the beginning to this day. I think I may say that the court—or, I had better here speak in the first person—that *I* am wholly uncommitted as to the guilt or innocence of these defendants. Some of the reporters of the newspapers have misapprehended no doubt remarks made by the court on former occasions; because I have seen in more than one paper a remark attributed to the court giving a most decided expression of opinion upon that question. I am sure the jury have never heard any such expression. The court has carefully abstained, from beginning to end, from uttering any expression of its opinion as to the guilt or innocence of these defendants. There was an occasion some time back in the trial when the witness Walsh was introduced and the question arose whether he was admissible to prove the offer which had been submitted to the court when the court did say that, in its judgment, there was enough evidence on the question of conspiracy to be submitted to the jury for their opinion, and it was upon that ground that Walsh was admitted; not that the court had made up its mind that the fact of conspiracy had been made out, but that there was enough evidence in the case to allow that question to be submitted to the jury for their judgment. That is as far as the court has gone and the whole extent to which the court has expressed an opinion. I feel, then, that I am wholly free as to that question; and we will now proceed together, with your consent, to look at some of the features of this case, arising from the law and from facts, so far as the facts upon which I propose to remark may serve to illustrate the principles of law which I may lay down. I do not propose, however, to go over this case at large. The facts have been so amply discussed on both sides, and they are so numerous and so complex, that it would not only be a very laborious, but, in my view, it would be an unnecessary undertaking on my part.

By the act of March 3, 1879, entitled an act making appropriations, &c., for the Post-Office Department for the year ending June 30, 1880, Congress appropriated for transportation on the star routes \$5,900,000. Observe that though the appropriation was for the service of the star routes for the year ending June 30, 1880, the appropriation was available for that service after the 30th of June, 1879. It has been proved that this appropriation was all that was asked for by the department. The Post-Office Department comes nearer to the people of this country than any other department of the Government. It visits them in their homes

almost daily throughout the length and breadth of the land. There is not a corner of the country between the oceans that is not visited by the agencies of the Post-Office Department. It is, therefore, a cherished institution of the Government, and Congress has never hesitated to appropriate the full amount of the estimates for that department so far as I know. Then the department was given all that it said it wanted for that year. I may state further that the reports of the Treasury and the Post-Office Department show that for the three years preceding prior to 1879 there was an unexpended balance in each year to the credit of the Post-Office Department. Those balances amounted to \$3,900,000, or thereabouts. I speak from memory, but after having looked at the reports. These balances had been covered into the Treasury because they had not been needed. We have in evidence in this case a communication from the Postmaster-General, Mr. Key, dated December 8, 1879, in which he says:

I have the honor to transmit herewith a communication from the Second Assistant Postmaster-General calling attention to the insufficiency of the appropriation for inland mail transportation for the present fiscal year, and asking that the sum of \$2,000,000 be reappropriated out of the unexpended balance of former appropriations for that purpose, which have been covered into the Treasury, and to be made available to meet the necessities of the service and of the country during the current fiscal year. I cordially indorse the recommendation, and take this occasion to suggest that the business interests of the country will be promoted by the prompt and favorable action of Congress.

D. M. KEY,
Postmaster-General.

Here was a communication calculated to arrest the attention of Congress and of the country that in a department to which Congress had uniformly been so liberal in making appropriations up to the full amount of the estimates, and that as to this star-route service, for which Congress had appropriated \$5,900,000, available after the 30th of June, 1879, on the 8th of December, 1879, five months and a few days after that time, there should be an approaching deficiency of \$2,000,000. The attention of Congress was arrested and an inquiry instituted in regard to the matter. Now, let us look at another law upon this subject. It is provided by section 3679 of the Revised Statutes that—

No department in the Government shall expend in any one fiscal year any sum in excess of the appropriations made by Congress for that fiscal year or involve the Government in any contract for the future payment of money in excess of such appropriation.

There is another provision of the law which exempts the officers of the War and Navy Departments from the infliction of any penalty in consequence of engagements beyond the appropriations, but as to all other departments there is no such liberty. There is a reason for the distinction between the War and Navy Departments and the other departments of the Government. The Navy traverses all the oceans of the world. Its ships are abroad. The Army is spread all over the country and has to be supported. It would not do to allow it to be disbanded. Exigencies may arise in which it would be highly important for the public service that officers of the Army and Navy should not be subjected to a penalty for supplying the necessities of the Army and Navy; but when those necessities occur as to the other departments the law is imperative. They are not permitted to involve the Government by any contracts beyond the amount of the appropriations and it is a misdemeanor to do it. Well, here was a fact calculated to alarm the country, and to alarm Congress, and it did alarm the House

which I have to make it shall be my endeavor to travel with you over the case, so far as it is necessary to do so, in my judgment, taking care on my part not to trespass upon the domain of the jury. You are the exclusive judges of the facts in this case. It is your further power to be the ultimate, final arbiter of the law, too, in the case. Your power of rendering a general verdict gives you that power. At the same time, the traditions of the law and the practice of the courts from the beginning of jury trials has authorized the court to talk with you and to consult with you, even in regard to the facts. The jury may often be aided in that way. But the opinion of the court is not to be taken as obligatory upon the jury in regard to the facts, and I shall not insist regarding questions of law upon the difference between advice and instruction. I assume that the jury will listen attentively to the views of the court, even in regard to the facts, so far as the court may refer to them, and not feel themselves at all bound, but perfectly at liberty to exercise their own free judgment according to their consciences and their own views on that subject. You have heard what has transpired in this courthouse during this trial from the beginning to this day. I think I may say that the court—or, I had better here speak in the first person—that *I* am wholly uncommitted as to the guilt or innocence of these defendants. Some of the reporters of the newspapers have misapprehended no doubt remarks made by the court on former occasions; because I have seen in more than one paper a remark attributed to the court giving a most decided expression of opinion upon that question. I am sure the jury have never heard any such expression. The court has carefully abstained, from beginning to end, from uttering any expression of its opinion as to the guilt or innocence of these defendants. There was an occasion some time back in the trial when the witness Walsh was introduced and the question arose whether he was admissible to prove the offer which had been submitted to the court when the court did say that, in its judgment, there was enough evidence on the question of conspiracy to be submitted to the jury for their opinion, and it was upon that ground that Walsh was admitted; not that the court had made up its mind that the fact of conspiracy had been made out, but that there was enough evidence in the case to allow that question to be submitted to the jury for their judgment. That is as far as the court has gone and the whole extent to which the court has expressed an opinion. I feel, then, that I am wholly free as to that question; and we will now proceed together, with your consent, to look at some of the features of this case, arising from the law and from facts, so far as the facts upon which I propose to remark may serve to illustrate the principles of law which I may lay down. I do not propose, however, to go over this case at large. The facts have been so amply discussed on both sides, and they are so numerous and so complex, that it would not only be a very laborious, but, in my view, it would be an unnecessary undertaking on my part.

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of Representatives and the matter was taken up for investigation. It was investigated and the result of that investigation was the passage of the act dated April 7, 1880, appropriating \$1,100,000, instead of the \$2,000,000 that was asked for, to meet the expenses of inland mail transportation on star routes for the remainder of the current year. It was provided that during the remainder of the current fiscal year no further expedition of service on any postal star route should be made; and then, section 2 provides:

That the further sum of \$100,000 be, and the same is hereby, appropriated as aforesaid to enable the Postmaster-General to place new service as authorized by law, *Provided*, That the Postmaster-General shall not hereafter have the power to expedite the service under any contract either now existing or hereafter given to a rate of pay exceeding 50 per cent. upon the contract as originally let.

Then, section 4 declares:

That nothing in this act contained shall be deemed or construed to affect the validity or legality of the acts or omissions of any officers of the United States or to affect any proceedings therefor.

That was the act of Congress, and it was as far as an act of Congress probably ought to have gone. Everything pertaining to a judicial investigation of the acts of the persons concerned in the expenditure of the money, which had been appropriated by Congress, was left open for judicial investigation. Now the subject of the expenditure of a portion of this money appropriated for the fiscal year 1879-'80 is before us for consideration in this case, and an indictment has been found charging the defendants with a conspiracy to defraud the Government of the United States for the benefit of these several alleged conspirators. This indictment may be said to have five features. The first is the historical part of the indictment which relates to the duties of the Postmaster-General and the several officers of that department. The second charges the conspiracy as you have heard. The third describes the means to be used to carry out the conspiracy. The fourth describes the overt acts alleged to have been committed in pursuance of the conspiracy. The fifth charges the partition of the money alleged to have been taken fraudulently from the Government of the United States amongst the several conspirators. As to the historical part we know all about that, because it is found in the acts of Congress establishing the Post-Office Department. You need trouble yourselves in no respect in regard to that. As to the means used in carrying out the conspiracy you need give yourselves no trouble. Whether they are properly described in the indictment or not is of no consequence in this trial. As to the distribution of the money, that is a matter that will be determined by your finding upon the question of conspiracy and the overt act. If you find the conspiracy and the overt act, the distribution of the money follows. You cannot find the existence of this conspiracy as charged in this indictment without finding that the conspiracy was for the purpose of dividing the money amongst those in it and defrauding the United States. So that if you find the conspiracy you find the truth of that part of the indictment. The only consideration with which the jury need concern themselves in their deliberations is whether there was a conspiracy in the case, followed by an overt act. When the indictment says that the conspiracy was to be effected by means of false papers false affidavits, false letters, and false petitions, without setting them out, those are the means, and it has never been held on the trial of an indictment that the Government was bound to prove the exact means described in the indictment. So, although the indictment declares that these several contractors had these nineteen different con

tracts—and that they were legal contracts in which they were mutually interested—that is a matter of historical detail or description of the means not entering at all into the charge of the conspiracy. Whether these parties were originally interested in the several contracts or not is of no consequence. The mutual interest, if they had a mutual interest, was not in the contracts, but it was a common lot in the body of the conspiracy. The conspiracy was concerned about contracts, but the parties had their own contracts, and it was so alleged in the indictment. Each party had his several contracts. The conspiracy did not give them a common interest in the several contracts, but it was a common conspiracy in regard to these several contracts, and the parties remained several owners of their own contracts, yet bound together by the tie of the conspiracy. It was in that view that the court held that an overt act done under one of these contracts was an overt act as to them all, because they were all a common subject of conspiracy. It is a conspiracy that you are trying. For example an overt act under No. 19 of these contracts upon that theory was just as good an overt act under No. 1, as it was under nineteen, and so as to them all. Any overt act under any one of the contracts, assuming the conspiracy to be established, was an overt act under them all, because they were united by the conspiracy, although the several contracts still had several owners. I particularly wish not to be misunderstood on this point. Some remarks made by the court at one stage of the case have been brought repeatedly to the attention of the court with a different view. Perhaps there may be one or two expressions in those remarks that might be interpreted in a different sense from that I am now giving; but the remarks then delivered must be construed in reference to the subject then before the court. Evidence of an overt act was offered, and it turned out that there was no such overt act set out in the indictment as belonging to that particular route. But as the overt acts were common to all the contracts in the view of the court, it was a matter of utter indifference whether the overt act was under one contract or under another. As the conspiracy was one, the overt act under one contract was just as effective as to every other contract as though it was an overt act under its own contract.

Now, I have said that much in regard to the frame of the indictment in this case. Here it is proper to give an answer to some of the prayers that have been offered. The conspirators are united in an indictment. They are joint for certain purposes, but they are several for others. Although united in the indictment, and, in some respects, having a common interest, they plead severally. They do not unite in their pleas. Each man stands upon his own defense, and has a right to do it; and although united, yet it is the nature of offenses, as well as torts of all kinds, to be several; that is, some may be found guilty and others may be acquitted. You cannot acquit all but one, because it is necessary that there shall be at least two to make a conspiracy; but it is in your power theoretically to acquit every man of these defendants except two, and find them guilty. It is your further power in consequence of the change of the law which has been made, our statute requiring an overt act to be done by one or more of the conspirators, that if you should acquit one of these conspirators and the overt act was his and there was no other overt act in the case, not to convict, and you could not convict any of them. Our statute requires that there shall be a conspiracy followed by an overt act by one or more of the conspirators, and that overt act is binding upon them all, although committed by but one. So if you acquit one of

the conspirators and there is no other overt act than his in the case you must acquit them all. For example, if you were to acquit Mr. Brady in this case, who has been called the master key in this conspiracy, and no other overt act than his can be found proved, of course the indictment must fall and the prosecution must fail. So in case you acquit any of these defendants, and are deliberating about the guilt or innocence of the others, you must see whether the overt act was committed by some one still remaining among the conspirators.

There is another point that has been raised, and it is this: The defense claim that the conspiracy must be made out as to all these contracts, and that unless the conspiracy is established under each of these contracts there must be an acquittal of all the defendants. That is not so. I will put an extreme case. If you should be of opinion that there was a conspiracy between these defendants, or any number of them, as charged in the indictment, but relating to but one of the contracts, and should be satisfied that there was a conspiracy amongst them as to that, it would sustain the indictment, although you may not be satisfied of the conspiracy as to the rest. These matters are, as I said before, the means and instrumentalities for making out the charge of conspiracy, and if there is enough left in the proof to show that there was a conspiracy even as to one of the routes, followed by an overt act, the conspiracy is established. It is so in regard to all indictments. In a case of larceny, a charge of feloniously stealing and taking away, there may be a great many things specified in the indictment, and it may turn out in the evidence that the indictment has been established only as to a part; but still a crime has been committed, and if the indictment is broad enough to cover the crime proved it is sufficient. Surplusage in an indictment will not vitiate it. If it would many indictments would probably have bad luck, because they are very voluminous, and always have been immensely voluminous. The ideas are covered up in so much verbiage that it becomes difficult for the common mind to understand an indictment at all. But if the indictment covers a crime and the crime is proved, then whether it amounts to the whole of the offense charged in the indictment is of no consequence whatever.

Whilst upon this branch of the subject I will advert to a neighboring point, in which the defendants are entitled to instruction by the court: That this indictment is one. It charges one offense. It is a very long indictment, covering, I believe, seventy or eighty pages, but it is one indictment, contains but one count and charges but one offense, that is it charges but one conspiracy. The instruction of the court is asked upon the question whether if there be two conspiracies proved there may be a conviction. I am of opinion that it cannot be. You may acquit part of these defendants wholly and convict others; but if you be of opinion that the proof shows two conspiracies and three are guilty of one conspiracy and four guilty of another the indictment will fail.

Now, I have expressed, so far as they occur to me, my views as to the frame of the indictment, and what may be done under it by the jury in certain contingencies as to the defendants. I shall pass now to say a few words in regard to some other points. As to the proof, it is very true that persons who commit crimes seek darkness. They avoid the light, and all crimes are generally more or less difficult to establish for that reason; but conspiracies are peculiarly the product of darkness. Conspiracies are very seldom reduced to writing. They are entered into sometimes in a very informal way; generally, in fact, in an informal way. The parties may not come together at all. They may be in different parts of the country. But if by any means, by telegraph

or letter or by dumb show, if any of them are dumb, if by any means whatever, they come to a mutual understanding for the purpose of committing a crime against the Government that is a conspiracy, provided it be followed by an overt act. It is said that you ought not to convict men on circumstantial evidence unless it be of the clearest and most absolutely convincing character. The rule in regard to conspiracy, as in regard to all crimes, is that you shall be satisfied in your own mind, beyond a reasonable doubt, of the guilt of the defendants. I do not know that I am capable of making that any clearer. The books contain discourses on the subject, amplifications of that idea, but after all it comes back to the point that every man on the jury should be satisfied of the guilt of the defendants beyond a reasonable doubt. The reasonable doubt ought to be a doubt which arises out of the evidence in the case. It ought not to be conjecture. It ought to be a doubt supported by a reason. There is a difficulty though. You are twelve men on the jury. Your organs are different, your mental capacities are different, and your powers of observation are different. What may seem to be a reasonable doubt to one may not seem so to another. But that is a difficulty which cannot be avoided as long as twelve men have to pass upon the question of the liberty of the citizen. Each man ought to be satisfied in his own mind of the guilt of the accused beyond a reasonable doubt in that sense. The jury ought to be careful to see that the doubt arises out of the evidence and is not a mere conjecture. A man is seen upon the street to strike another upon the head and fell him to the ground by a blow with a bludgeon. The stricken man's skull is cracked and he dies. It is possible that he might have had a convenient apoplectic fit and died from it; but if there is no evidence of apoplexy and no evidence that that caused his death and the blow was sufficient to cause his death it would be folly, weakness, and an unreasonable thing on the part of any jurymen to acquit the defendant on the ground that the man might have died of apoplexy. There is a case in the books that was tried before Lord Ellenborough. A poacher who trespassed upon the preserves of a nobleman shot a bird. The bird was dead. The poacher had violated the laws of the land and he was arrested and brought before Lord Ellenborough for trial. The jury acquitted him, and the reason given by the jurors afterward was that the gun might have scared the bird to death. Such doubts as those, gentlemen, are childish. It would not do to administer justice in any such way as that.

Then it is said that it is better that ninety and nine guilty men should escape than that one innocent man should suffer. I believe Lord Hale was the author of that proverb, but it was not exactly so extensive. As I find, it was, that it is better that ten guilty men should escape than that one innocent man should suffer; but I suppose he meant the number to be indefinite. It makes no matter. It is better that any number of guilty men should escape than that one innocent man should suffer. That was a very important principle in the administration of justice in England when it originated, and it is a very important principle to this day; it was of great importance in those days. A criminal was brought to the court and had to defend himself, being denied the advantage of counsel. They did not allow his witnesses to be sworn, and of course his witnesses might not be believed. When he appeared before all the array and ceremony that characterized the courts of those days, the judges upon the bench with gowns and with wigs, and the learned sergeants, all composing an impressive scene, he, or any common man, would not know what to say and would not know what to do. When we con-

sider, too, that at one time there were not less than one hundred and fifty odd capital offenses under the laws of England, we can see how absolutely necessary it was that the court should be careful as to the conviction of persons charged with crime. All that is changed in this country, but still we have the rule, and the rule must be observed. So I say that it is better, in the language of the proverb, that ninety and nine guilty men should escape than that one innocent man should suffer. It would be a very happy condition of things if we could not only protect the innocent but also punish the ninety and nine guilty. That would be the perfect administration of justice. When guilt is made out there should be no hesitation at all about the infliction of punishment, but we should not take any risk. There is an old Latin proverb which translated means this—I use the Latin for the benefit of the learned gentlemen, and will give the English for the benefit of the others :

Judex damnatur cum nocens absolvitur.

The judge is in fault when the wicked escape.

That is a liberal translation of it, it is true. Society is an institution which requires order for its protection and the enforcement of the laws. The world would be a hell if the good were not protected against the bad. Even barbarians have their institutions. Life and property could not subsist an hour if the wicked and vicious were allowed to have their way. Happy, indeed, is that people where the number of crimes is small and of small importance. Happy also is that people where the innocent are vindicated and the criminal punished. I do not propose, gentlemen, to read to you from the books in regard to this subject. I am talking to you as a practical man talks to practical men, with a view of applying the law to the facts of this case. I think it would be a vain thing for the court to lay down abstract propositions in regard to these matters of which I have been talking to you. My object is to enable you, so far as I can understandingly, to apply the law to the facts in this case and under this indictment.

Now, with a view to a practical application of the law as I have stated it, I will not take up more than one, but I will take up one of these routes and see what are the facts, and whether you can reconcile them with any rational theory of innocence. If you can, the defendants are entitled to the benefit of that conclusion. If you cannot, taking the history of this route and comparing it with the other facts in the case, and the history of the other routes, you will draw your conclusion the other way. I will take up a small route, a comparatively insignificant route in this case, not remarkable in its features as distinct from several others. I select it partly because it is a small route, and I will confine myself to it for the reason that all these routes have been like threshed straw, beaten over and over again until you are familiar with the facts. But let me recall the history of the case in connection with the route from Vermillion to Sioux Falls. The date of that contract was the 15th of March, 1878, and it was to run for four years from the 30th of June, 1878. John W. Dorsey was the contractor. The service was once a week and the compensation \$398. The distance as advertised and as specified in the contract was fifty-two miles. Two miles were subsequently added for which an allowance of \$10.90 pro rata was made. The time was fourteen hours. That was at the rate of three and fifty-seven one-hundredths miles an hour. That was probably a fair rate of travel in that country. The route lies in Dakota. Dakota is an agricultural country. There are no mining camps there. The route ran between two towns, Vermillion and Sioux

Falls, and there are no towns between them. There are nine post-offices I believe, but the witnesses in the case testify that there were no towns, according to my recollection of the evidence. Soon after the service was put upon that route, once a week, it was discovered that the actual distance was about seventy-three miles, some say seventy-five, and some as low as seventy; but, the witnesses speak of it as a seventy-mile route. Information of the fact was given distinctly and repeatedly to the Postmaster-General that the distance was seventy miles, or over that. On the 23d of December, 1878, the service was increased to twice a week. The law prescribes the amount of increase of pay, when the service is increased. The compensation was doubled, \$408.90 additional being allowed, making \$817.80. On the 3d of May, 1879, this contract was assigned; I say assigned because it is practically an assignment. The law forbids contracts to be assigned, but they call them subcontracts. There was a subcontract to H. M. Vaile, but the subcontractor was entitled to 100 per cent. of everything additional that should be allowed, so that practically, it seems to me, it was an assignment. This was the 3d of May, 1879. On the 10th of July, the same year, the service was increased to six trips a week, and the compensation raised to \$2,453.40 for the increase of service, and at the same time the schedule time was reduced from fourteen to ten hours, and \$3,680.10 allowed for that. We have the compensation raised in that way to \$6,133.50. Now, the Post-Office Department was informed that the distance was over seventy miles at the time the order for expedition, reducing it from fourteen hours to ten was made. Fourteen hours was the time prescribed when it was supposed that the distance was fifty miles, and after they had notice that the distance actually was seventy miles or seventy-five miles the service was increased to six trips a week and the time was reduced from fourteen hours to ten hours. By the regulations of the department the carrier of the route was required to stop seven minutes at each post-office. There were eight or nine post-offices, according to the evidence, so that took off more than an hour and the time was actually reduced to less than nine hours for seventy-odd miles, requiring the carrier to perform that service at the rate of eight miles an hour in an agricultural country between two points where there were no towns. All these expeditions and increases of service were supported by petitions purporting to be from people through the country there, and the petitions were indorsed by the member of Congress, C. G. Bennett, I believe the name is. He indorsed these petitions, and recommended that the expedition should be made and the service increased, and it was done. It does not necessarily follow that it was done with any fraudulent purpose, because it might have been done in consequence of the great influence of Mr. Bennett and the influence of these unknown people who had signed the petitions along the route. That is a hypothesis which the jury have a right to consider. You have no right to presume that a man has committed a fraud. Fraud must be established to your satisfaction, and if you can account for the act on any reasonable hypothesis of innocence you must do it. Here was Mr. Bennett, an influential member of Congress—I do not know how influential, but a member of Congress, and presumed to be influential for that reason—indorsing these petitions and procuring these allowances. Soon afterward every postmaster on that route signed a petition and sent it to the Second Assistant Postmaster-General, declaring that it was not practicable to perform service in that time, seventy-three miles in nine hours practically, and at the rate of eight miles an hour, and asking for a restoration of the old time, four-

teen hours. This same Mr. Bennett, the member of Congress, indorsed the postmasters' petition. He had recommended the reduction of the hours, and now he recommends the restoration of the old time. The postmasters had reported that the time was impracticable. These petitions were brought to the attention of Mr. Brady. Mr. Bennett's recommendation for the restoration of the old time was called to his attention by Mr. Brewer, I believe. Now, this member of Congress seems to have lost his influence just at that point. Mr. Brady tells Brewer to write to Judge Bennett and tell him it cannot be done. Bennett then was like a common man. If he had influence enough to reduce the number of hours he had not influence enough to increase them. Now, you remember the act:

The Postmaster-General shall provide for carrying the mail on all post-routes established by law as often as he, having due regard to productiveness and other circumstances, may think proper.

What was the productiveness of this route? The original compensation was \$398, and the service was once a week. The whole productiveness of this route for the quarter ending 31st of March, 1880, from all the intermediate offices between these two points was \$48.01, and for the year which ended the 30th of June, 1879, \$261.51. For the year ending the 30th of June, 1880, it went up to \$420, and for the year ending the 30th of June, 1881, it fell back to \$240. I say that that is a small route, but it is remarkable. I do not know that it is remarkable, either; I ought not to say that; but it is worthy of attention, certainly, in several respects, and particularly in the one to which I have called your attention. It is claimed that members of Congress have a right to say what route is to be established, and that when a member of Congress has advised the establishment of a route it is to be assumed that the officer does right in establishing it, and that the officer is to be excused if he yields to this high influence. This route is remarkable for the fact that the increase and expedition was ordered at the instance of a member of Congress, and when he asked that it should be restored to the old rate he was snubbed. I think that is about the way the thing presents itself fairly to my mind. I do not want you to embrace my views about it; but as I do not propose to examine all these routes, and as I thought it would be unjust to this cause to let it pass without an examination of the main features of the case, I felt called upon to say what I have in regard to that little route.

Mr. HENKLE. Will your honor permit me to call your attention to a question of fact?

The COURT. Yes.

Mr. HENKLE. I think your honor is in error as to that order. The order to increase to six trips was made by French.

The COURT. "Do this—BRADY," is there.

Mr. HENKLE. Yes. The order was made by French.

The COURT. The order was signed by French, but he was ordered to do it by Brady. Brady was his master in that matter, and when he was called upon to restore the original schedule his order was equally brief and peremptory, to say to Judge Bennett that it could not be done. Now, as to my view of this act:

The Postmaster-General shall provide for carrying the mail on all post-routes established by law as often as he, having due regard to productiveness, may think proper.

I am very well satisfied that that law was drawn in that liberal way to allow the Postmaster-General to exercise his discretion fairly in regard to the increase of service and expedition, where the public interest

required such increase to be made; but here was an increase made at a heavy expense, when the revenues had begun to run down and to run in arrears. I cannot say, but the jury may be able to say, that that was a proper discretion, and that it might not be criminal. That is a question for the jury to decide. It could not be negligence. Negligence itself is a crime when injury falls upon the innocent and when the negligence is gross. Pilots on steamboats, brakemen on railroads and switchmen on railroads, when grossly negligent, are guilty of crime, and sometimes they have been punished, although not often enough. But there is no evidence that I can see in the history of this route to show that those remarkable results sprang from negligence. Manifestly it was purposely done. Manifestly it was done with a motive.

The question for you to consider, gentlemen, in trying this case of a high public functionary charged with abusing his trust, is, whether it was a mistaken exercise of his discretion, or was done purposely and with such a motive as ought not to actuate a public officer. You are to consider this route and the facts in connection with it and in connection with the history of other routes.

It has been argued in this case that if increase of service and expedition have been allowed and granted in instances where there have been fraudulent papers, fraudulent affidavits, and untrue affidavits, still if the public service has been promoted, and if the public have gained the advantage, the criminal acts of these parties, if they be criminal, are not the subject of punishment because they resulted in no injury to the public. I, of course, think that there is no soundness in any such view. That would be doing evil that good may come, and that is not good gospel nor good law. I referred some time ago to the case of Lord Bacon, and as it may relieve the tedium of this charge to the jury for a moment, I will read the letter which he wrote to Buckingham, who was then a great court favorite. It was after his fall, and whilst he was in prison, and he was begging for mercy and pardon, which he afterwards obtained. Here is the letter:

Good, my lord, procure the warrant for my discharge this day. Death, I thank God, is so far from being unwelcome to me, as I have called for it (as Christian resolution would permit) any time these two months. But to die before the time of His Majesty's grace, and in this disgraceful place, is even the worst that could be. And when I am dead, he is gone that was always in one tenor a true and perfect servant to his master, and one that was never author of any immoderate nor unsafe, no (I will say it) nor unfortunate counsel, and one that no temptation could ever make other than a trusty and honest and Christ-loving friend to your lordship; and (howsoever I acknowledge the sentence just, and for reformation sake fit) the justest chancellor that hath been in the five changes since Sir Nicolas Bacon's time. God bless and prosper your lordship, whatsoever becomes of me.

Your lordship's true friend, living and dying,

FRANCIS ST. ALBAN.

He claims that he had been the justest chancellor that hath been in the five changes since Sir Nicolas Bacon's time.

Here is a note which Lord Campbell appends to the commentary upon that letter:

He tries to delude himself into some sort of self-complacency from the thought that his decrees were sound in spite of all the bribes he had accepted, and that he sold justice, not injustice.

I think that we cannot sustain any public officer in selling public benefits.

There is another point that occurs to me in regard to the proof of the conspiracy in this case.

Several prayers have been presented containing the principle that the conspiracy must be proved independently of the overt acts; that the

overt act must follow the conspiracy and grow out of it; that the conspiracy cannot be established, as the logicians say, *a posteriori*—that is, backwards; that we cannot go backwards from the result of the conspiracy to establish the conspiracy. But that is not so, and it has never been so. The proof of the conspiracy may be made out from its consequences. One of the earliest authorities upon that subject is in Strange's Reports, 144, *Dominus Rex vs. Copest*, our lord the King against Cope at *nisi prius* before Pratt, Chief Justice.

What is evidence of a conspiracy?

is the head note to the case. The husband and wife and servants were indicted for a conspiracy to ruin the trade of the prosecutor, who was the king's card-maker. You see this is an indictment for a conspiracy on the part of a man and his wife and servants to ruin the trade of the prosecutor, who was the king's card-maker.

The evidence against them was that they had at several times given money to the prosecutor's apprentices to put grease into the paste, which had spoiled the cards, but there was no account given that ever more than one at a time were present, though it was proved they had all given money in their turns. It was objected that this could not be conspiracy, for two men might do the same thing without having any previous communication with one another.

They had all paid money to the apprentices to do this, but they never acted in concert, and each one paid his money at a different time and in the absence of the others.

But the chief justice ruled that the defendants, being all of a family and concerned in making cards, it would amount to evidence of conspiracy, and directed the jury accordingly.

There was no proof of concert there at all, except the similarity of what was done by the several persons who were charged with conspiracy, but as they belonged to the same family and were card-makers, and of course were likely to have a jealousy of the king's card-maker, the similarity of the acts was held to be proof of the conspiracy, although no preceding conspiracy has been established at all.

And in the history of this court I think I can give you a more striking illustration of the principle than that. In this court within a year past there were several persons brought to trial charged with larceny, and the larceny in one case consisted in getting money and a watch from a young gentleman who had been attending the University of Virginia. He was on his way home from the university to Missouri, where his parents resided. He stopped over a few days in Washington. He had a curiosity to visit the public places, and while walking along the Avenue a person respectably dressed in the apparel of a young gentleman spoke to him. Some conversation ensued. This young gentleman told the student that he was a stranger in Washington, and was going about to see the public buildings and the curiosities of the city, and proposed that they should go together. To this the student readily consented. This stranger conducted the student around the Capitol grounds, and on the east side of the Capitol grounds happened to fall in with an acquaintance. Introductions passed. This acquaintance proposed, as they were both strangers, to guide them around and show them things, and he conducted them down to a wood upon the Carroll place, a large square with the ancient forest still standing thereon, and I think he said there was there the tomb of Mr. Jefferson, or the tomb of some distinguished Virginian. At any rate he supposed that this gentleman from the University of Virginia wanted to see Mr. Jefferson's tomb, if there was one, as a curiosity, so they were conducted by

this guide into the interior of the forest, and while there strolling along they met a rough-looking man, whom the guide accosted as a stranger, and the rough-looking person told them he was a Kentucky drover; that he had been to Baltimore with a drove of cattle and horses and had sold out. Says he, "I was very unlucky; I fell in company with some fellows who played a game on me and got my money, but I think I got the worth of my money; I learned how to play the game." Well, they were all interested, and he sat down to show them the game. One thing led to another until they proposed betting to this student. The student bet his watch which cost \$160 and \$100 in money besides; he was certain to win; the Kentucky drover was showing him how. His friend assured him that he could win money from the Kentucky drover, so he put up his watch and his \$100. When the money and the watch were put up another fellow sprang in dressed like a policeman and claimed that he arrested them and was about to carry them off to jail. That scattered them, and this fellow picked up the \$100 and the watch and made off with them, and the student was robbed in that way.

Now, there was a conspiracy plainly, and if the conspiracy might be proved by the acts that took place in fulfillment of it, there was no question that all these fellows were in concert together. The concert was proved by what they did in pursuance of it. So that the principle of law that it is necessary first to prove the conspiracy and then to prove the overt act afterwards is not true. The facts may be such in their nature that the overt acts establish the existence of the previous conspiracy, such as meeting together to invade a man's house at night, and the persons are detected in breaking in or making their escape maybe, and they had come at different times. But if any doubt existed the coincidence of their meeting, in point of time, was enough to establish the conspiracy between them.

I have said, gentlemen, about as much in this case as perhaps I ought to say, and a great deal more than I intended to say. There is one question, though, which I must not overlook, and it is this: the doctrine contained in several of the prayers, that if the jury believe that expedition was ordered upon false papers and fraudulent papers, and at the same time there were other papers that were genuine, papers procured in good faith, the order for the expedition and increase of service made upon those papers must be attributed to the influence of the genuine papers, and that the order is not vitiated or the act of the party presenting the claim is not vitiated by the co-existence of fraudulent papers with genuine papers. Now, it may be that there are such instances as that in this case. It may be that there were fraudulent papers, false affidavits, and other papers of that character in support of increase and expedition, and it may be that in the same cases there are genuine papers. Is the bad saved by the good in a case of that kind? Is the bad saved by its alliance with the good? Such a doctrine as that, gentlemen, is not to be tolerated. There is nothing so odious in a court of justice as fraud. It is not only vicious itself but it contaminates everything with which it is associated. It is like a drop of poison in a tumbler of pure water. A party who commits a fraud very often finds it convenient, in order to greater certainty in obtaining success in his object, to use truth as well as schemes of falsity. Truth and falsehood, if left to themselves, are always quarreling, always at war. Indeed falsehoods are of so impious a nature that they quarrel among themselves, and that is the security for honest people in controversies in this world—that lies quarrel among themselves and are inconsistent with truth, too. Truth will quarrel

with falsehood. Fraud is not exactly identical with falsehood. Fraud is a twin cousin of falsehood, no doubt, but fraud for its own purposes will make use of either truth or falsehood indiscriminately, and often does. Truth is very often impressed into the service of fraud and for a time cannot get away. I have seen fraud of the most abominable character with a live of truth marshaled in its front and all its impish tribe behind, out of sight. So that when fraud sets out to accomplish a purpose, it is ready to use either truth or falsehood as may be most convenient, and the more of truth it can work into its service the better chance of success it will have. But it is no less fraud after all. So that the fact that truth is sometimes found under the banner of fraud is not to be allowed or suffered to justify the cause of fraud. If you find the same man employing both truth and falsehood for a fraudulent purpose the fraud is even deeper, more odious, because he has had the impudence to adorn its front with the beauty of truth.

Now I think I have said all I need say. If there is anything else that you desire any instruction upon I should like to be advised of it.

Before concluding, gentlemen, I will say another word, and I hesitate to say that word, too. I fill one place and you fill another, we are both ministers of the law. We both have our duties to perform in our several places, and it might be presumptuous on my part even to seem to advise you, but I know it is usually done in this place and from this place, and I will presume upon your indulgence to say it.

You have a duty to perform. If you believe these defendants innocent, if you believe the charge against them not made out beyond a reasonable doubt (and I have explained that to you), then you should acquit them without regard to any amount of clamor, without regard to the opinions of the world. Your manhood requires that of you. The self-respect which you ought to be anxious to carry with you as long as you live demands that of you. I shall not believe that any man upon that jury is so base a coward as to refuse to follow his own conscience and judgment in that respect.

On the other hand, the same rule will apply; if you believe that these men are guilty and proved to be guilty beyond a reasonable doubt, then your duty to your country, your duty to yourselves, demands that you shall find a corresponding verdict. Now, do not shrink from this position. Maintain your self-respect. Guard your own honor. Pay no respect to any other consideration. That is worth all other considerations in the world. If you violate your oaths you will have that consciousness with you and you will lead a life baser than that of slaves as long as you live.

Now, I ask your pardon for presuming upon your patience to make these remarks. The occurrences that took place yesterday possibly needed a passing remark. If the information which has reached my ears be true, then there are men engaged in the business, as it is technically called in New York, of *firing the jury*. I believe there is a professional class that goes by *that* name. It would be very natural that any of you who have been approached in that way should feel indignant. You would be very likely to experience such a revulsion of feeling from this scandalous, degrading offer and insult as to be repelled to the other side. You ought to be careful about that, and not even let that interfere with a calm, dispassionate exercise of judgment. These men are to be tried according to the evidence, and you have taken that oath. If any of you have been approached with a bribe, be so *brave*, be so *true* to YOURSELVES that not even *that* insult shall disturb the equanimity of your consciences and judgments.

Mr. INGERSOLL. Would it be proper for me to ask the court whether the court has the right now to say to the jury that they might freely tell each other as to all persons who had approached them, so that the jury in deciding the case would know among themselves who had offered to corrupt? If the court has that right I would like to have that done.

The COURT. I do not want to have that inquiry started in the jury-room. There is another thing, gentlemen, not pertaining to the merits of this case, but pertaining to a matter of practice. I have observed that several of you have been taking notes, and some of you very copious notes, during the progress of this trial. The rule established in courts of justice prohibits the jury or any of them from carrying their notes into the jury-room. In the trial of civil cases the jury are not allowed to carry out depositions, for the reason that twelve men would get into argument over the depositions. So it might be in regard to notes. Some of your notes of some of you doubtless are more copious than those of others, and the fact that several of you carried notes into the jury-room might lead to differences of opinion about the accuracy of your notes, and the law is established in full consideration of all the advantages and disadvantages that would attend such a practice. Gentlemen, I am obliged to say that you must leave your notes at home.

Mr. DICKSON. [The foreman.] The court will remember at the outset of this trial I sought your advice for my own guidance, and I have taken notes in accordance with that advice from time to time. It was my intention before entering the jury-room to ask as to the propriety of any of the jurors taking their notes with them.

The COURT. I did not know whether the thought had occurred to you.

Mr. DICKSON. [The foreman.] Oh, yes, sir.

Mr. HENKLE. May it please your honor, the announcement that your honor made on yesterday from the bench was a startling surprise to me and it startled the community. I rise now to say that I hope the matter is not to be dropped without an investigation. Let us find the source of this great scandal, and let him who is guilty be punished for it. I believe, your honor, that the rules require that exceptions shall be taken to the charge of the court before the retirement of the jury, and that exception cannot be taken to the whole charge. I rise therefore respectfully to submit the exceptions that I propose to make to your honor's charge.

I except to that part of the charge in which your honor refers to the deficiency in the appropriation. In the beginning of the charge I understood your honor to say that it appeared that the appropriation of five millions in about five months had been exhausted.

The COURT. You did not understand me correctly. I said that within about the expiration of five months from the time of the appropriation the necessities seemed to be apparent for an application for a new appropriation.

Mr. HENKLE. Your honor, I do not desire to discuss that. I simply call attention and reserve an exception to the remarks of your honor in that connection.

I next desire to except to the part of the charge in which the jury was instructed that they need not trouble themselves about the means by which the conspiracy was to be carried into effect as set out in the indictment. To the remarks of your honor upon that subject I desire to reserve an exception.

I desire to except to that part of the charge that refers to the distri-

bution of money as not being necessary, and as following the finding of the conspiracy.

I desire to except to that part of the charge wherein it is said that it is not necessary to prove the means as they are described in the indictment.

I desire to except to that part of the charge in which the mutuality of interest in the contracts is discussed, and it is decided that it is not necessary—

The COURT. [Interposing.] Before you go any further, that remark calls to my attention an important prayer that was presented yesterday that I have not answered.

Mr. HENKLE. Will your honor permit me to present my exceptions.

The COURT. No; I wish to answer that prayer before you go any further. These prayers are very voluminous. I have been obliged to answer them from memory. I have not seen them since they were presented. There was one prayer repeated at the time that is of so much interest and so important in the case that I would be without excuse if I failed to answer it, and it is this: That if the jury, believe—I am stating the substance of it—from the evidence that in the latter part of April, 1879, Vaile became the purchaser of the interest of several—

Mr. HENKLE. Vaile came into the combination, your honor. You mean the division.

The COURT. No, no, not at all. Vaile purchased the interest of several of these conspirators in certain of their contracts.

Mr. TOTTEN. These *alleged* conspirators, your honor.

The COURT. Well, that is understood. I am speaking in the language of the indictment.

Mr. MERRICK. Which prayer is that, can you tell me, Mr. Henkle?

Mr. HENKLE. No, sir.

The COURT. Vaile became the purchaser of the interest of several of the alleged conspirators in several of their contracts.

Mr. HENKLE. Will your honor permit me to correct any statement of fact? I represent Mr. Vaile.

Mr. MERRICK. The prayer is printed. It is the second prayer on page 3173 :

If the jury find from the evidence that the defendants John W. Dorsey, John A. Miner, and John M. Peck were contractors under the lettings of 1877, of the star mail routes set out in the indictment, and that they had been unable for want of credit or means to put service upon their said routes on the 1st day of July, 1878, as required by their contracts; and that on the 16th day of August, 1878, for the purpose of enabling them to procure the means to put the service upon said routes, they associated with themselves the defendant Vaile, and that thereupon with the aid of said Vaile the service was commenced upon the said routes in the fall of 1878, and the early part of the winter of 1878-'79, and that they carried on said business under said contracts as partners until the latter part of March or fore part of April, 1879, when their partnership was dissolved and a new agreement was made, by which the said routes were divided into three parts, the said S. W. Dorsey taking one part for the said John W. Dorsey and John M. Peck, the said John R. Miner taking one part and the said H. M. Vaile taking one part, and that they have never since had any joint interest in said routes, or either of them any interest in the routes belonging to the others, except that after said division the defendants, Miner and Vaile, formed a partnership in the routes taken respectively, and S. W. Dorsey became interested in some of the routes taken by him for the said John W. Dorsey and John M. Peck. In forming their verdict they will not consider any affidavit or affidavits for increase or expedition of service upon any of the said routes, nor any letters written or petitions filed with reference to the business upon said routes, nor any other act or thing done by any one of these defendants above named prior to the dissolution of the copartnership, and the segregation of their interests in the latter part of March or fore part of April, 1879, unless they further find from the evidence that these defendants had formed the conspiracy with Brady set out in the indictment prior to the dissolution of said copartnership as aforesaid, and before the said affidavits were made, or letters were written or petitions

or other acts or things were done, and that such conspiracy had continued down to the 23d day of May, 1879, notwithstanding the dissolution and separation of their interests as aforesaid.

The COURT. That prayer is of so much length that I prefer to answer it in my own way. Of course the jury cannot convict any of these defendants except for what they have done since the 20th of May, 1879. I believe that is the time. The statute of limitations is three years, and what took place prior to the 20th of May, 1879, is not in this indictment. We went into a great deal of evidence in regard to matters that occurred prior to that date, but it was for the purpose of showing the relation in which these parties stood towards each other, and for the purpose of showing if there was any conspiracy formed prior to the 20th of May, 1879, and if so, whether it was continued on. There may have been a conspiracy formed a long time anterior to the period fixed by the statute of limitations, and all the acts done prior to that period would be barred by the statute. But if the conspiracy was continued on down within the period, it makes no matter whether the conspiracy was the continuance of an old conspiracy or the formation of a new one. An old conspiracy continued within the period of the statute of limitations is just as effectual as a new conspiracy formed within the period.

Then it is another principle that any new partner, new associate, may come into an existing conspiracy and from that time is liable for his conspiracy (if there was one) just as one of the original members—just as much. But unless these parties are guilty, some or all of them, within the period of three years from the date of the finding of this present indictment, they cannot be convicted.

On the other hand, in regard to the interchange of interest, these parties being the several proprietors of their several contracts were at liberty to interchange their interest in one another if they chose. They might go on, and if the interchange took place amongst parties who were already in the conspiracy it would not affect the character of the conspiracy in the least. For instance, suppose Miner and Vaile were already in the conspiracy. Miner might sell out part of his interest to Vaile, and Vaile being in the conspiracy knew what Miner was doing and Miner being in the conspiracy knew what Vaile was doing, and so any arrangement that they might make amongst themselves as to the increase or diminution of their several interests would have no effect at all upon the conspiracy. The conspiracy is altogether matter independent of the ownership of the contract. In the conspiracy they are joined. The subject of the conspiracy, the means with which the object of the conspiracy is to be carried out, might be entirely several, as it was in this case, and as it is declared to be in the indictment. To be sure it is said that they had interests respectively in the several contracts. What that means exactly I do not understand, except that it might be such an interest as the conspiracy would create.

Mr. HENKLE. Then the prayer as asked is declined.

The COURT. Declined and answered in that way.

Mr. HENKLE. I except, if the court please, to the refusal to grant the prayers as asked, and to the modification as made by your honor.

I except, I believe I did say, to that part of the charge of the court in which the mutuality of interest is discussed.

I except to that part in which your honor explained the former decision of the court with reference to the question of overt acts.

I except to that part of the charge in which the subject is discussed as to the mutuality and the divisibility, the individuality and separateness of the interest of the different members of the so-called conspiracy.

I except to that part of the charge of the court in which your honor takes up and reviews the testimony in the case of Vermillion and Sioux Falls, and especially to the deductions that your honor draws from the facts as they are recited by the court.

I except to that part of the charge in which your honor discussed the question of productiveness.

I except to that part of the charge in which your honor discussed the subject of false petitions and the effects of crime that is to be deduced from false petitions, although it may not be shown that they were not the foundation of the action of the department or of the Second Assistant Postmaster-General.

I except to that part of the charge in which your honor maintains that the conspiracy may be proved by the proof of the overt acts.

I except to that part of the charge where it is said that where there are genuine and false petitions the presumption is not that the action of the department or the Second Assistant Postmaster-General was based upon the genuine petitions.

The COURT. The presumption.

Mr. HENKLE. In that part of the charge I understood your honor to remark that it was claimed, or had been argued to the jury, that where there were false petitions and genuine petitions the presumption was that the action of the Second Assistant Postmaster-General had been based upon the genuine petitions and not upon the false.

The COURT. You misunderstood me.

Mr. HENKLE. I desire to except to that part of the charge, whatever it was.

The COURT. You can except to that part of the charge, but the charge was not in the sense that you understood it. What I did say, or what I certainly intended to say, was this: That if there was fraud in the business, as to any of these parties, that fraud was not saved by being associated with true or genuine papers.

Mr. HENKLE. Well, I do not, of course, want to discuss the matter with the court. I only desire to reserve an exception to what your honor did say with reference to it. Now, if the court please, before I resume my seat, there was quite a number of the prayers I submitted yesterday. I have not had time to read them in the printed document before, and I did not know until this moment that they were printed. I think there was a number of the prayers I submitted that have not been touched, and, I suppose, upon the theory announced by your honor yesterday, that they are to be regarded as rejected.

The COURT. Yes.

Mr. HENKLE. If they are not covered by the charge.

The COURT. I should be glad and much indebted to your courtesy, if you would just state what particular instruction has been overlooked.

Mr. HENKLE. If it is practicable for me I will do it. I did not know the prayers were printed until this moment. There are a good many of them and it will take some time to read them.

The COURT. It was my purpose, in a general way, to cover the whole ground of the case—first, in regard to the indictment; second, in regard to the facts and proof under the indictment and what was necessary under the indictment and the law of conspiracy in regard to the union of the defendants amongst themselves.

Mr. HENKLE. It would be impossible for me, your honor, to call attention to the ones that were omitted, unless I were to detain the court to read them. I hardly like to ask that.

The COURT. I think your instructions were more compendious than the others.

Mr. HENKLE. I think they are shorter than the others. I do not care to read them. I only want to select out such as have not been passed upon.

The COURT. I will give you time.

Mr. HENKLE. Does your honor want me to read them?

The COURT. No. Just take your seat, and if there is any instruction which you presented yesterday, and which has not been substantially answered already, and you will call my attention to it, I will answer it on the instant.

Mr. HENKLE. Here is one that I think has not been passed upon.

EIGHTH.

Brady had a legal right to make orders for increase of trips and for expedition of service, subject to the approval of the Postmaster-General, and where such orders were made the legal presumption is that they were made honestly and for the public good; and the jury is not at liberty to presume that they were made for the benefit of the contractors unless they are satisfied thereof from the evidence in the case beyond a reasonable doubt.

The COURT. I have answered that.

Mr. HENKLE. Your honor will permit me to reserve an exception to this prayer not being given as I asked. I ask now that the prayer be given as it is prayed here.

The COURT. The court declines, having answered it very fully, I think, two or three times.

Mr. HENKLE. [Reading:]

NINTH.

Petitions for increase of trips or for expedition, or both, accompanied by the recommendations of Members of Congress and Senators, found on the files of the Post-Office Department in the absence of evidence to the contrary, are presumed to have been filed by the members or Senators whose recommendations they bear, and they have no right to infer they were filed by the contractors unless satisfied of it from the evidence in the case beyond a reasonable doubt.

The COURT. I do not think there is any such presumption.

Mr. HENKLE. Then your honor rejects that prayer?

The COURT. Yes.

Mr. HENKLE. [Reading:]

TENTH.

Where petitions signed by citizens living along any of the routes named in the indictment, or by military officers stationed along any of such routes, for increase of service or expedition had been filed in the Post-Office Department, and the granting of the prayer of such petitions had been recommended by members of Congress representing the Territories and by Members and Senators representing the districts and States in which such routes were located by indorsements upon the backs of such petitions or oral recommendations, you will presume that the orders for increase of trips or for expedition of service were innocently and honestly made by the Second Assistant Postmaster-General in compliance with the prayer of said petitions and said recommendations; and this presumption can only be overcome by evidence sufficiently strong to satisfy you beyond a reasonable doubt that said orders were not based upon said petitions and recommendations, but that they were corruptly made by the said Brady in consideration of money paid or agreed to be paid to him by the other defendants.

Does your honor give or reject that prayer?

The COURT. I will not base my answer upon the fact that petitions were signed by Members of Congress and Senators or anybody else, but I

will say broadly, as I have said already, that the presumption is in favor of the integrity of General Brady's acts in office. Oh, as to this thing of members of Congress and generals of the Army, I do not believe in public officers being guided by recommendation. I know no line of policy for the guidance of a public officer except the law, and when a member of Congress or a member of the Cabinet comes into this court and says that in his opinion every camp of twenty men in the Rocky Mountains is entitled to daily service of the mail, I do not think that that is the law. It is not the law for me. I do not think it ought to be law for any officer in the department, and even when the General of the Army comes into court and says that the extension of a post-route two or three hundred miles across the Rocky Mountains over roaring streams amongst hostile Indians is a good thing, and ought to be done, I do not think that there is any presumption that the officer who obeys that request has done his duty at all. On the contrary, I wish to call attention to an act on that subject. I refer to the postal laws and regulations of 1879, Revised Statutes, section 3974:

Whenever, in the opinion of the Postmaster-General, the postal service cannot be safely continued, the revenues collected, or the laws maintained on any post-road, he may discontinue the service on such road or any part thereof until the same can be safely restored.

It appears to me that it is a policy of the law that when Indians are running over the Rocky Mountains and interfering with the transport of the mail in a country that is thinly inhabited that is a time to withdraw the mail, instead of using the mail carriers as pickets for relief in the Army. Now, your prayer is that the court ought to instruct the jury that when a Member of Congress or a Senator, not acting in his official capacity, goes to the office or writes a letter recommending something to be done the presumption is that that is right. I know no such rule at all. Why the Supreme Court has decided that in interpreting a statute the opinion of the most eminent men in Congress in the discussion of that law or its passage is not to be regarded as the construction of the law—that these opinions are not to be taken as a guide in the construction of the law. Members of Congress are like other people out of their place. Their opinions are entitled to respect as intelligent gentlemen, but we should have a sad and wretched condition of the administrative branches of the Government of the United States if the Postmaster-General, the Second Assistant Postmaster-General, the Secretary of the Interior, the Secretary of the Treasury should say, "Well, here is a request of a member of Congress that you should do such and such a thing, that must be done." That is not the policy of the law. The law must be maintained, even in the face of a Senator.

Mr. HENKLE. If the court please, I want to take exception to what your honor has just been saying, and I guess I will not trespass upon the time of the court. Where my exceptions have not been touched on I will have to claim the right to reserve an exception. I find that I am consuming so much time——

The COURT. We have time enough. I am willing to sit here and have you point out anything that I have failed to answer.

Mr. HENKLE. There are quite a number of mine that have not been touched upon, as I understand it.

The COURT. If there are any, just point them out. I am here to answer them, and will answer them.

Mr. MERRICK. I hardly think it is a proper mode of practice for counsel to present to the court thirty-one pages of prayers, without argu-

ment, and get them all passed upon. Unless your attention is called to these prayers specifically I shall object to excepting to them.

The COURT. I recognize the right of counsel to make as many exceptions as they choose.

Mr. HENKLE. I will go through them. It seems to me it is almost cruel to consume so much time in this manner. The tenth prayer is rejected in the form in which it is, as I understand.

The COURT. Yes.

Mr. HENKLE. The next prayer is—

ELEVENTH.

Unless the jury are satisfied from the evidence beyond a reasonable doubt that the defendant Vaile when he came into the combination with John W. Dorsey, John M. Peck, and John R. Miner was advised that false and fraudulent petitions and recommendations for increase of trips and expeditions of service was one of the means by which the above-named defendants, together with S. W. Dorsey and Rerdell, had agreed with Brady for the purpose of procuring such increase and expedition, or unless they find that after associating himself in interest in the routes described in the indictment, he became aware of that fact, or that he filed or caused or procured to be filed such false and fraudulent petitions or communications, or that such false and fraudulent petitions and communications were filed with his knowledge and consent, in considering the evidences of his guilty connection with such conspiracy they must eliminate all evidence of this character.

The COURT. I have substantially answered that. No man can be convicted of conspiracy unless he is a member of the conspiracy, or came into it. If Vaile is in that condition under the evidence of course he is not a member of the conspiracy and cannot be convicted.

Mr. HENKLE. Well, your honor, I believe I will not take up the time any longer.

Mr. BLISS. Is it understood, sir, that there is to be any right to any exception on the part of Mr. Henkle to any one of his specific requests to which he does not call your attention except so far as your attention has already been called? I submit that with thirty-one pages of these prayers put in here it is the right of both sides that attention should be called to them, and that if attention is not called to them exceptions should not be hereafter allowed.

Mr. HENKLE. Unless I have the right reserved to except I shall have to proceed.

The COURT. Well.

Mr. HENKLE. I just read the eleventh, I believe, at the bottom of page 3175.

The COURT. I have answered that.

Mr. HENKLE. That is refused in the form in which it is asked.

The COURT. Yes, and answered in the form in which it has been asked.

Mr. HENKLE. [Reading:]

TWELFTH.

If the jury find from the evidence that the defendants S. W. Dorsey, John W. Dorsey, John M. Peck, M. C. Rerdell, and John R. Miner did enter into a conspiracy with the defendants Brady and Turner, or with Brady, before the biddings upon the routes set out in the indictment in 1877, and that the defendant Vaile did not become associated with the defendants S. W. Dorsey, J. W. Dorsey, John M. Peck, and John R. Miner until the fall of 1878, they cannot convict him unless they further find from the evidence that he knew the unlawful character of their combination when he joined them, or afterwards learned it, and assented to it by continuing to act with them in carrying into effect the objects of said conspiracy.

That has been given substantially, I suppose.

The COURT. Oh, I have answered that.

Mr. HENKLE. [Reading:]

THIRTEENTH.

If the jury believe from the evidence that Harvey M. Vaile, on the 16th of August, 1878, had no acquaintance with John M. Peck, John W. Dorsey, M. C. Rerdell, and Stephen W. Dorsey, or they with him, this is a circumstance that the jury may consider tending to disprove a conspiracy of the defendants. Again, if the jury believe from the evidence that from December, 1878, the defendants Vaile and S. W. Dorsey were unfriendly it is a proper subject for the jury to consider in determining whether they were parties to a conspiracy or not.

The COURT. I decline to grant that.

Mr. HENKLE. That is refused.

Mr. MERRICK. Oh, no.

Mr. HENKLE. The court says it is refused.

Mr. MERRICK. What did your honor remark.

The COURT. There are two propositions contained in this prayer. I refused the first because of its want of relevancy or weight, its worth as evidence. I refused the second because there is no evidence of the averment. I do not remember any evidence that from December, 1878, Vaile and S. W. Dorsey were unfriendly.

Mr. BLISS. I think Vaile so testified.

Mr. HENKLE. The exception will not hurt you.

FOURTEENTH.

All affidavits made prior to July 1, 1879, not having been required by the regulations of the Post-Office Department, are mere statements of the party making them, although they may have had an oath affixed to them, and are presumed to be the honest opinion of the party making them, unless the contrary is proved.

I ask this prayer; does your honor refuse it?

The COURT. Yes, I refuse it.

Mr. HENKLE. [Reading:]

FIFTEENTH.

A subcontractor is merely a mail-carrier. He has no agreement with the Post-Office Department whatever—gives no bonds and assumes no responsibility or obligation, except what is assumed in his oath as carrier before the mails can be given to him. His compensation is to be the price agreed upon between himself and the contractor; and in case he files his subcontract the Post-Office Department agrees to see him paid to the amount of the contractor's pay, not more, and any money paid to him in the regular order of business cannot be considered in the light of presenting a claim against the United States, and cannot be considered as overt acts in this indictment.

The COURT. I refuse that.

Mr. HENKLE. [Reading:]

SIXTEENTH.

The prosecution having proved the execution of the Peck affidavits, or statements, by the notary public, Jacob S. Taylor, who saw said Peck sign the same, and who administered to him the oath, are estopped from proving the contrary, and the affidavits or statements must be considered as the affidavits or statements of Peck.

The COURT. I think I will have to grant that.

Mr. HENKLE. That disposes of Mr. Blois.

Mr. MERRICK. Not at all; not by a good deal.

Mr. HENKLE. I thought it did.

Mr. MERRICK. No, sir; you are mistaken about it as you are about a good many other things.

Mr. HENKLE. [Reading:]

SEVENTEENTH.

The people have a right to petition for increased mail facilities—members of Congress have a right to urge the same in their behalf, and there is nothing unlawful in their acts. The Postmaster-General has a right to favorably respond to their demands, and the contractors upon such routes should not be held responsible for their acts, unless the jury believe from the evidence, beyond a reasonable doubt, that such increases and expeditions were not had by reason of these agencies, but by the corrupt use of money used by these defendants or some one of them.

The COURT. That sounds nearly right.

Mr. MERRICK. That has been covered in your charge.

Mr. BLISS. Is it clear that there could not be anything but the corrupt use of money that would render them bad?

The COURT. That is what is charged in the indictment.

Mr. BLISS. They say we do not charge the corruption in the indictment. They have thrown that out of the case all the way through.

Mr. HENKLE. I am not particular whether this is granted or refused.

The COURT. I will refuse it on the ground that it is covered already.

Mr. HENKLE. [Reading:]

EIGHTEENTH.

The averments in the indictment charge that the conspiracy was in connection with nineteen routes; that they were increased and expedited for the gain and profit of all the defendants. Now, if the jury believe from the evidence that there was a separation on the 31st day of March, 1879, to take effect from the 1st day of April, 1879, or thereabouts, and that John W. Dorsey and John M. Peck, through S. W. Dorsey, took 30 per cent. of the routes and went their way, and Harvey M. Vaile drew out of the same 40 per cent. of the routes, and John R. Miner 30 per cent. of the same, and never afterward joined their respective interests except the joining of the individual interests of Vaile and Miner with each other, the scheme mentioned in the indictment was dissolved, and if a conspiracy it no longer existed. If there was any conspiracy after April 1, 1879, it must have had two parts—one connected with the interest of Vaile and Miner, the other with S. W. Dorsey, or Peck and the Dorseys; and this is not the scheme of the indictment, and if the jury so find they must acquit the defendants.

The COURT. I will refuse that for the reasons already given.

Mr. HENKLE. [Reading:]

NINETEENTH.

The mere making and filing of affidavits, as to the number of men and animals necessary to carry the mails on a given time, and the number necessary on a faster time, by either Miner, Peck, or Dorsey, for expedition on routes in which they had no interest after April 1, 1879, should not be construed as the continuing their joint interests, if the jury are satisfied from the evidence that the regulations or custom of the department required the making of such statements or affidavits by contractors.

The COURT. I grant that.

Mr. HENKLE. [Reading:]

TWENTIETH.

In the absence of positive or direct evidence a conspiracy may be proved by circumstances, but in that event every material circumstance must be proved beyond a reasonable doubt, and if the jury can account for the facts and circumstances proven upon any hypothesis consistent with the innocence of the defendants, or any of the defendants, they must acquit such defendant or defendants.

Your honor has perhaps substantially passed upon that point.

The COURT. That I decline to grant for that reason.

Mr. HENKLE. Your honor in your charge did not say specifically that every material circumstance must be proved beyond a reasonable doubt, but you did charge that they must be satisfied from the evidence

beyond all reasonable doubt. The point that is intended to be presented is that every material circumstance must be established beyond a reasonable doubt.

The COURT. In regard to the circumstances which go to make up the proof of the charge it is true that the existence of every one of those circumstances which is material ought to be proved beyond a reasonable doubt.

Mr. HENKLE. That is the prayer; every material circumstance. Your honor charges the jury that every material circumstance going to make up the conspiracy must be proved beyond a reasonable doubt.

The COURT. Yes. I think that is substantially comprehended, though, already in what I have said.

Mr. HENKLE. I do not know but what it is, your honor.

The FOREMAN. [Mr Dickson.] Some of the jury desire that you will read over the last prayer granted by his honor.

Mr. Henkle reread his twentieth prayer.

Mr. BLISS. Must it not be a hypothesis derived from the evidence, and not an outside hypothesis?

The COURT. That I take to be implied.

Mr. HENKLE. Of course.

The COURT. I have instructed the jury that they are not to resort to imaginary doubts. It must be a doubt based on reason and on the evidence.

Mr. HENKLE. Undoubtedly. I do not claim anything else.

Mr. MERRICK. The prayer is a great deal broader than that.

Mr. HENKLE. I will call your honor's attention now to our fourth prayer, on page 3174:

FOURTH.

It is totally immaterial whether the affidavit or affidavits as to the number of men and animals necessary to perform the service upon any route or routes named in the indictment overstate or understate the number of men and animals actually necessary to perform said service, unless the jury find from the evidence that said overstatement or understatement was known by the affiant or affiants to be false at the time of the making of said affidavit or affidavits, and that the defendant Brady knew of the falsity of said affidavit or affidavits when he acted upon the same; and unless they further find from the evidence that said false affidavit or affidavits was or were made in furtherance of the conspiracy set out in the indictment and for the common and joint benefit of the conspirators.

Mr. BLISS. Do you mean that if the affiant knew they were false and Brady did not it is entirely immaterial?

Mr. HENKLE. You have it before you.

Mr. BLISS. I understand it so.

Mr. WILSON. It means just as it reads.

Mr. BLISS. I submit that is not the law.

Mr. HENKLE. Then it is refused.

Mr. BLISS. No. I am not passing upon it. I am simply stating our views.

The COURT. I shall refuse that.

Mr. BLISS. Suppose having made the affidavit he discovered it was false before he filed it.

The COURT. In the first place there is not a particle of evidence in this case to show that any man who made an affidavit here was mistaken.

Mr. HENKLE. [Reading:]

FIFTH.

It is not criminal or unlawful for a contractor for carrying the mails upon the star routes to write or cause to be written and circulated petitions and recommendations for the increase and expedition of such routes; or to write or cause to be written and published newspaper articles advocating such increase or expedition of service; but, on the contrary, such acts are lawful and legitimate; provided such contractor does not himself write or publish, or cause or procure to be written or published, false statements for the purpose of unfairly or dishonestly influencing the Post-Office Department to allow such increase or expedition.

The COURT. I will allow that.

Mr. HENKLE. [Reading:]

SIXTH.

If the jury should find from the evidence that any one or more of the defendants has or have been guilty of acts which were intended to enable him or them to obtain money from the Government dishonestly or fraudulently, they should not consider such fraudulent or dishonest act or acts in forming their verdict, unless they should further find that such acts were performed in pursuance of the conspiracy set out in the indictment, and for the common benefit of the conspirators.

Mr. MERRICK. Your honor, they may consider such acts, may they not, as evidence of the existence of the conspiracy, although not done in pursuance of the conspiracy, exactly as the case in *Strange*?

The COURT. I think that that proposition is correct, but for the purpose of guarding against misapprehension I will say that any act done by these defendants, or any one of them in furtherance of the conspiracy, is binding on all the conspirators, if the jury believe from the evidence that the act was done in furtherance of the conspiracy. But if they are of opinion that any act done by any one of these persons was an individual act——

Mr. HENKLE. [Interposing.] Simply for his own benefit.

The COURT. Simply for his own benefit and not for the purpose of carrying out the general object of the conspiracy, then he is individually responsible and not responsible as a conspirator.

Mr. HENKLE. [Reading:]

SEVENTH.

While any act done with the purpose of obtaining money from the Government fraudulently is morally wrong, and in many cases is criminally indictable, yet no number of such fraudulent acts performed by one or more of the defendants will justify a verdict in this case against the defendant or defendants perpetrating such fraudulent act or acts, unless the jury shall find from the evidence the existence of the conspiracy set out in the indictment, that such defendant or defendants belonged to said conspiracy, and that said fraudulent act or acts was or were performed in pursuance of said conspiracy.

The COURT. If it be intended to convey the idea that it is necessary that the existence of the conspiracy must be shown to have pre-existed the fraudulent acts, I cannot grant it. I will grant it with this proviso: That the jury still have the right to judge from those acts whether they establish beyond a reasonable doubt the existence of the conspiracy, as alleged in the indictment.

Mr. HENKLE. What, I suppose, your honor intends to say is this: That any number of fraudulent acts performed by any one or more of these so-called conspirators is not to be imputed as the crime in the indictment unless the jury find either from that act itself or from evidence *aliunde*—other evidence—that there was a conspiracy and the act were performed in pursuance of the conspiracy.

The COURT. Now, that is the idea; provided, however, that this in-

struction is not to be understood as denying to the jury their right to draw an inference from such acts of the existence of the conspiracy.

Mr. HENKLE. Your honor then declines the prayer in the form in which it is presented, and qualifies it.

The COURT. Yes, sir.

Mr. HENKLE. Your honor will permit me to reserve an exception both upon your refusal to grant and upon——

The COURT. [Interposing.] Oh, yes. The reporter is taking it all down.

Mr. TOTTEN. If the court please, we join in all the exceptions which have been taken by Mr. Henkle, and I desire to call your honor's attention to one or two other matters which I think he has not brought to your honor's attention. We desire an exception to what your honor said about section 3679 of the Revised Statutes, the section which prohibits the involving of the United States in contracts over and above an appropriation. We think that is not good law.

We object to what your honor said about its not being needful that the party shall be convicted of an overt act on all the contracts. Your honor stated that an overt act on one contract was sufficient and would relate to all. To what was said on that subject we except.

We object to what your honor said as to the territory of Dakota and the Vermillion route. We join with brother Henkle in that. There are some statements of facts in that that we object to.

Your honor submitted the question as to this Vermillion route of whether it was a proper or important exercise of discretion. I think your honor used this language :

You may see, I cannot, that that was a proper exercise of discretion.

The COURT. Still I tell the jury that they are not to be convicted for the want of proper discretion in the absence of a fraudulent purpose.

Mr. TOTTEN. We object to it. I cannot repeat what the court said, but the language I thought conveyed an erroneous view of the law on the subject. I also desire an exception to the reading of the letter of Lord Bacon, and the note which your honor read.

Connected with your honor's illustration of the case in 1st Strange, touching the meeting of the man on the Carroll estate, we object to that. Your honor used language there which we think was entirely too broad—that the meeting together was enough to establish a conspiracy, or words to that effect.

We particularly object to your honor's doctrine that an old conspiracy may be continued within the limits of the statute of limitations, and also that any party may join a conspiracy. We object to what your honor said upon that subject.

We object to what your honor said in relation to the recommendations that the generals of the Army and members of Congress made, and we also object to a statement which your honor made a few minutes ago, that there was no evidence that any man who made an affidavit was mistaken. We take an exception to all that.

The COURT. I did not say that. I said, on the contrary, that on the part of the Government it is insisted that these affidavits are all false. What I meant to say was this: That I do not remember, and do not think the fact is, that there was any effort, or any attempt, or any offer, made on the part of the defense to show that the affidavit-maker in any one instance swore that he made it by mistake.

Mr. TOTTEN. We object to what your honor said about it. Now, if your honor please, touching these prayers that were read to the court

yesterday I have this to say: I understood your honor, and for that reason we did not insist upon having them passed upon at the time, that wherever the court had not covered the subject-matter, or had not answered the subject-matter according to our desire, that we were entitled to an exception. Now, your honor in several instances answered the subject; that is, your honor passed upon the subject, but not as we understand the law to be. For instance, on the subject of reasonable doubt, I think your honor limited it too much. We are entitled to a more liberal instruction on that subject. Upon all the questions concerning reasonable doubt we ask that an exception be reserved, because your honor did not give the instructions as we prepared them. There is sometimes an important difference, your honor, whether a particular rule of law is declared in particular language or in some other language. We prepared these instructions carefully, and we think we have them as nearly right as we are able to get them. Your honor stated your views of the law to the jury in your own way. They do not please us in some instances, and it would save us a great deal of trouble——

The COURT. [Interposing.] It is the court that talks to the jury in giving the instructions. It is its business to instruct the jury.

Mr. TOTTEN. Undoubtedly.

The COURT. The court is not obliged to adopt your language to express its thoughts.

Mr. TOTTEN. Oh, no; I am not contending for that.

The COURT. The only question on all these points is whether the court has stated the law correctly.

Mr. TOTTEN. Yes, sir.

The COURT. If the court has stated the law correctly in regard to the subject of your prayers that is enough.

Mr. TOTTEN. That is undoubtedly enough; but who is to be the judge? I may say my statement is correct, whilst your honor says yours is correct; your honor will not deny that I have a right to my exceptions.

The COURT. Oh, a man has as much right to an exception as he has to a writ of habeas corpus if he is in jail. It is the privilege of every free man.

Mr. TOTTEN. That is the only question. I was going on to say that there was a large portion of your honor's charge to which we have no sort of objection. It would take some time to go through these prayers and pass upon each one as Mr. Henkle did. So far as any subject-matter has been covered by your honor, according to what we think is the substantial right of the parties, we have no objection, and would not make use of any in any way. If we can have an exception to all these prayers which are not covered by your honor's instructions satisfactorily to us that is all we care for.

The COURT. You will have to point them out. The court stands upon its instructions to the jury. It has refused all the prayers that have not been brought to its attention and substituted instead of those prayers, its own instructions. Now, if there are any of those prayers which have been refused in that way you can take your exceptions. The court has refused them. But you will have to take your exceptions in court before the jury retires.

Mr. TOTTEN. Well, your honor, we will then take an exception on your honor's refusal to grant each and every one of these prayers as specified by counsel.

Mr. BLISS. I submit, your honor, that that cannot be done.

The COURT. No; that cannot be done.

Mr. TOTTEN. Your honor, then I will point out the second prayer, on page 3149, relating to the subject of reasonable doubt. I think the defendants are entitled to the prayer as it is written there.

The COURT. That is plainly covered by the charge.

Mr. TOTTEN. Then your honor declines to give it as we write it ?

The COURT. Yes.

Mr. TOTTEN. We except. The third prayer, your honor, relates to the mutual interest which your honor has passed upon. We think we are entitled to the prayer as written.

Mr. MERRICK. That is covered by the charge.

The COURT. I have expressed my views pretty fully on that subject.

Mr. TOTTEN. Against it ?

The COURT. Yes.

Mr. TOTTEN. Then that is refused and we except. Now comes the fourth. That relates substantially to the same subject.

Mr. MERRICK. That is covered by the charge.

Mr. WILSON. That is refused as written here.

Mr. TOTTEN. Your honor has passed upon that subject so that it is against us.

The COURT. Yes.

Mr. TOTTEN. I want an exception to the fourth prayer. The fifth relates to circumstantial testimony. That your honor rejects, I suppose, it having been touched upon by your honor, but not in quite as broad language as we think it ought to be.

The COURT. Yes. You have repeated that several times.

Mr. TOTTEN. The seventh prayer relates to a party being guilty of the whole of the charge and not of a part. Your honor has passed upon that point.

Mr. MERRICK. Allow me to go back and call your honor's attention to an element of the sixth prayer. There seems to be some purpose in skipping it.

Mr. WILSON. No, sir.

The COURT. They do not except to it.

Mr. MERRICK. Do you make no exception to that prayer ?

Mr. TOTTEN. No, sir. Your honor refuses the seventh prayer.

The COURT. Yes. I stand by my ruling on that. That is overruled.

Mr. TOTTEN. The next states that the Second Assistant Postmaster-General was a subordinate. That is the eighth.

The law authorizes the service to be increased and expedited, and the duty of deciding upon increase and expedition, or either, devolves upon the Postmaster-General. The law commits that to his judgment and discretion.

That relates to the subject-matter of discretion and that the court has no right or power to examine that exercise of discretion.

The COURT. That was ruled upon at a very early day on demurrer to the indictment. You took an exception then.

Mr. TOTTEN. We want an exception now. The ninth prayer relates to the corrupt purpose of the public officer making these orders. I will read it:

NINTH.

To prove that the defendant Brady made these orders set forth in the indictment will not satisfy the requirements of the law in this case. The proof must go much beyond that. It must establish that he *agreed*, as a part of the conspiracy charged, with the defendants to make them, and it must go still further, it must satisfy you that he so agreed for the *corrupt purpose* as charged in the indictment.

It is not sufficient to show that he had taken a bribe from any one or more of these

defendants, or from somebody else, for that is not the offense with which he is charged. He is charged with conspiracy—an agreement with these defendants to defraud the United States, and you cannot consider whether he has been guilty of any other offense than that so charged. If it is claimed that he has been guilty of such other and different offense, then before his guilt of it can be considered he must be specifically charged with it, according to the forms and requirements of the law, so that he may have an opportunity to meet it. No charge can be tried or considered in this case except the one set forth in this indictment—the charge of conspiracy. If that is not proved you must acquit.

Mr. BLISS. You mean that they may not consider bribery as evidence of conspiracy.

Mr. WILSON. There it is.

Mr. TOTTEN. I do not want to be catechised.

Mr. BLISS. Perhaps not. I submit we are entitled to have every exception made specifically, and to know whether this request is intended to cover the ground that bribery if proved cannot be used as evidence of the conspiracy. If they do not care to answer that question I call your honor's attention to it, and ask, in passing upon the request, that your honor will treat of that subject.

Mr. TOTTEN. I submit the ninth prayer, your honor.

The COURT. Undoubtedly counsel for the Government have a right to express their views in regard to any of these prayers.

Mr. TOTTEN. Certainly; I am not objecting to that. He can talk all day if he wants to.

The COURT. Some parts of this instruction are unobjectionable. I will grant it with this modification: That the acceptance by the Second Assistant Postmaster-General of money or any other valuable consideration in pursuance of a previous agreement with his fellow-defendants or any of them for the purposes alleged in the indictment, is evidence of a conspiracy.

Mr. TOTTEN. We take an exception to the modification of your honor.

Mr. HENKLE. I want to except to that too.

Mr. TOTTEN. I pass to the tenth now, relating to the subject of confounding genuine petitions with those that are not genuine, where there is a divided responsibility touching the petitions and papers on file which are supposed to have formed the basis of action. Your honor has already passed upon that.

The COURT. I think I was right in the view I took.

Mr. TOTTEN. Then that is refused and I want an exception.

Mr. BLISS. It is denied, as already covered.

The COURT. Yes.

Mr. TOTTEN. The eleventh prayer, your honor, is brief.

The COURT. I have read it. It is covered by the instructions.

Mr. TOTTEN. That is denied then.

The COURT. Yes.

Mr. TOTTEN. We except to that. I will read the twelfth:

TWELFTH.

To make the offense of conspiracy complete under the statute there must not only be a combining together of two or more persons, but some act must be done by some one of the alleged conspirators in furtherance of the common design. The act done here referred to is in law called an overt act. Without an overt act there is no offense, and it is therefore necessary that at least one overt act shall be charged in the indictment, and the proofs in the case, as to overt acts, must be confined to the overt act or acts set forth in the indictment, and you cannot consider any overt act that is not charged in the indictment.

The COURT. That is covered by the instructions already given.

Mr. TOTTEN. That is rejected, and we take an exception.

The COURT. And so is the next.

Mr. MERRICK. I was going to ask your honor in connection with that to give a more specific instruction in reference to the overt acts as distinguished from the testimony in the case. The distinction may be marked in one particular. The testimony may antedate the period barred by the statute of limitations. An overt act is to be subsequent to the period barred by the statute of limitations. There are various overt acts charged in this indictment, and among them are the acts of Brady, his orders granting this expedition, which are specifically described in the indictment, and which orders are based upon the precedence of fraudulent papers and false affidavits. There was a good deal of talk of variance which had no application on the face of the earth to the body of this crime.

The COURT. The overt acts of which we have heard so much are the overt acts set out in the indictment. The jury ought not to look at any overt act set out in the indictment or proof unless it is an overt act within the period of the statute.

Mr. TOTTEN. And within the indictment.

Mr. MERRICK. And within the indictment. All the orders are within the period and are specifically and carefully described and proved.

The COURT. It is for the jury to pass upon them. Those brief orders, "Do this—BRADY," are a great many of them within the period of the statute.

Mr. TOTTEN. We object to that statement, your honor.

The COURT. Take this case that I adverted to a little while ago—Vermillion to Sioux Falls. The record of evidence in the case which I have examined shows that on the 10th of July the service was increased to six trips a week and the compensation raised \$2,453.40 for increase, and on the same day the schedule was reduced from 14 to 10 hours and \$3,680.10 allowed for that. Those were orders made on the 10th of July, 1879. Those are set out as overt acts.

Mr. TOTTEN. The thirteenth prayer, the fourteenth prayer, and the fifteenth also may as well be put together. They allude to that very subject.

Mr. WILSON. And the seventeenth.

Mr. BLISS. It may be that part of them are good and part of them bad.

Mr. MERRICK. Will you take them all as one, or separately?

Mr. TOTTEN. We will take them separately.

The COURT. What do you want done about the fourteenth.

Mr. BLISS. They have not had your honor pass upon the thirteenth yet.

The COURT. Undoubtedly the overt act must be set out and must be stated specifically and distinctly.

Mr. TOTTEN. Then your honor allows the thirteenth and fourteenth prayers.

The COURT. Yes.

Mr. TOTTEN. [Reading:]

THIRTEENTH.

The overt act must be specifically and distinctly set forth in the indictment, so that the accused may be fully advised what he is required to answer, and no overt act charged can be considered by you unless it is proved as charged.

The COURT. That is true.

Mr. TOTTEN. [Reading:]

FOURTEENTH.

For illustration, it is charged as an overt act that Brady made an order to expedite service on the 23d of May, 1879; that charge would not be sustained by proof that he made the order on the 9th of May, 1879. This would be a fatal variance.

The COURT. Fatal to what?

Mr. TOTTEN. Fatal to that overt act.

Mr. MERRICK. But you say in the prayer it is charged. Where is it charged in the indictment?

Mr. TOTTEN. That does not make any difference.

The COURT. It is a question of variance. You alleged that the indictment states that the order was made on the 23d of May, 1879, when in point of fact the proof shows it was made on the 9th of May, 1879.

Mr. TOTTEN. We do not ask your honor to say what the proof shows, but to so charge.

Mr. MERRICK. You say simply, "For illustration it is charged."

Mr. TOTTEN. I believe it is so charged. But the other part does not follow.

The COURT. Your prayer is objectionable for bad grammar, I think.

Mr. TOTTEN. Our law may be better than our grammar.

The COURT. You deal in the subjunctive tense there. Now, the proof is all in, and you are asking instructions of the court upon the question of variance between the proof already in and an averment in the indictment. If it be so, the jury are the judges of that. If the fact be so that the order is charged in the indictment to have been made on the 23d of May, 1879, and the proof shows that it was made on the 9th of May, 1879, that is a good objection.

Mr. TOTTEN. That is satisfactory.

The COURT. But it is not an objection fatal to the indictment.

Mr. WILSON. No; fatal to that item.

Mr. TOTTEN. Fatal to that item.

Mr. MERRICK. Fatal as an overt act, but not as evidence.

Mr. TOTTEN. [Reading:]

FIFTEENTH.

Or if it is charged as an overt act that Brady made an order, and the proof shows that it was in fact made by French while he was acting as Second Assistant Postmaster-General, this would be a fatal variance between the proof and the charge, although it might appear that Brady had in writing or orally advised French to make such an order.

In such case the overt act is alleged to be the *making* of the order, not *advising French to make it*, and hence if the proof should show that he advised French to make it, it would not sustain the charge that he made it; there would in such case be a fatal variance, and such overt act must be excluded from the case.

The COURT. I refuse that, for several reasons.

Mr. TOTTEN. The sixteenth is not here. I suppose it is a misnumbering.

The COURT. The principal reason I have is this: That there is no evidence to show that Brady gave advice to French. When French did anything it was done because Brady said, "Do this." Brady was French's superior in office, and what French did under an order of that kind is Brady's act.

Mr. TOTTEN. We object to that statement, and take an exception. The seventeenth prayer relates to the presentation of fraudulent claims, and proceeds upon the theory that if a part of the claim is correct it cannot be separate in fact so as to consider that part which may not be correct.

The COURT. What is the meaning of that?

Mr. MERRICK. If one five hundred dollar bill is good and another five hundred dollar bill is bad, and the claim is for a solid thousand, the good five hundred makes the other five hundred good also.

The COURT. Is that what it means?

Mr. TOTTEN. I cannot explain it to you any better than it is explained in the paper. I do not want you to take brother Merrick's explanation.

Mr. MERRICK. Am I not right?

Mr. TOTTEN. No, sir.

The COURT. I think it means what Mr. Merrick suggests.

Mr. TOTTEN. What does your honor do?

The COURT. I refuse it.

Mr. TOTTEN. We take an exception.

EIGHTEENTH.

The principle stated in these illustrations is applicable to each and every overt act charged in this indictment, and you will look to each and the evidence in regard to it, and wherever you find a variance such as is here referred to between the charge of the overt act and the proof in regard to the charge, you must exclude such overt act from your consideration.

And if you find such a variance as to each overt act set forth in the indictment it is fatal to the case, because even if you should believe that the parties conspired, still there can be no conviction without proof of an overt act.

Mr. MERRICK. There is no evidence to base that on.

Mr. BLISS. No, sir; your honor has denied several of those illustrations already, and I do not see how you can say that the principle in this illustration is good.

The COURT. I refuse that.

Mr. TOTTEN. We take an exception. The nineteenth prayer relates to the question of productiveness, upon which your honor has passed, and against us.

The COURT. Without reading that I will reject it, because I have covered that ground.

Mr. TOTTEN. That is excepted to also. Now, I skip the twentieth, as it is so long.

TWENTY-FIRST.

In proving a case by circumstantial evidence, each circumstance relied upon must be proved with that degree of certainty which excludes every hypothesis other than that of guilt. If the circumstance relied upon is consistent with innocence, you must adopt that hypothesis. In other words, the evidence must prove to you that that circumstance is wholly inconsistent with innocence. If it is consistent with innocence, you must exclude that circumstance from your consideration. The law requires that a party accused shall be proven guilty of the charge imputed to him beyond a reasonable doubt; and, until the evidence removes from your mind every reasonable doubt of guilt, you cannot find the defendant guilty, and this rule applies to each circumstance in the case, when circumstances are relied upon for the purpose of proving the party's guilt.

Mr. MERRICK. I have one suggestion to make about that.

The COURT. I refuse that. It has already been fully answered.

Mr. MERRICK. One circumstance may be inconsistent with guilt, but when linked to two or three circumstances the chain formed may conclusively show guilt.

Mr. TOTTEN. We except to the refusal of that prayer.

TWENTY-SECOND.

Again. The offense is complete when the conspiracy is formed and an overt act is done in furtherance of the object of that conspiracy. As soon as the offense is com-

plete the statute of limitations begins to run, and although the parties may have gone on afterward in doing acts in furtherance of the objects of the conspiracy, such acts do not change the time when the offense was complete, and therefore if you believe from the evidence that the conspiracy charged was entered into, and that an overt act was committed in furtherance of that conspiracy, and that that overt act was committed more than three years prior to the commencement of this prosecution, the prosecution must fail.

The COURT. I refuse that for the reason that a conspiracy is no less a conspiracy within the three years because it existed anterior to the three years. An old conspiracy is just as good as a young one if it is continuous.

Mr. TOTTEN. We object to that, your honor, and except to it all.

TWENTY-THIRD.

Again. The law requires that this prosecution shall have been commenced within three years after the offense is committed, and the commencement of the prosecution is the filing in this court of the indictment. The indictment was filed on the 20th day of May, 1882, and therefore this offense, if committed at all, must have been committed within three years prior to the 20th of May, 1882, or since the 20th day of May, 1879. The indictment is found upon a statute approved on the 17th day of May, 1879, and to sustain this indictment it must be proven that the offense was committed since that statute took effect and within three years prior to the finding of the indictment. The statute is, in substance, that if two or more persons shall conspire, &c., and one or more of them shall commit an act in pursuance of the alleged conspiracy, the parties shall be deemed guilty of an offense. The indictment being under the statute of May 17, 1879, and that statute providing that an overt act must be committed for the purpose of carrying into effect the conspiracy, no act that was committed prior to the passage of that act can be of any avail in this case, and you must reject it from your consideration. To prove this case the prosecution must establish by the evidence beyond a reasonable doubt that within three years prior to the finding of the indictment, and since the enactment of the statute mentioned, the defendants, or some of them, did combine, conspire, confederate, and agree together to defraud the United States for the mutual benefit of the defendants, as charged in the indictment, and unless the evidence shows such an agreement within the three years alluded to, this prosecution cannot be maintained, and you must acquit the defendants.

I want to strike out the word "pursuance" and say "to effect the object of the conspiracy." That is the language of the statute.

Mr. MERRICK. That is covered by the charge.

Mr. TOTTEN. I do not think it has been.

The COURT. When we began the trial of this case I supposed that the indictment was framed under section 5440 of the Revised Statutes, and I remained under that impression until very recently. I never saw this new statute in fact until last night.

Mr. MERRICK. The only change is in the punishment. The character of the offense is not changed, and that is the reason there was no discussion by us.

The COURT. The only difference between it and section 5440, which was the law in force up to the 17th of May, 1879, is in the punishment. This statute declares that section 5440 of the Revised Statutes of the United States of America shall be amended so as to read as follows:

If two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to the penalty of not more than \$10,000 fine or imprisonment for not more than two years, or both fine and imprisonment, in the discretion of the court.

This act was approved May 17, 1879, and of course since that date has been and is the law of the land, and section 5440 of the Revised Statutes is repealed so far as it is inconsistent with this. This indict.

ment having been found on the 20th of May, 1882, the three years run back to the 20th of May, 1879, and it seems that this statute was then in full force.

Mr. BLISS. Perhaps I might be permitted to call your honors attention to the reason why you were probably under the misapprehension as to 5440. The discussions preliminary to the trial were had upon the original indictment found against these defendants. That alleged a period which was prior to the 17th of May, 1879, and therefore came under that statute. One of the reasons why we preferred to try this indictment rather than the other was that in case of conviction and when it came to the sentence there might be a trouble arising from the difference of the sentence imposed under 5440 as it originally stood and under the act of May 17, 1879, and therefore this indictment found on the 20th of May, 1879, avoided that difficulty.

The COURT. Of course this is the law now applicable to this case.

Mr. TOTTEN. Then your honor grants the twenty-third prayer.

The COURT. Oh, well, it is really in my view a very impracticable question, but I shall undoubtedly grant that prayer. I have already told the jury that none of these defendants can be convicted except for being members of a conspiracy since the 20th of May, 1879, and that there must have been one or more overt acts committed by one or more of the defendants in pursuance of that conspiracy since that time.

Mr. TOTTEN. If your honor intends that for a modification of this prayer we object to it.

The COURT. That is the law, I think.

Mr. TOTTEN. That is what your honor has declared.

The COURT. That is the way I hold.

Mr. TOTTEN. Your honor refuses to give this prayer without the modification.

The COURT. I do not understand that I modify it. I declare to you the sense in which I understand it.

Mr. TOTTEN. We object to that declaration of the sense of it, and note an exception.

The COURT. I have ruled in favor of your clients that they cannot be convicted except for belonging to this conspiracy since the 20th of May, 1879, and that there must have been an overt act committed by one or more of the defendants in pursuance of such conspiracy. That is the way I understand it.

Mr. TOTTEN. I understand it very differently.

The COURT. I understand that to be your prayer, and if there is any other sense in it I would like to have you explain it.

Mr. TOTTEN. I cannot explain it except that I object to the theory of the law that if a man is found belonging to a conspiracy three years' old on the 23d of May, he can be convicted under this statute.

The COURT. It is pretty difficult to comprehend such a proposition as that.

Mr. TOTTEN. Then your honor refuses that prayer, except with that modification?

The COURT. I do.

Mr. TOTTEN. Now, your honor, we will pass to Mr. Chandler's first prayer. It is a very long one and is simply recitative.

The COURT. I think my brother Chandler has gone very far wrong as to the law of this case.

Mr. CHANDLER. The court will change its mind, after awhile.

The COURT. I shall overrule the first prayer on account of its length.

Mr. BLISS. I submit that it is not a prayer in any sense.

The COURT. I overrule it on account of its length and for other reasons.

Mr. TOTTEN. For general infirmity. The second, your honor, relates to the subject-matter of the means and instrumentalities to be used upon which your honor has already passed. We object to what your honor said, and ask for this prayer, which I suppose your honor will refuse.

Mr. MERRICK. There is another objection to the prayer. If a prayer has any defective feature in it that disposes of the whole prayer. The close of the prayer says that the jury are the judges of the law and facts.

Mr. TOTTEN. The court so informed the jury this morning.

The COURT. We will not have any dispute about that question. They have the power.

Mr. TOTTEN. Your honor has covered this subject.

The COURT. Yes.

Mr. TOTTEN. That is the second prayer of Mr. Chandler on page 3162. Your honor denies that and we take an exception. The third prayer relates to fraud upon the United States. Your honor has already practically denied that doctrine.

Mr. BLISS. I don't recognize what is meant there.

Mr. TOTTEN. You had better read the prayer.

Mr. BLISS. It is pretty clear that you are anxious to have that instruction denied, and I want to see what is in it.

Mr. MERRICK. The fifth part of it is unquestionably defective, your honor. I am willing to have the denial of that.

The COURT. Oh, yes; I cannot grant that.

Mr. TOTTEN. We note an exception.

FIFTH.

The jury are charged that whether or not the public good or welfare required the increase of trips and the decrease of time in carrying the mail over the several routes mentioned in the indictment (which increase of trips and decrease of time is complained of in the indictment) was and is a question by the laws of the United States primarily and exclusively confided to the judgment of the Postmaster-General to determine, and it is wholly immaterial for the purposes of this trial whether the jury believe said increase of trips and decrease of time ought to have been ordered or not.

I think we have been over that subject before.

Mr. BLISS. Is it wholly immaterial if the acts of the Second Assistant Postmaster-General were caused by corruption?

Mr. WILSON. There is the instruction.

Mr. BLISS. I think I may make a remark to the court in the nature of a criticism upon the request if I see fit.

The COURT. I will refuse that prayer on the ground of want of distinctness.

Mr. TOTTEN. We take an exception. The sixth prayer I think I will skip, inasmuch as we have disposed of that subject pretty fully. The seventh relates to the mutual interest, and that has been passed upon. I will skip that.

EIGHTH.

The jury are instructed that the indictment charges that defendants conspired to defraud the United States by means, among others, that defendants John W. Dorsey, John R. Miner, John M. Peck, Stephen W. Dorsey, Harvey M. Vaile, and Montfort C. Rerdell, then and there fraudulently wrote and signed, and caused and procured to be written and signed, a large number of fraudulent letters and communica-

tions and false and fraudulent petitions and applications to the Postmaster-General for additional service and increase of expedition on and upon the mail routes mentioned in the indictment. To the extent that the evidence has shown in this case that the increase of service and expedition on said routes was procured and ordered upon letters, communications, and petitions not written or signed or procured to be written or signed by said defendants there is a failure of proof of the allegations of the indictment in that respect.

Mr. MERRICK. That is too vague.

The COURT. I cannot see the ground for that.

Mr. TOTTEN. We take an exception. The ninth prayer relates to the subject of reasonable doubt.

Mr. MERRICK. We have had enough of that, haven't we?

Mr. MCSWEENY. I call attention to a part of that prayer.

No circumstance can affect a defendant in this prosecution which does not arise out of his own conduct or admissions connected therewith.

The COURT. That ignores the character of a conspiracy.

Mr. MERRICK. Because he is affected by the acts and declarations of his coconspirators.

Mr. MCSWEENY. That is the universal decision of the authorities. I have read the authorities stating that very language. It is his own act that must bind him, subject, of course, to a difference if there is a conspiracy.

The COURT. There is the trap. We will refuse that.

Mr. TOTTEN. We note an exception. I skip the tenth and ask your attention to the eleventh.

Mr. MCSWEENY. Let me call attention to the ninth. We said we would call your honor's attention to anything that we deemed bad law that was announced. I do not do this in that sense. I am content with what you have said upon the subject; but the distinction between civil and criminal cases, I have no doubt your honor will take pleasure in saying a word about. In the latter part of the ninth prayer are these words:

It is not sufficient to justify a verdict of guilty that there may be strong suspicions'

I simply wish the court would emphasize a word there as to the distinction between civil and criminal cases as to the kind and quantity of evidence; not that you have not charged correctly and fully, as far as you have gone, but I will be obliged to the court if the court will mention to the jury the difference between criminal and civil cases, and impress it upon their minds a little better. That is all I ask.

Mr. MERRICK. I think your honor has charged fully upon that subject.

The COURT. I think we had better not deal with civil cases at all.

Mr. MCSWEENY. It is laid down in the books——

The COURT. [Interposing.] I know; but here we are dealing with a criminal case, and the less we talk about civil cases the better. The jury are not going to read the criminal books.

Mr. MCSWEENY. I read them to the court.

The COURT. I know. That is the doctrine, and if I were writing a book I would say something on that subject too. But we are not trying a civil case or laying down rules for trying a civil case. I have covered this point fully in my instructions.

Mr. TOTTEN. I proceed, with your honor's leave, to skip numbers tenth, eleventh, twelfth, and thirteenth.

FOURTEENTH.

The jury are instructed that the defendant Brady, in the official management of

the Post-Office Department, was an officer subordinate in authority to that of the Postmaster-General, and the orders made by defendant Brady, read in evidence in this case, were subject, under the operation of the laws of the Post-Office Department, to the approval or disapproval of the Postmaster-General, and if the jury believe from the evidence in this case that the Postmaster-General signed and approved the orders read in evidence, signed D. M. Key, relating to the increase and expedition of mail service on the routes mentioned in the indictment, then such signing and approval of said orders by said Postmaster General Key, was an official confirmation of said Brady's orders, and constituted said orders the orders of the Postmaster-General.

The COURT. They undoubtedly were the orders of the Postmaster-General, but the charge in the indictment here is a conspiracy to impose upon the Postmaster-General and get money from the United States by procuring those very orders. That is refused.

Mr. BLISS. I merely call your honor's attention to one thing; that there is one entire day of orders, including two of the orders in this indictment in the journal that was not signed by anybody. Do they mean to say that those orders were the orders of anybody?

The COURT. Oh, there are orders enough.

Mr. TOTTEN. Well, that prayer is denied and we take an exception.

Mr. WILSON. The next relates to the appropriations. I suppose that is covered.

Mr. TOTTEN. Your honor has passed upon that question.

Mr. BLISS. They claim that Congress has a pardoning power, that is the idea.

The COURT. In my construction that act of Congress has no such effect. It has if anything the reverse effect.

Mr. TOTTEN. That is refused then and an exception noted. The sixteenth prayer I will leave. I am not disposed to quarrel with your honor upon that subject. I will read the seventeenth:

SEVENTEENTH.

It is not sufficient to establish the charge of conspiracy to defraud the United States, made in the indictment against the defendants, to show that the defendants, exclusive of Brady and Turner, had a mutual and common pecuniary interest in any number, or all, of the contracts, subcontracts, and the property and property rights thereto appertaining or springing out of or connected with the mail routes mentioned in the indictment, for such mutual interest in and joint ownership of said contracts, subcontracts, and property and property rights by defendants is permitted by law.

The COURT. There is no such point as that in the case.

Mr. TOTTEN. Does the court deny it?

The COURT. Yes; on the ground that there is no question about that proposition.

Mr. TOTTEN. We note an exception.

EIGHTEENTH.

The jury are instructed that the alleged official acts charged in the indictment to have been done, or to have been intended to be done, as a part of the alleged conspiracy set forth in the indictment, by defendant Brady as an officer of the Government of the United States, are not in the indictment charged to have been corruptly done or intended to be so done, and therefore in that respect there is no sufficient charge of corruption against said defendant Brady, and the jury will acquit him.

The COURT. That is refused.

Mr. TOTTEN. We except.

NINETEENTH.

For the purpose of this trial it is immaterial to inquire whether the amounts shown by the evidence in this case to have been paid to certain of the defendants as a re-

sult of the increase of trips on the routes mentioned in the indictment, and a decrease of time in carrying the mail over said routes, were extravagant or not, and the jury are instructed that with that question they have nothing to do.

The COURT. That is refused.

Mr. TOTTEN. We note an exception.

TWENTIETH.

The jury are instructed that the body of the offense in this case as charged is conspiracy to defraud the United States, and an overt act charged to have been done by one of the defendants to effect the object of the alleged conspiracy; it is not competent, therefore, for the prosecution to use or the jury to receive the facts and circumstances and testimony introduced to prove the conspiracy, and also to prove by the same testimony the alleged overt act; to effect the object thereof the conspiracy must first be proved by the evidence, before there can be perpetrated an overt act to effect the object thereof, so that the testimony which is necessary to establish the alleged conspiracy cannot at the same time prove the alleged overt act to effect its object.

The COURT. I am pretty well committed on the other side of that question.

Mr. TOTTEN. We except.

TWENTY-FIRST.

The indictment in this case charges that one of the means alleged to have been by the defendants employed to promote and carry into effect the alleged conspiracy to defraud the United States, was to deceive the Postmaster-General by the alleged false petitions, letters, affidavits, and other means, &c., in said indictment mentioned; the jury are instructed that there is no evidence in this case that the Postmaster-General was deceived, or was by defendants conspired to be deceived about and concerning the matter in said indictment complained of, and they will acquit the defendants.

The COURT. That is refused because it is neither the law nor the fact.

Mr. TOTTEN. We take an exception to what your honor stated just now. I pass the twenty-second.

TWENTY-THIRD.

The Second Assistant Postmaster-General, at the time or times mentioned in the indictment, possessed no lawful power to make an order for either expedition or increase of service on any post-route, and no money could have been lawfully paid out of the moneys in the Treasury of the United States appropriated for the Post-Office Department, by reason or on the authority of such an order, if made by the Second Assistant Postmaster-General.

The COURT. I do not see that that has anything to do with the issue we are trying. That is denied.

Mr. TOTTEN. I pass over the twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, and fortieth. We ask the forty-first,

FORTY-FIRST.

The jury are instructed that on the indictment and evidence in this case they will acquit all the defendants.

The COURT. That is unreasonable.

Mr. TOTTEN. That is denied, and an exception noted. We pass all the remainder, your honor.

The COURT. All the rest, then, are regarded as refuses, without exception.

Mr. HENKLE. I desire to ask one more prayer:

The part assigned to Turner in the scheme of the indictment is an essential element in the description of the conspiracy charged; and if the jury find from the evidence that Turner is not guilty they must find the rest of the defendants not guilty also.

That, of course, is refused.

The COURT. Of course.

Mr. HENKLE. And an exception noted. Now, I desire to reserve the same exceptions that have been reserved by my brothers on the other side.

The COURT. Oh, I suppose in this matter you are joint.

Mr. TOTTEN. Each and every exception is reserved for all the defendants, your honor.

Mr. MERRICK. And all the prayers that have not been called to the attention of the court are withdrawn practically.

Mr. TOTTEN. That is all we have to say, your honor.

The FOREMAN. [Mr. Dickson.] I would like to submit an inquiry to the court. In this case there have been a number of documents presented in the shape of proof taken from the records of the Post-Office Department. It occurred to me to inquire of the court whether it would be proper to take into the jury-room such papers as we may deem of importance, not only to refresh our memory, but in connection with the charges as presented in the indictment?

The COURT. No. All those papers are matters of evidence. The rule is that nothing is to go into the jury-room except the indictment and the pleas. Nothing of the character of evidence.

The FOREMAN. The indictment never having been read to the jury, the propriety of asking if it would not be proper before proceeding with our deliberations to have the indictment fully read also occurred to me.

The COURT. It has been discussed. I suppose you know more about it from the discussion than you would from reading it probably. That is my case. I see no reason why you should not take one or more copies of the indictment with you.

Mr. HENKLE. Let them take one of the printed copies.

Mr. WILSON. We have no objection.

Mr. HENKLE. We want them to have it.

Mr. MERRICK. Both sides consent that they may take a printed copy. [A printed copy of the indictment was handed to the foreman.]

The COURT. I may be able to save you a little trouble. There is a good deal of matter in the indictment that you need not read very carefully. From page 1 to page 15, inclusive, you will find nothing more important than introductory matter. From page 15 to page 27 you will find the charge of conspiracy. From page 27 to the end you will find the overt acts set out. There are 89 pages in the indictment.

Mr. HENKLE. If the court please I think the jury had better read a little farther back. I would like to have them commence as far back as page 4.

The COURT. Oh, they will read it all. What I say to the jury is merely my opinion. Conspiracy is the crime, and it is the only crime in the indictment; but it must have under our statute an overt act. A mere conspiracy with nothing done afterwards is no crime under this act; but a conspiracy formed and followed by an overt act done by one or more of the conspirators, even one act, is the crime. Now the conspiracy being the crime, must be proved, and the overt act being necessary to constitute the crime must be proved as set out.

Mr. INGERSOLL. As set out in the indictment.

The COURT. But every one of these overt acts need not be proved. If any one of all this multitude of overt acts, between pages 27 and 89, you find to be done in pursuance of the conspiracy, that is, if there is a conspiracy, that is enough. Provided there is a conspiracy, one overt act done by any one of them is enough. As to all this history it really might have been omitted. As to all the detail of means that were in the contemplation of the conspirators at the time the conspiracy was formed that is unimportant, because it does not belong to the conspiracy itself. Whatever is unnecessary to prove or whatever may be proved by a variation from the averments in the indictment, is not a matter of strict proof. The conspiracy is the only thing that must be strictly proved besides the overt act. All the rest admits of variation and liberty of proof or not, as the prosecuting officer may deem proper. The court did admit a large amount of proof under the indictment in regard to those averments, but the prosecution does not necessarily fail because it has not proved the means to be used by the defendants in pursuance of their alleged conspiracy according to the description of them in their indictment.

Mr. HENKLE. That we except to, your honor.

The COURT. I understand that, but that is my view of the law, and unless the jury adopt your doctrine it is proper to consider that it is the law. I suppose they will take it to be the law, or ought to take it to be the law; but they have the power not to find in that way.

This has been a very long case, and it is not to be expected that some points may not have been overlooked. It was impossible for me to prepare a written charge on the case. I did not know what ground was going to be taken by the defense in their prayers, and it would have been an unnecessary labor. The trial itself and the strain upon the attention during the whole progress of the trial was enough of a task for me to perform. Although my duty has been very imperfectly done in instructing you, you have my instructions as they are. You have my convictions of what the law is, and my hearty commendation. The questions of fact are for your consideration. Take the case, gentlemen. The court will take a recess until six o'clock. If you have agreed upon your verdict at that time we shall be glad to see you, and whether you have or not you had better appear.

The jury then (at 2 o'clock and 53 minutes p. m.) retired in charge of the bailiffs sworn for the purpose, and the court took a recess until 6 o'clock p. m.

SIX O'CLOCK P. M.

Messrs. Henkle, Wilson, Totten, and Williams, of counsel for defendants, present.

The COURT. [To the marshal.] Let the jury know that I am here. (After an intermission of four minutes the jury entered and remained standing.)

The COURT. Call the jury.

(The jury was called and answered, all being present.)

The CLERK. Gentlemen of the jury have you agreed upon a verdict?

The FOREMAN. [Mr. Dickson.] We have not except as to one of the defendants.

The COURT. That won't do. You had better take your seats until the counsel for the Government come in.

(The jury here took their seats, and after the lapse of one minute Messrs. Bliss and Ker, of counsel for the Government, entered.)

The COURT. The foreman of the jury announces that the jury have not agreed except as to one. I told them they had better take their seats until the counsel for the Government appeared, and see what they have to say upon that subject.

Mr. BLISS. I do not understand that your honor expects anything from us in the matter.

The COURT. As at present advised I will decide that the jury will have to go back. We cannot take a verdict piecemeal. They might come in to-morrow and say that they had agreed upon a verdict as to another one. [Suppressed laughter.] [To the jury.] We will have to remand you, gentlemen, to your quarters again. The marshal will be instructed to attend you to-night and provide entertainment for you. I will not promise what we shall do in that respect after to-night.

The MARSHAL. [To the court.] They will go to the room upstairs.

The COURT. That is rather uncomfortable.

The MARSHAL. If they go there at present we will provide quarters for them afterwards.

The COURT. [To the jury.] You will retire to your room, gentlemen. The marshal is instructed to provide for your comfort to-night, but take care that you do not let any of the jury-fixers approach you at the hotel or anywhere else.

At this point (6 o'clock and 8 minutes p. m.) the jury retired.

Mr. HENKLE. What time will the court meet again?

The COURT. The court will meet at 10 o'clock to-morrow morning. If the jury shall reach a verdict before that time they will wait until that hour. If they should agree in five minutes from this time they will have to wait until to-morrow morning. The court will take a recess until to-morrow morning.

At this point (6 o'clock and 13 minutes p. m.) the court took a recess until to-morrow morning at 10 o'clock.

AFTER RECESS.

Ten o'clock a. m., [Saturday, September 9, 1882.]

Counsel for the Government and for the defendants being present.

The MARSHAL. [To the court.] Are you ready for the jury?

The COURT. Ask the jury if they have any report to make.

[After a few minutes' absence the marshal returned and spoke to the court in an undertone.]

The COURT. I want to say a word to them. Tell them to come down.

[At 10 o'clock and 19 minutes the jury entered and took their seats; were called by the clerk, and all responded to their names.]

The CLERK. Gentlemen of the jury, have you agreed upon your verdict?

The FOREMAN. We have not, sir.

The COURT. The court having taken a recess until a certain hour desires to hear from yourselves the answer to that question. That is the reason I sent for you instead of receiving the report by the messenger. You can retire.

The FOREMAN. The jury desire me to present a proposition to the court, and before reading it permit me to submit it in writing and ask whether it is proper at the present time, sir. [Submitting a paper.]

The COURT. [After reading the paper to himself.] The jury have a right to be instructed by the court upon any difficulty in regard to the law which they may entertain as to any questions of fact. That is their province. They must decide questions of fact. Now, I will read your question except the introductory part of it. [After further perusal of the paper.] It seems from this that the jurors are divided in opinion in regard to whether there were one or two conspiracies after the 20th of May, 1879. That I understand to be the substance of the question now presented to the court.

Mr. DICKSON. [The foreman.] Now submitted; yes, sir.

The COURT. Well, that is a question of fact. I endeavored to advise with the jury yesterday in regard to the law to be applied to the facts in relation to that question. I can only repeat now, substantially what was said yesterday, that if the jury are of opinion, on the evidence, that since the 20th of May, 1879, the evidence shows that there were two conspiracies instead of one, it is impossible to find a verdict under this indictment. This is an indictment for one conspiracy; but it is not necessary that all the defendants should be guilty or none of any conspiracy. As I told you yesterday it might be that some were not guilty of a conspiracy and others guilty. That rests with the jury on the facts. As to the effect of interchange of interest between certain of these defendants which took place, or it is claimed took place, about the 30th of March, 1879, the court instructed you that no mere interchange of interest in the contracts ought to affect at all the question of conspiracy. If the conspiracy continued still the interchange of interest between the members of a conspiracy will have no effect whatever upon the conspiracy itself. If A was the contractor on one route, B the contractor on another route, and C the contractor on another route, and these three were members of the conspiracy, then if A interchanged his contract with B and B in exchange gave the interest in his contract to A and the same thing took place with C, they all remaining in the same relation to the conspiracy, that interchange ought not to have one particle of influence on this question. If that is the difficulty that is a question of law which I think I have a right to say something about. I have no doubt on that matter of the right of the court to instruct the jury absolutely—a question of law. I was satisfied that, without arrogating the full power of the court in terms with regard to that question, this jury would be content to accept with consideration the views of the court on a question of law. Now, gentlemen, I am obliged to say to you—

Messrs. TOTTEN and HENKLE. [Interposing.] We except to what your honor has said.

Mr. DICKSON. [The foreman.] There are some of the jurymen who desire to present a question. Mr. McCarthy desires some information on that subject. [Presenting a paper to the court.]

The COURT. [After perusing the paper.] This is a fair question for a jurymen to ask, but I think it one of no difficulty at all.

Should the jury be satisfied that a conspiracy existed on the part of some of the defendants, but the date of the overt acts charged to have been committed do not agree with the dates set forth in the indictment, would that be fatal to the indictment?

I do not wonder, gentlemen, that your minds should become a little confused in regard to an indictment which covers eighty-odd pages of printed matter, and which you have before you, and have no doubt been examining; especially as jurors are not accustomed to the examination

of papers of that character, and do not know what a mass of irrelevant matter is generally trundled into an indictment. I do not mean to say that there is anything in this indictment that was not prudent for the pleader to put into it, because an indictment is prepared and found before the case is tried, and the pleader who prepares the indictment with proper care and prudence will prepare it in such a way as to cover all probable aspects of the evidence as it may be presented.

This indictment is based upon the statute which I am about to read to you. It is the act approved 17th of May, 1879, a very recent act. It is in these words, and it is in the same words identically with the act contained in section 5440 of the Revised Statutes, which you have heard read before, except as to the punishment. But I will read this again:

That section fifty-four hundred and forty of the Revised Statutes of the United States of America be amended so as to read as follows:

If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act—

ANY ACT—

- to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court.

You, gentlemen, have been sworn to try the question of conspiracy under that law, and you have the character of the conspiracy set out in that indictment. If you believe that these defendants or any of them are guilty of that conspiracy, that is one step settled, and you should, when you reach that conclusion, sink a post there. That question being settled, the next one is as to the overt acts, for there are forty or fifty pages of this indictment which are employed in setting out distinct overt acts. If any one of those overt acts is correctly set out, and be such an overt act as is contemplated by that statute it is enough, although all the others might be incorrectly set out. I called your attention to one route in this case—the route from Vermillion to Sioux Falls. I compared the overt act set out in the indictment with the overt act as it was proved in that case. The overt act in that case as proved corresponds in date and terms with the overt act charged in the indictment, if you believe the evidence. Now, I did not go over it for the sake of talking with you and consulting with you. I did not think it worth while; I did not think it was necessary. I thought it would be an abuse of your patience, after all this time and all this labor in this case, to go over all these overt acts *seriatim*; but I confined myself as a specimen, as an example, to the facts proved in regard to that one route, and I say to you as a matter of law that if in your judgment there is one conspiracy established by the evidence as in existence it makes no odds when it originated; but if it was a conspiracy in existence since the 20th of May, 1879, and it was in existence at the date of these overt acts, or any one of them, and any of these defendants belonged to that conspiracy, the case is made out.

Mr. INGERSOLL. Will the court just allow me one word?

The COURT. Yes, sir.

Mr. INGERSOLL. There is the case referred to by the court of this overt act on some route. I would like, however, for the court to instruct the jury that they have no right to consider any overt act set out in the indictment as an overt act unless it has been established as charged.

Mr. MERRICK. I would ask the court in addition to that to call the attention of the jury—

Mr. INGERSOLL. [Interposing.] I am not through yet.

Mr. MERRICK. Pardon me.

Mr. INGERSOLL. Just one moment. That they have no right to consider any overt act set out in the indictment as an overt act, unless it has been proven exactly as laid. Secondly, that it is impossible to make any one defendant responsible for the act of any other unless the fact of the conspiracy has been established beyond all reasonable doubt. And third—

The COURT. [Interposing.] I am not going to have this question argued any more.

Mr. INGERSOLL. I am not going to argue it.

The COURT. I cannot hear any more. This is a talk between the jury and myself.

Mr. MERRICK. Have I the right—

The COURT. [Interposing.] No, sir; I will hear nothing more.

Mr. MERRICK. I would ask your honor to give—

The COURT. [Interposing.] The court has its responsibility. That responsibility is thrown upon the court in such a way now that the court must meet it. The time for argument is passed.

Mr. MERRICK. The counsel on the other side having said a word, I want to ask your honor, in a single sentence, to do one thing in reply to the suggestion of counsel. To call the attention of the jury to the orders made by Brady expediting the routes and increasing service, and ask them to inquire whether or not those orders are all strictly proved, precisely—

The COURT. [Interposing.] Mr. Merrick, that was unnecessary.

Mr. CARPENTER. Certainly. The mischief is done.

The COURT. None of these remarks were needed. There is nothing new suggested by any of them. The court has covered the ground already. It covered the ground yesterday, and covered that ground in response to the questions presented to it this morning by the jury. [Mr. Wilson arose.] I cannot be interrupted, gentlemen. I must be allowed to talk to the jury alone. The law requires that the overt acts shall be proved as laid. You cannot set out in an indictment an overt act of one character and claim that an overt act of a different character sustains that indictment. There must be one or more overt acts identically described in the indictment. The proof must be that the same overt act as it is described in the indictment has been made out. But if there be forty overt acts described in the indictment and none of them described correctly according to the evidence except one, and you find the proof in regard to any one overt act corresponds exactly with the description of the overt act in the indictment, that I tell you, upon my responsibility, is sufficient.

Be sure that you have a conspiracy, and then be certain that some overt act or one or more charged to have been performed by one of the conspirators is proved as laid, and so far as you are concerned the question is settled.

Mr. HENKLE. If the court please, the part of your honor's remarks in which your honor stated as a fact that your honor had examined the route Vermillion to Sioux Falls, and had found an exact correspondence between the allegation and the proof I desire to except to.

The COURT. Yes, you excepted to that point yesterday.

Mr. HENKLE. I desire to except to it again and to your honor's statement of facts found by your honor.

The COURT. Now, I must have a close of that—

Mr. HENKLE. Will your honor, then, allow me while I am on my feet

to conclude my exception to all the remarks of your honor as to the conspiracy?

The COURT. Why, certainly. I consider that every syllable that I have uttered is exceptionable to the gentlemen.

Mr. TOTTEN. I want to note an exception to all your honor has said in reply to the inquiry made by the last juror.

The COURT. I know you do. [Suppressed laughter.] I know it is no jest at all. I do not think that what I have said is at all gratifying to the gentlemen, and I know that they do not like the law, and they have a right to except to it, and they have a right to hold the court responsible for its errors.

Mr. INGERSOLL. I certainly except to your honor saying that we do not like the law; that is what we do like, and I want a verdict according to the law, and no other way.

The COURT. What I say is that these points of law to which you except are exceptionable to you.

Mr. HENKLE. I put it exactly the way your honor put it.

The COURT. I understand that they are all excepted to by the gentlemen, and that is their right.

Mr. INGERSOLL. I meant no disrespect by excepting—not the slightest.

The COURT. I understand that; but the remark which has just fallen from General Henkle brings a suggestion to my mind in regard to this overt act on the Vermillion and Sioux Falls route. It is one of the well-settled doctrines of the law that the interpretation of written instruments belongs to a court. If there be a paper in a case requiring interpretation, that interpretation belongs to the court, and there is no question between the court and jury on such a proposition as that. It is absolutely the business of the court to interpret written instruments. I read in the indictment a description of an overt act in regard to a certain route, and I read on the jacket a written paper produced here in the cause, and submitted the description of an overt act done by one of the defendants, and that description corresponds *verbatim*, to the last and most minute particular, with the description in the indictment. It becomes the duty of the court, then, to say to you, gentlemen, that if you believe that jacket is a genuine paper in this case, and that order signed, "Do this—BRADY," written on that jacket was written by Brady there is no escape; that overt act is proved. I think now, gentlemen, that I have made myself as plain as I am capable of doing.

Mr. WILSON. To the last observation of the court in response to what Mr. Henkle suggested we all except.

The COURT. Oh, yes.

Mr. HENKLE. We all except.

Mr. WILSON. And I desire to take a further exception. The court said awhile ago, and subsequently modified it, after reading the statute, that if the parties conspired and did any act—*any act*—that made out the offense. To that also I take exception.

The COURT. Any act described and set out in the indictment as an overt act.

Mr. WILSON. That is not what your honor said before.

The COURT. I am sure it is. You could not have been attentive. I dislike to speak peremptorily in that way when I know that the gentleman is honest in what he says in regard to his understanding of what fell from the court. But in regard to that matter I think it is not possible that I could have been in error. I will repeat it, though, so that I may meet the misunderstanding that I think there is of my brother Wilson.

Mr. MCSWEENY. If the court please, there is also this last expression, "If this be so, there is no escape."

The COURT. I will explain that, too.

Mr. MCSWEENY. Very well.

The COURT. Well, gentlemen, we are talking so that we can get at the proper ground of decision in this case, and I shall be ready at all times to talk with the jury in regard to any difficulty they may have. As to the validity of this indictment, you are not the judges, gentlemen. The court has passed upon the indictment. That is a valid indictment. The court determined that a long time ago, and we have been engaged, not in trying whether that indictment is a well-drawn instrument or whether it charges a crime, but whether the facts sustain the indictment. Now there is a conspiracy charged in that indictment, a conspiracy to defraud the Government, and there is only one conspiracy charged. You may find any two or more of the defendants guilty under that indictment of that conspiracy. If there are others guilty of something else, but not of that conspiracy, of course they must be acquitted. Whoever in this indictment is guilty of *that* conspiracy can be held.

Now as to the overt act. If the overt act set out in the indictment is an overt act done by one or more of the conspirators, and that act is proved to be the identical act described in the indictment, I do not see where there is any gap left between the conspiracy and the overt act. If you are satisfied first that the conspiracy exists, and then that an overt act in pursuance of that conspiracy has been proved as set out in the indictment, the two elements necessary for a verdict are linked together by hooks of steel. All this is a question of fact for you, gentlemen, except as I stated, that where the overt act is proved in writing as set out the court has the right to say whether that overt act so set out in writing corresponds in form with the overt act described in the indictment. It is for you to say whether in these papers brought from the department this signature of Brady is a forgery or not, whether the execution of that order has been proved. That is a matter of fact. But I am bound to say that where a man's signature has been proved on one side and not disputed on the other it makes a pretty strong *prima facie* case of execution. Now, gentlemen, you can retire. I will say this—

Mr. HENKLE. I except to what has been said last by the court.

Mr. INGERSOLL. Is it not proper for the court to say that nobody ever did dispute the signature; that we have never raised any issue on that?

The COURT. Yes, it is proper for me to say that.

Mr. INGERSOLL. Do not let this case go off on the idea that we dispute that that order was signed. I am perfectly willing to admit that order and twenty more.

Mr. BLISS. I do not know that the gentleman has any right to admit for Mr. Brady.

The COURT. It was on account of the utmost scrupulosity on my part as to interfering with the functions of the jury that I was not even willing to take that admission as proof of the fact.

Mr. CARPENTER. We except to the last statement of the court as to the finding of any fact by the court in the case.

The COURT. Of course, you can settle that with the court above. Now, gentlemen, as to the next recess. It is now 11 o'clock. I will be here at 1 o'clock. I do not know how comfortable the marshal may have made you.

Mr. DICKSON. [The foreman.] Very comfortable, sir. We have no complaint to make.

The COURT. I hope he has done his duty in that respect.

Mr. MCCARTHY. [A juror.] I wish to state in regard to the overt acts that I would like some information. We have no right to question the dates regarding the overt acts? We are to suppose that they are all right?

The COURT. Why, certainly.

Mr. MCCARTHY. [A juror.] We have nothing to help our memories.

The COURT. What is written is written there on the indictment. You have before you an admittedly correct copy.

Mr. INGERSOLL. The only question he says is, is he bound by those dates?

The COURT. Certainly. So far as your duty is concerned every date on the face of that paper is to be taken as true, and then you must apply the proof to that paper. No proof of an overt act that does not correspond with the description in the indictment is a valid overt act.

Mr. MCCARTHY. [A juror.] We have no means of finding out, we have no dates nor anything of the sort. It is almost impossible to find out any such thing as that. That is my reason for asking you the question.

Mr. INGERSOLL. I am willing the jury should take the printed record so far as I am concerned.

Mr. MCCARTHY. I wish we could.

Mr. INGERSOLL. And the speech of everybody.

Mr. MCCARTHY. If we could have the record it would be very satisfactory to us. It is impossible for us to remember so many dates.

The COURT. I have told you that it is not necessary that you should remember them all. If you remember one it is sufficient.

Mr. DICKSON. [The foreman.] If the court will allow me I will renew a request made yesterday. I asked yesterday for permission to take into the jury room the papers that have been submitted in evidence upon some of these routes. The gentlemen composing the jury—and it is not to be wondered at—have had such a voluminous lot of testimony thrown at them that they are considerably mixed as to dates, and it has led to some debate as to whether the dates set forth in the indictment correspond with the dates of the papers submitted on that particular route, 35015.

The COURT. As to that, in the argument there was a good deal of question made in regard to the want of correspondence between the description of the affidavits that were given in proof and the description contained in the indictment as to the time of filing and by whom they were filed.

Mr. INGERSOLL. And as to the petitions also.

Mr. HENKLE. Now, your honor, the foreman has taken very elaborate notes of this trial, and on behalf of my client, and I presume on behalf of others, I am quite willing that Mr. Dickson shall take his notes into the jury-room and use them.

Mr. DICKSON. [The foreman.] I prefer not, sir. I would prefer to have the papers.

Mr. BLISS. We are willing that they may take into the jury-room every exhibit proved and marked in this case.

Mr. HENKLE. It would be better to take the printed record.

Mr. BLISS. No, sir; the printed record is full of the remarks of counsel and other things which I think should not go there. But the exhibits proved in the case we are willing should go there. I am accus-

tomed to practice in a jurisdiction where they go if the jury wishes them always.

Mr. MERRICK. That is if your honor considers it to be the law that the parties by agreement can, according to the rules of law, allow the papers to go.

The COURT. I regard this as a statutory misdemeanor.

Mr. MERRICK. That is true.

The COURT. And that the parties are bound by their waivers or agreements. It would be different in a case of felony where the defendant cannot waive any right, and where his counsel can waive no right on his behalf. If you agree on both sides that these papers which have been given in evidence may go in——

Mr. HENKLE. Oh, no, your honor.

Mr. INGERSOLL. We agree that the record may go in.

Mr. HENKLE. They may take the printed record in with them.

The COURT. I should not allow the printed record to go in, because wherever there is evidence it contains two or three speeches, and the jury ought not to have the speeches.

Mr. HENKLE. It won't hurt them any.

Mr. HOLMEAD. [A juror.] We have all taken notes. Those notes are now in the custody of the marshal, and I think if we all were to take our original notes that we could come to a more intelligent verdict. We had placed our sole dependence upon those notes with the expectation that we would be allowed to use them in the jury-room.

Mr. INGERSOLL. I am willing.

Mr. HENKLE. We have no objection to that.

Mr. MERRICK. I have no objection to it.

The COURT. Now, gentlemen, take your notes. You can retire. The court will meet you here at 1 o'clock.

Mr. DICKSON. [The foreman.] Two o'clock would suit us better, your honor.

The COURT. Then, make it 2 o'clock.

Thereupon (at the hour of 11 o'clock and 5 minutes a. m.) the court took a further recess until 2 o'clock.

AFTER RECESS.

Two o'clock p. m. [Saturday, September 9, 1882.]

Counsel for the Government and for the defendants being present.

The COURT. [To the marshal.] Ask the jury if they have agreed upon a verdict.

[The marshal here left the room, and after an absence of a few minutes returned and spoke to the court in an undertone.]

The COURT. They have not sent any answer yet. I have sent to inquire if they have agreed upon a verdict, and will get a reply to that question in a few minutes.

[After a lapse of 20 minutes.]

The COURT. It appears that this jury have not made up their minds yet. We will take a further recess until 6 o'clock.

At this point (2 o'clock and 30 minutes p. m.) the court took a recess until 6 o'clock p. m.

AFTER RECESS.

6 O'CLOCK P. M.

The COURT. [To the marshal]. Tell the jury the court is here.

The MARSHAL. (Returning after an absence of a few minutes.) It is reported that there may be an agreement in a few minutes.

(After a lapse of eight minutes the jury entered and took their seats.)

The COURT. Call the jury.

(The clerk then called the jury, and all the members thereof responded to their names.)

The CLERK. Gentlemen of the jury, have you agreed upon a verdict?

Mr. DICKSON, the foreman. We simply desire to report to the court that the jury have come to an agreement as to some of the defendants named in the indictment and not as to others.

The COURT. Well, the court is not now at any rate willing to accept a verdict of that kind. I believe there is an instance of that sort in the history of this court, and there have been instances in which what I might call imperfect verdicts have been rendered—a verdict as to some of the defendants and no verdict as to others. I am not willing to accept such a verdict as that, at any rate at this stage. The verdict of the jury, in my judgment, ought to be complete. You have a number of defendants here. Those who are guilty, if there are any, will have to submit, of course, to the verdict as to them. Those who are innocent, if there are any, are entitled to a verdict of acquittal. I do not mean to say that, if after a fair test the jury should come into court and say that they are able to agree upon a verdict as to some, but that they are really unable to agree in a verdict as to others, the court might not accept such a verdict as that, but it would only be after a longer trial on the part of the jury.

Mr. DICKSON, the foreman. The jury have not yet directed me to make such a report. We simply came down in obedience to your summons to state what I have stated.

Mr. INGERSOLL. Would the court allow me to ask—I do not know, of course, what the jury have done, but if a defendant has been found not guilty by the jury——

The COURT [interposing]. Sir?

Mr. INGERSOLL. If one of the defendants, or two, or any number have been found not guilty, I can myself see no reason why they should not know that fact and why they should not be discharged. I do not see what right the court would have to hold a person after the jury had said that he was not guilty. I do not know, of course, what the jury have done in the case, but it seems to me that if they have found one or more of these defendants not guilty it is the right of such defendants to know and to have that verdict. If they can agree as to others that they are not guilty, or if they fail to agree as to others, that is another matter.

The COURT. Well, when it comes to the time when the court is prepared to discharge the jury and the jury shall say, "We find certain of the defendants, one or more, not guilty, and are unable to agree as to the others," that will be the time for the court to determine that question. But that time has not come. I think that no instance can be found in which a court at common law accepted a verdict of acquittal as to one to-day, and to-morrow as to another, and the next day as to another, and the next day as to another, or proceeded on any such principle as that.

Mr. INGERSOLL. I would like to see the goods delivered as fast as they are finished. I do not know; of course I would like to know.

The COURT. If I saw any propriety in such a course as that, I should be very glad to relieve the minds of any of the defendants; but until the moment arrives when the court is prepared to discharge the jury I think it would not be proper to accept a verdict of that kind.

Mr. MERRICK. There can be but one verdict, your honor, in any case. It cannot be divided.

The COURT. Well, gentlemen, we are obliged to detain you another night.

Mr. DICKSON, the foreman [laughingly.] At the public expense.

The COURT. And to-morrow being Sunday——

Mr. MERRICK [interposing]. The record of this court will state that it is Friday.

The COURT. The record of this court will not observe Sundays. The record of the court does not show that we have had a Sunday. To-day's sitting is yesterday's sitting, because we do not adjourn; we take a recess; and when the record of this case comes to be made up, its last day's sitting will appear under the head of Friday's sitting. And if you should agree upon a verdict to-morrow, and let me know, I will come and relieve you from your imprisonment. It will all be called Friday.

Mr. HENKLE. Would it not be well, your honor, to fix some time to-morrow when the court will meet. The defendants will be scattered, and want to be present, and ought to be present.

The COURT. Perhaps that is a good suggestion. They ought to be here when the verdict is rendered. Then we will say 10 o'clock to-morrow morning.

Mr. MERRICK. I was going to suggest, your honor, that if the jury are going to remain in their own room to-night, there might be a meeting at 10 o'clock for them to make a report.

The COURT. I do not suppose the jury is very anxious to come in at 10 o'clock to-night. They are very comfortable where they are, and would rather come in to-morrow morning at 10 o'clock.

Mr. MERRICK. It is only on their behalf that I make the suggestion.

The COURT. If they were locked up in the upper story of this building and were obliged to sit up on stools or lie down upon the floor I should entertain that proposition. I do not think that they are undergoing any punishment where they are.

Mr. DICKSON (the foreman). We are very comfortable, sir.

The COURT. We will take a recess now until to-morrow, Friday (Sunday), morning at 10 o'clock.

At this point (6 o'clock and 19 minutes) the court took a recess until to-morrow morning at 10 o'clock.

AFTER RECESS.

10 O'CLOCK a. m., *Sunday, September 10, 1882.*

Counsel for the government and defendants present.

After the court was called to order the marshal retired from the court room and in a few minutes returned and whispered to the court.

The COURT. The jury have overslept themselves this morning.

At 10 o'clock and 12 minutes the jury entered and took their seats.

The COURT. Call the jury.

The clerk called the jury and all the members thereof responded to their names.

The CLERK. Gentlemen of the jury, have you agreed upon a verdict?

Mr. DICKSON, the foreman. I am not yet directed by the jury to make a return, sir.

The COURT. You have not agreed upon a verdict?

Mr. DICKSON, the foreman. Partially.

The COURT. I do not know but I shall have to administer the common law in its purity in this respect. At common law the jury is to be locked up and kept together without light, fires, or any of the comforts of civilized society, and so kept until the verdict is reached. I will consider whether I shall adopt that course. The common law is in force in this District. Well, we must have another recess, then.

Mr. DICKSON, the foreman. It may be proper for me to state that we are no nearer a conclusion than when our last report was made.

The COURT. Well, then, gentlemen, the time has come when we will enforce the common law. The marshal will take this jury to their own room and detain them as other jurors are detained until a verdict is reached, and the court will take another recess. I shall consult the convenience of the jury as much as possible in that respect—shall it be 1 o'clock or 2 o'clock?

Mr. DICKSON, the foreman. Whenever it may be convenient to you, sir; any hour you may designate.

The COURT. Say two o'clock.

Thereupon, at 10 o'clock and 17 minutes, the court took a recess until 2 o'clock p. m.

AFTER RECESS.

2 O'CLOCK P. M.

The COURT [to the marshal]. Invite the jury down.

The marshal retired, and in five minutes returned and spoke to the court in an undertone.

The COURT. The jury say if the court has anything to say to them they are willing to come. So far as the court is concerned it has nothing to say. Adjourn the court until 10 o'clock to-morrow morning. I think that adjournment would be the better way. I propose to end Friday now. But perhaps it is better to take a recess. We will take a recess until to-morrow morning at 10 o'clock.

At 2 o'clock and 6 minutes the court took a recess until to-morrow morning at 10 o'clock.

AFTER RECESS.

[10 O'CLOCK A. M., *Monday, September 11, 1882.*]

The COURT [to the crier]. Adjourn the court of Friday until Monday at 5 minutes past 10 o'clock. This is in imagination Friday's sitting.

The crier adjourned the court until Monday morning, September 11, at 10.05 a. m.

MONDAY, *September 11, 1882.*

The court met at 10.05 a. m.

Present, counsel for the government and for the defendants.

The COURT [to the marshal]. Inform the jury that the court is now in session.

The marshal retired, and in a few moments returned and spoke to the court in an undertone, and at 10.10 the jury entered.

The COURT. Call the jury.

The clerk called the roll of jurors and all responded to their names.

The CLERK. Gentlemen of the jury have you agreed upon your verdict?

The FOREMAN [Mr. Dickson]. I will report that the jury stand the

same as they did on Saturday last when my report was made. They have decided as to four of the defendants, and do not agree as to the others.

Mr. INGERSOLL. I wish the court to ask if there is any prospect of a change in their opinion.

The COURT. That is a matter about which different jurymen might differ. That is a matter of opinion. I am not willing to discharge you yet. The court will take a recess until 2 o'clock.

Mr. INGERSOLL. If it be proper, I would like to call the attention of the court to section 1036 of the Revised Statutes, providing that a jury may find a verdict as to some of the defendants and not as to others.

The COURT. That was the law before that statute was passed. I am satisfied that that might be done. Still, it is an inconclusive sort of verdict. If it is possible the jury should be brought to decide the issue as to all the defendants. It is due, I may say, to the defendants themselves. The issues are of the highest importance to all of the defendants. If there are any not guilty in the opinion of the jury, I think they ought to have a verdict.

Mr. INGERSOLL. Of course; but we know there is very little logic in hunger and not much evidence in inconvenience.

The COURT. You are assailing the venerable institution of trial by jury.

Mr. INGERSOLL. I am not assailing that institution, but I am assailing the barbarism of two hundred years ago.

The COURT. We need not discuss that. The jury consists of twelve men, and the law requires that they shall be unanimous. Some persons think that an unreasonable law; but it is the law. It is part of the law, too, that, unless permitted by the court, the jury after they go out are not to be allowed anything to eat or drink or anything to sleep upon. If we do not keep them awake they may fall asleep where they are; but lights and fuel are to be denied them. The court in this case has not enforced that part of the barbarism of the law any further than that it has instructed the marshal to treat this jury as he has been in the habit of treating other juries; of course they are not to be indulged in luxuries which might tempt them to stay out longer than is necessary; but I am unwilling to enforce the barbarism of the law, as you term it, by starving them. They can have water to drink, and food to eat, and a place to rest.

The FOREMAN [Mr. Dixon]. May it please your honor, the jury have just instructed me, if it be proper, to present to you my personal views, briefly, upon the subject of an agreement.

The COURT. I cannot receive those. If the jury are still in darkness as to the questions of law, the court will with pleasure try to enlighten them. If you have any trouble as to any point of law, and will submit it to the court, the court will answer it.

The FOREMAN. We have fully discussed every point as presented by your honor with regard to the law of conspiracy and the facts presented in the testimony.

The COURT. That, of course, I have no doubt you have done.

Mr. MCNELLEY [a juror]. Your honor, I would like to state that I am firm in my convictions and nothing would alter them; nothing at all.

The COURT. I have no doubt of that; but there is no one of you now who can speak for all.

The FOREMAN. No one, sir.

The COURT. After discussion comes deliberation. You have announced to the court that you have discussed the whole case. I have no doubt you have been deliberating, but you have not reached a con-

clusion upon the whole case. It is in the power of the court to accept such a verdict as you are prepared to render now; but the importance of the issue and the great amount of labor, expense, time, and care expended in the trial of this case, render it very important that, if possible, you should find a complete verdict as to all the defendants, although I do not wish to give you a binding instruction as to that. You may try once more.

The FOREMAN. We obey with respectful submission to the court.

The COURT. I do not wish you to understand that the court has given a pledge to discharge you at 2 o'clock. I merely now say that we will take a recess until 2 o'clock.

At this point, 10.21 a. m., the jury retired, and the court took a recess until 2 p. m. to-day.

AFTER RECESS.

2 P. M.

The COURT. Inform the jury the court is waiting.

(The marshal retired, and Messrs. Merrick and Ker, of counsel for government, entered.)

Two o'clock and seven minutes the jury entered.)

The COURT. Call the jury.

(The clerk called the jury, and all the members thereof responded to their names.)

The CLERK. Gentlemen of the jury, have you agreed upon a verdict?

Mr. DICKSON (the foreman). The jury stand as at last report.

The COURT. I have come to the conclusion, gentlemen, to accept your verdict.

(The foreman here consulted with the jury.)

The COURT. Are the defendants all here?

Mr. INGERSOLL. Yes, sir.

The COURT. Call them.

The CLERK (calling). John W. Dorsey.

JOHN W. DORSEY. Here.

The CLERK (calling). John R. Miner.

JOHN R. MINER. Here.

The CLERK (calling). Stephen W. Dorsey.

Stephen W. Dorsey did not answer.

Mr. INGERSOLL. He is at the door.

Mr. WILSON. Mr. Brady is at the door also.

The COURT. Well, have them come in.

(The clerk here stopped calling, and after the lapse of a few minutes Stephen W. Dorsey and Thomas J. Brady entered.)

The CLERK (calling). Stephen W. Dorsey.

STEPHEN W. DORSEY. Here.

The CLERK (calling). Montfort C. Rerdell.

MONTFORT C. RERDELL. Here.

The CLERK (calling). Thomas J. Brady.

THOMAS J. BRADY. Here.

The CLERK (calling). William H. Turner.

WILLIAM H. TURNER. Here.

Mr. DICKSON (the foreman). I am instructed by the jury to make a report as to this indictment (indictment indicated in his right hand). As to John M. Peck and William H. Turner, not guilty. As to John R. Miner and Montfort C. Rerdell, guilty as indicted. As to John W. Dorsey, as to S. W. Dorsey, as to Harvey M. Vaile, and as to Thomas J. Brady, the jury are unable to agree.

Mr. MERRICK. John M. Peck was not indicted before the jury.

Mr. DICKSON (the foreman). We understand that, sir, and thought that the form required such a return, and it was an error therefore on the part of the jury in making it.

The COURT. He is not in the indictment.

(After conversation between the court and the clerk.)

The COURT. Report now the verdict.

Mr. DICKSON (the foreman). Then we change the form. The jury instruct me upon this indictment to make the following return: As to William H. Turner——

The COURT (interrupting). The jury find that William H. Turner is not guilty; that John R. Miner and Montfort C. Rerdell are guilty as indicted; that as to John W. Dorsey, Stephen W. Dorsey, Harvey M. Vaile, and Thomas J. Brady, the jury are unable to agree.

Mr. HENKLE. If the court please——

The COURT (interposing and referring to the rising of several counsel). Take your seats.

The CLERK. Gentlemen of the jury, your foreman says you find Wm. H. Turner not guilty, John R. Miner and Montfort C. Rerdell guilty, and as to John W. Peck——

The COURT (interposing). No.

The CLERK. And as to John W. Dorsey, Stephen W. Dorsey, Harvey A. Vaile——

Mr. MERRICK (interposing). Harvey M. Vaile.

The CLERK. Harvey M. Vaile, and Thomas J. Brady, you fail to agree upon a verdict. So say you all, gentlemen.

Mr. HENKLE. Would it be proper now, your honor——

The COURT (interposing). The jury are discharged.

Mr. HENKLE. I desire to submit a motion in arrest of judgment and for a new trial on behalf of John R. Miner. I will put it in form and file it at the proper time.

Mr. MERRICK. If your honor please, in relation to the parties who have been found guilty, I presume that the exigency of their bail bond is answered, and your honor will put them in custody. As to the parties in reference to whom the jury has found not guilty, of course Mr. Turner will be discharged. As to those in reference to whom the jury have failed to agree, I ask your honor to require new bonds for their appearance, as the exigency of the old bonds is answered.

Mr. WILLIAMS. If your honor please, on behalf of Mr. Rerdell I give notice of the motion in arrest of judgment and a motion for a new trial.

Mr. INGERSOLL. As to the difficulty as to the bonds, we had that question before the court, I think, three or four days ago, as to the condition of the bond, that they should appear and not depart without leave of the court. That bond is a surety as good now as it ever was, and I see no propriety in giving a new bond. I see no object, no legal necessity for any new bond.

Mr. MERRICK. That bond was a valid bond up to the time of the finding of the jury.

Mr. INGERSOLL (interposing). The jury have not found——

Mr. MERRICK. The jury have found that they could not find, and the jury is discharged. The question that was submitted to the court the other day was whether or not the exigency of that bond had not been answered when the case was given to the jury. Your honor determined that it had not and that the bond remained good until the jury had come to a conclusion of some kind or other. I submit on behalf of the government that the exigency of that bond has now been answered, and the last or additional provision, that the parties should not depart

the court without day, does not save the obligatory part of the bond, and I therefore ask for new bonds for all these parties.

Mr. WILSON. If your honor please, it seems to me that it is almost too plain for argument. Here is the form requiring these parties to appear and abide the judgment of the court. That is the substance of it. The case has been submitted to the jury, and there is no verdict against them. Now the bond certainly is obligatory on them, and upon them all. I cannot conceive why the government should require these parties to come in now and give new bonds, when they are already under recognizance. What has discharged their bonds? The court has not discharged them. There is no judgment in the case, nothing upon which to predicate a judgment. Now, I would like for somebody to give some sensible suggestion as to what it is that has discharged these recognizances. If anybody knows of any they can enlighten me. It is precisely as though this jury had never been impaneled. I cannot conceive of anything that has happened that would release either of the defendants or his surety. I never heard anything like it before.

Mr. TOTTEN. The court will remember, by the terms of the recognizance which was read a few days ago, that the object of those who signed that recognizance was that the defendants should not depart without the leave of the court. Now, I take it that the defendants, who have no verdict against them or for them, stand exactly in the same attitude which they would have occupied if some day had been fixed for trial, and in consequence of some question or other the case had been postponed until some future day, whether it be two weeks or two months. We have been here, it is true, trying this case, but there has been a mistrial as to all these defendants, so that your honor has upon the records of the court a recognizance for the appearance of these defendants at any time your honor may call upon them, and I submit that it is entirely superfluous to call upon anybody for a bond. A bond is good until your honor says they shall go, and when your honor says that, I take it they may go.

Mr. KER. If your honor please, as I understand it, the condition of the bond is that the defendants will appear in court and answer at the present term, and from term to term until they are discharged. Now, the form of this recognizance is the same all over the world where the common law of England prevails. The bondsmen of the defendants have brought the defendants here and have submitted them to your honor, and they have undergone a trial which has resulted in a mistrial. The moment that the defendant is submitted to the court, the moment that he is brought within the view of the court and the jury take charge of the case, that moment the obligation of the bond is entirely fulfilled. But, leaving that to one side, your term is limited by assignment; your honor has entered upon the records of this court that you take a recess from time to time, not that you adjourn, not that the court is over. Now, it may be that we will not be able to bring this case up for trial again during the time that your honor sits upon the bench, and then the question will arise, "Are these bonds good? Have the bondsmen fulfilled their obligations? Are we able to hold the bondsmen in case the defendants do not appear?" If there is any doubt upon that subject, I ask your honor to resolve that doubt in favor of the Government. We are in earnest in this matter. One mistrial does not mean that we do not intend to pursue these people to the end, and we want simply to have them here; and all that we ask on the part of your honor is to make that obligation so certain that it should not be subject to a doubt or a dispute, and therefore we ask your honor to compel them to renew their bonds.

Mr. WILSON. Now, if Mr. Ker is right in his proposition, it is this, as I understand it, that whenever these parties come here and submit themselves to the jury then their recognizance is discharged. According to that theory, for the last three months not one of these defendants has been under any bond or recognizance whatever. Now, it seems to me, with all due respect to brother Ker, that that is absolutely absurd. Now, what has happened? Has anything happened to change that? Not a thing; no verdict; not anything to change the status of these parties before the court. Now, we are here under recognizance. Nobody questions the entire sufficiency of the recognizance we have given.

Mr. MERRICK. Pardon me, I do.

Mr. KER. So do I.

Mr. WILSON. Nobody has made any proposition in that direction. why the court should require additional recognizance so far as Mr. Turner is concerned. As a matter of course his case is out of court. So far as General Brady is concerned, his recognizance is ample.

Mr. MERRICK. How much is it?

Mr. WILSON. Twenty thousand dollars, backed up by one hundred thousand dollars in real estate.

Mr. MERRICK. I am very glad to hear it.

Mr. WILSON. There is no sort of doubt about it. Now, what has happened, I repeat, to discharge this recognizance? As Mr. Ker says, this is an obligation which requires these parties to appear from term to term until this case has ended, and my client has given a bond amply sufficient to secure his appearance from term to term, and I do not see why we should be subjected to this kind of a motion.

Mr. MERRICK. May it please your honor in reference to the last suggestion made by our learned friend as to the sufficiency of the recognizances, I question their sufficiency, and from one of the defendants particularly I shall demand a larger recognizance. The other recognizances I shall look after. I have sent for them, but they are not here. Twenty thousand dollars by Mr. Brady, backed up by one hundred thousand dollars in unincumbered real estate, liable, as I shall endeavor to show, for money received by him.

The COURT. That is another question.

Mr. MERRICK. That is another question. Now, I say that Mr. Ker's theory of the meaning of the law, in its strict application as stated by him, is entirely correct. But after the jury has acted, and after they have failed to agree, two consequences follow. First, upon an indictment the court sees if there is cause to hold the party to answer to a petit jury, and it looks at the probabilities of the criminality as charged in that indictment, and makes its bond accordingly. After a petit jury has considered the case under the facts presented and the law, and failed to agree, then I submit that the original bond taken on the indictment from the grand jury ought not to be regarded as sufficient, but there should be another bond, by reason of an additional certificate of probability of criminality from a petit jury.

The COURT. That is another aspect of the case altogether.

Mr. MERRICK. That is true, but Mr. Wilson introduced it, and I question the sufficiency on the statement that he made that there was no question of that. Now, when the petit jury has failed to agree, there is unquestionably great room for doubt, in my opinion and Mr. Ker's, as representing the Government. The doubt is a certainty in favor of the exigency of the bond having been answered, and I merely submit—

The COURT. Your course in that view is to enter a motion that these

defendants should be required to increase the amount of their recognizance.

Mr. MERRICK. My motion is double; that they should give a new recognizance and an increased amount, and I simply submit it on the part of the Government without further discussion.

Mr. INGERSOLL. I want to say one word. In the first place, the bond now given is good, legally speaking. There is nothing to discharge. Nothing has happened that can by any possibility discharge it. We understand that. Now, the first question is, can we give an additional bond? The only reason that we should give an additional bond is that the jury has failed to convict them; therefore, they contend, that is great evidence they are guilty. I do not care to discuss that, for there is no motion to discuss to give bond. Of course they can make that motion, and of course the court can fix the time to-morrow morning. I do not want anything done in this case except what is fair. We are willing to give any bond that this court thinks we ought to give, but we are not willing to have a bond declared void that is not void.

The COURT. I am of opinion that the recognizance already entered into, so far as the parties against whom there has been no verdict rendered, are subsisting and valid recognizances. It might not have been so at the common law, but we are governed to a great extent by the statutes passed. As to the two parties who have been found guilty, Rerdell and Miner, I am of the opinion that there is a need for their recognizances, the jury having rendered a verdict of guilty in their cases.

Mr. HENKLE. Does your honor think that you can accept new bond for them pending the——

The COURT. It is certainly decided that the old recognizance is at an end.

Mr. HENKLE. I think that is so, your honor. I was going to ask the court to accept new bond for them pending the hearing of the motion.

The COURT. I am not disposed to foreclose you on that question immediately. I will allow you to be heard upon that subject, but the jury having rendered a verdict in this case, there is nothing left except an order of commitment as to these two. The law *does* provide that where the offense is a capital offense or is punishable by imprisonment in the penitentiary, as this is, that the execution of the sentence may be suspended until thirty days, or some period after the expiration of the next term of the general term of the court—until some day not later than thirty days after the adjournment of the next general term. Now, there has been a motion in arrest of judgment and a motion for a new trial in regard to these two defendants, and no doubt there will be an appeal to the court in general term upon the questions which have been passed upon in the course of this trial; but whatever will be needed as to those motions on that appeal, there is no doubt about the point that the liability of both of the two recognizances of the two defendants terminated with the rendition of the verdict. The order of the court, therefore, is, as to them, that they be committed. The court will accept bail hereafter in their cases pending the appeal for their benefit, and an appeal is a question which we will pass upon hereafter, and also in regard to the motion that has been made by Mr. Merrick for the increase of bail in the other cases. That will be considered. My present inclination very decidedly is that the bail already entered into in the cases that are still pending and undecided remains. It has not been discharged by order of the court or any finding of the jury. But that does not meet the question entirely. Mr. Merrick's motion is that new recognizances be required and that the bail be increased. I think, for the purpose of

hearing these two questions further, we will adjourn the court until to-morrow morning, or, if it be possible, the morning after.

Mr. HENKLE. I would suggest the day after to-morrow. To-morrow morning would hardly give us the time to examine the question to aid the court by authorities.

Mr. MERRICK. I have no objection to accommodating my brother, so far as I am concerned.

The COURT. The marshal will take into custody the defendants Rerdell and Miner. Adjourn the court now.

Mr. DICKSON (the foreman). One moment, sir. I am requested by the gentlemen composing this panel to return to you, sir, our thanks and gratitude for the many kind considerations you have extended to us, and for your courteous treatment of us at all times. We also feel grateful to the officers of the court for their kind and considerate treatment. Many of us who have composed this panel have been performing compulsory duty since early in March. We have had before us an army of witnesses. We have been talked to death by the gentlemen who stood before us here. We have been imprisoned; but we shall leave the court-room with pleasant recollections of an unpleasant duty. We thank you, sir.

The COURT. Gentlemen of the jury: The court parts with you with sentiments of entire friendliness. I had hoped that we should have been able to decide this case; but we have not reached any conclusion that I can regard as a decision of the case at all. But I have no ground, I have no reason to suspect, much less to make a comment upon, the motives of any one of you. You have not seen the law, probably, as the court has seen it, but you have exercised your power under the law of deciding finally upon the matters submitted to your investigation. You have decided the facts, I have no doubt, conscientiously, and it is not for the court at all to express any dissatisfaction as to the difference between the jury and the court. I take pleasure in saying that to all the members of the jury. With entire feelings of respect, I beg to express my gratitude to the members of the jury for the patience and great exemplary conduct which they have manifested in this trial from its beginning to its close. Parting, therefore, gentlemen, on these terms, with respect, with no suspicion, the court cannot entertain any doubt in regard to the verdict as representing the conscientious consideration of the jury. It is not such a verdict as I would have been glad to see; but it is your verdict, it is your work. You are responsible for it, and the court is not.

Mr. DICKSON (the foreman). As to another subject, if you will permit me, sir. At the close of the proceedings on last Thursday your honor, in severe strictures, alluded to the attempts that had been made to bribe certain members of the jury. I then stated that after the disposition of this case I would lay before you such facts as I had to present. Shall I present them in a sworn statement now?

The COURT. No, sir; not at all. Your experience may be different from that of other members of the jury. I have no doubt it is. That is a subject which will probably be investigated in another way. It does not belong to your verdict.

Mr. DICKSON (the foreman). No relation whatever, sir.

The COURT. If it be true, as has been reported to me by several members of the jury, that efforts to bribe them have been employed, I think that no more abominable, no more censurous attempt at crime could be named, and I think that this is not the place for the court to talk on that subject or for the jury to talk on that subject. I think it

it is a matter that ought to be in the hands of the law, and if an scoundrel should be convicted of an attempt of that kind—I do not know whether the jury would convict him or not, but we shall endeavor to do our duty as a court, however. Good bye, gentlemen.

Mr. INGERSOLL. We have no objection to the jury telling who approached them.

The COURT. Oh, no.

Mr. MERRICK. Neither have we. But the Government will examine this whole matter, I presume.

Mr. WILSON. I will say that the counsel for the defendants will have a hand in that investigation.

The COURT. We will all join hands.

Mr. WILSON. The Government will not make this examination by itself.

Mr. MERRICK. Pardon me, but the Government will, and put it where it belongs.

The COURT. I never was so happy before in my life. Both sides are anxious to expose the crime, and we shall certainly have a conviction next time.

At this point, two o'clock and forty-five minutes p. m., the court adjourned.

WEDNESDAY, SEPTEMBER 13, 1882.

The court met at 10 o'clock a. m. .

Present, counsel for the Government and for the defendants.

Mr. WILLIAMS submitted and filed with the clerk the following motions for a new trial on behalf of the defendant, Montfort C. Rerdell:

Supreme Court, District of Columbia.

UNITED STATES }
r. } 14,336.
DORSEY *et al.* }

The defendant Montfort C. Rerdell moves the court for a new trial, and for grounds assigns the following, to wit:

1. Misbehavior on the part of the Government.
2. Misbehavior of the jury.
3. That the verdict is contrary to the evidence.
4. That the verdict is unreasonable.
5. Misconduct of Government attorneys during the trial in referring to the failure of defendants to testify, made and committed in the presence of the jury.
6. And for other manifest reasons.

A. B. WILLIAMS,
Of Counsel.

In the Supreme Court of the District of Columbia, holding a criminal term.

THE UNITED STATES	}	No. —.—Indictment for conspiracy.
r.		
JOHN W. DORSEY, JOHN R. MINER, JOHN M.		
Peck, Stephen W. Dorsey, Harvey M.		
Vaile, Montfort C. Rerdell, Thomas J.		
Brady, and William H. Turner.		

And now comes Montfort C. Rerdell, one of the defendants in the above-entitled cause, and moves the court to set aside the verdict therein, and to grant a new trial, and for cause therefor assigns the following reasons, to wit:

1. The verdict is contrary to the evidence.
2. The verdict is contrary to law.

3. The verdict is incomplete, imperfect, and contradictory, and no valid judgment and sentence can be rendered upon it.

4. The verdict was based upon evidence improperly admitted by the court, of acts done prior to the 20th day of May, 1879.

5. The court improperly admitted evidence of acts not set out and charged in this indictment, thereby misleading the jury to the prejudice of this defendant.

6. The court improperly refused to admit evidence offered by the defendants, thus depriving them of their right to a fair and impartial trial.

7. The court misdirected the jury, in its charge, as to the law of the case.

8. The court in answer to the interrogatories of the jurors, after they had stated they could not agree, erred in calling their attention to the order for expedition on route 35015, and deciding that there was no variance, that the overt act was proved, and if they found the conspiracy to be proved the defendants could not escape conviction.

9. The court erred in instructing the jury to omit the name of J. M. Peck from their verdict, the jury having found that this defendant had not conspired with W. H. Turner and J. M. Peck, as alleged in the indictment.

10. Because the court refused to give proper instructions asked to be given for this defendant.

11. Because of misconduct of the attorney for the United States made and committed during the trial and in the presence of the jury, in referring to the failure of the defendants, or some of them, to testify in their own behalf.

12. And for other reasons and causes.

A. B. WILLIAMS,
Of Counsel.

Mr. HENKLE called up the following motion for a new trial on behalf of defendant, John R. Miner, filed with the clerk on yesterday:

In the Supreme Court of the District of Columbia.

UNITED STATES

v.

JOHN W. DORSEY, JOHN R. MINER, JOHN M. Peck, Harvey M. Vaile, Montfort C. Rerdell, Thomas J. Brady, and Wm. H. Turner. } No. 14336.—Indictment for conspiracy.

The defendant John R. Miner moves the court for a new trial, and for grounds assigns the following, viz:

1. Misbehavior on the part of the Government.
2. Misbehavior of the jury.
3. That the verdict is contrary to the evidence.
4. That the verdict is unreasonable.
5. And for other manifest errors.

S. S. HENKLE,
Attorney for Defendant Miner.

Mr. HENKLE. Your honor is not blind as to what transpired in court. In view of the extraordinary statement made by the foreman of the jury, I thought, perhaps, the court might act without any motion on our part.

The COURT. The court cannot act to any extent on newspaper reports. Really, I am not ready; but, if there be any statements of consequence for the consideration of the court, they will have to be presented in the form of affidavits, so that the court can act upon them in the regular way.

Mr. HENKLE. I am not making any motion based upon any affidavit, but suggesting to the court—and I hope I am not trespassing in doing so—these scandalous things that appear in the public prints as coming from the foreman of the jury. I see from the papers that he has formally presented his affidavit to the District Attorney, and I thought it set forth such matters as would involve the court. As a matter of self-protection I thought the court would find it necessary to set this verdict aside, not at our instance, but by the order of the court, without any motion upon our part. That is for your honor.

The COURT. The court cannot do that.

Mr. HENKLE. As I understand, this affidavit is filed in the office of the district attorney, and perhaps it would be well, if the court should choose to do so, to have the district attorney bring it in.

The COURT. If you make the motion. It seems to me it would belong to you to file an affidavit.

Mr. HENKLE. I have not had an opportunity to take any affidavits at all, nor did I know until this morning, when I saw it in the papers, that the foreman of the jury was disposed to make an affidavit. Inasmuch as the city is filled with all sorts of rumors—and it is hardly necessary for me to say to your honor that the verdict is a most extraordinary one—it does seem to me to be the proper thing for the court to do to set this verdict aside, and to treat these defendants as the other defendants have been treated. I am sure, if your honor will permit me to refer to it—we are not talking to a jury now; the court is not to be influenced by what I may say on that subject—that that is the public sentiment of the people everywhere.

I hand to the court, with reference to what was suggested when we adjourned on Monday, some authorities as to the power of the court to admit to bail. I am prepared, if your honor desires it, to submit some authorities on that point now. Laying aside the other motion, I have no objection to taking up that one.

The COURT. Since the adjournment the court has looked into the law on this subject, and I am not disposed to call upon you for any argument, but to hear the other side.

Mr. MERRICK. Are you prepared to hear us on that proposition?

The COURT. I am inclined at present so to do. I do not feel like hearing argument on the other side.

Mr. MERRICK. I have some authorities that I will refer your honor to. I am glad to see the district attorney in court, and, though I have no doubt your honor is familiar with it, I will ask him what is the local practice of the court on the subject.

The COURT. I do not profess to be an expert in criminal-court practice.

The DISTRICT ATTORNEY. It has never been the practice since I have been district attorney to admit to bail after the verdict.

The COURT. I understand the question to be whether the bail already taken can remain as subsisting bail until the end of the case.

Mr. MERRICK. That is not the question to which Mr. Henkle addressed himself.

The COURT. Have you any objection to that?

Mr. MERRICK. Not at all.

The COURT. We may regard that question as out of the case.

Mr. MERRICK. I have looked at the question with some degree of care, and I think the bail is sufficient.

The COURT. We will not require any additional bail in those cases.

Mr. MERRICK. As to the question of additional bail, that is different from the question of bail.

The COURT. I know it is. It is in the power of the court to require additional bail if the circumstances justify it.

Mr. MERRICK. The amount of bail, I think, seems to be reasonable upon an examination of the specific amount, except in one case, the case of H. M. Vaile, whose personal recognizance is secured by a check for \$1,000 deposited with the clerk. I do not think that bail is sufficiently large. Brady is in recognizance for \$10,000, S. W. Dorsey \$10,000, and J. W. Dorsey for \$10,000.

The COURT. I think Mr. Vaile ought to give as much bail as Mr. Dorsey.

Mr. MERRICK. That is my impression.

Mr. HENKLE. Mr. Vaile is far from home. He lives in Independence, Missouri, where he has a large real and personal estate. My friends have been claiming all through the case that he is a very wealthy man, but he has a considerable real estate in Missouri. He is not going to run away. Mr. Williamson, who is a friend of his and connected with him in business, is here, and if the court desires additional bond, Mr. Williamson will go upon the bond for any amount that the court thinks proper, and he will justify. I do not care what the amount of the bond is if the court will take Mr. Williamson and depend upon his justification.

The COURT. I have looked somewhat into the question of depositing a check since we adjourned, and I doubt whether it would be the proper course to take. My doubts are so strong on the subject that I determined to save the form, and to return to Mr. Vaile his check and require him to give bond the same as the others did.

Mr. HENKLE. Will your honor fix the amount of the bail?

The COURT. Ten thousand dollars.

Mr. MERRICK. In response to what your honor said about the check I will state that it was acquiesced in by the Government at the time. I had some doubts then, but I waived them.

Mr. HENKLE. I want to ask your honor if Mr. Williamson will be taken upon the bond, the court being satisfied as to his sufficiency?

Mr. MERRICK. Is he the Williamson who was spoken of in the testimony?

Mr. HENKLE. Yes, sir.

The COURT. Let Mr. Williamson be sworn.

LAMBERT P. WILLIAMSON sworn and examined.

By the COURT:

Question. Where do you reside?—Answer. At Independence, Mo.

Q. What are your responsibilities after all your debts are paid?—A. In real estate do you mean?

Q. Everything, real and personal.—A. Well, \$30,000.

Q. You swear you are worth \$30,000?—A. Yes, sir.

Q. How much of that is real estate?—A. All of it.

Q. That is after all your debts are paid?—A. Yes, sir.

By Mr. MERRICK:

Q. Where is your real estate?—A. In Jackson County, Missouri.

The COURT. I know the county; it is a fine county.

Mr. HENKLE. Mr. Vaile has considerably more than that in real estate lying there.

The COURT. I have no doubt of that. Ordinarily there are two required upon the bond.

Mr. HENKLE. We do not require two. [Turning to the District Attorney.] Do you generally require two?

The DISTRICT ATTORNEY. It is entirely within the discretion of the court.

The COURT. I know it is. We will accept Mr. Williamson.

[Mr. H. M. Vaile thereupon entered into a new recognizance in the sum of \$10,000, with Lambert P. Williamson, of Independence, Mo., as surety.]

Mr. HENKLE. There was also a check deposited for Mr. Miner that should be surrendered up, unless you consider that check sufficient.

The COURT. We shall not need that security.

Mr. HENKLE. Does your honor desire to hear argument as to whether Mr. Miner and Mr. Rerdell shall be admitted to bail?

Mr. MERRICK. The court did not say that.

The COURT. No; there is a motion for a new trial, and in arrest of judgment, as to them.

Mr. HENKLE. I asked the court on Monday whether they would be admitted to bail notwithstanding the conviction, and your honor then said that you were not exactly satisfied about your powers, as I understood you, and you would hear me on Wednesday morning.

The COURT. I do not think it proper for the court to hear that question discussed; rather the motion in arrest of judgment, the motion for a new trial, should be first argued; for, of course, if the parties shall have a new trial, then the other question as to whether they shall be admitted to bail, and the amount of it, can be heard.

Mr. HENKLE. I know it is so; but I would rather that your honor would determine *sua sponte* to set aside the verdict, under all the circumstances of the case, without our arguing it.

The COURT. Probably if I take all the newspapers in the town and try it by them I should make up an opinion, but I tell you I cannot decide this question that way.

Mr. HENKLE. I should like, then, if the court does not conclude to take action from what it sees in the newspapers, nor what has transpired in the court, if it becomes necessary hereafter, to prepare to be heard, by affidavits, to bring these things that appear in the newspapers to the attention of the court in form if it is necessary.

The COURT. You must proceed in form. The court cannot proceed upon evidence in the newspapers.

Mr. HENKLE. Will your honor let me suggest briefly such views as I have? Really, the preparation that I have made is in regard to the other question; that is, the question that I thought would be heard.

The COURT. If you are not prepared with your motion the court will grant time. I do not care to have you argue the motion until you are ready.

Now, I told the jury the question of law in that case was that it was an indictment for conspiracy against several persons, and no one could be convicted alone of the charge. It was necessary, if they found a verdict of guilty against any, that it should be against two at least; it was in their power to find any two guilty and acquit the rest. They have found two guilty, and acquitted one of them, Mr Turner, who was not really prosecuted. Mr. Peck, who is dead, was not tried, and the jury have not been able to agree as to the others.

Now it is one of the mysteries, to be sure, of the jury-room as to the course which the jury traveled in reaching the verdict which they did render. Still it was a verdict which the jury had the power to render under the instructions of the court; and I have the same opinion to-day that I had at that time, that although in this conspiracy there were some more prominent than others; some who, I might say, if there was a conspiracy, were the masters, the leaders in the offense, and others who might be called subordinates, might even be called tools, the instruments, acting under the man who was the leader; yet all that remained of the conspiracy, acting on an inferior power, if found that way by a jury, are liable.

As to the apportionment of the punishment, that, of course, will be for the court. The court in determining the distribution of the punishment, in case of conviction, would make a difference between the leaders and the rest; but as to the verdict of the jury, it is different.

Mr. HENKLE. The theory I had about it was, and I thought that was the theory of the court; I know your honor did say to the jury that it took two to make a conspiracy, and that they might find a verdict of guilty as to two of them; that Brady was the key to the conspiracy. I thought your honor said during the progress of the trial that Brady was the key to the conspiracy.

The COURT. If there was a conspiracy he was at the head of the arch.

Mr. HENKLE. I understood your honor to mean, and on our side we have all understood it that way, that there could be no conspiracy without connecting Brady with it. That the part he took in the conspiracy was the obtaining of these orders.

The COURT. That question was approached several times during the progress of the trial, but it was never reached and finally determined. The farthest the court went was to say that Brady seemed to be the master.

Mr. HENKLE. Your honor said the "key," putting it very strong, and I had supposed, if the court please, that that was what your honor's view of it was; and our brethren on our side participated in that idea, that your honor held the opinion that there could be no conspiracy that did not embrace Mr. Brady.

The COURT. That it was not in the power of the jury to find any guilty unless they should find Brady guilty.

Mr. HENKLE. Yes, sir; that there was no conspiracy that did not embrace Brady; that the jury might find that any two of the defendants were guilty of the conspiracy, provided one of them was Brady.

Mr. MERRICK. No; the court never said that.

Mr. HENKLE. No; I know the court never said that, yet I suppose that was the logic of what his honor did say.

The COURT. Suppose the jury had found all guilty except Brady, would that not be finding a proper verdict?

Mr. HENKLE. Not according to our view of it. We deferred to the view of the court, and I thought the view of the court was coincident with our own.

The COURT. I do not know what view I should have taken as a jurymen.

Mr. HENKLE. The scheme of the indictment clearly is that these gentlemen got up false petitions and false affidavits; that they afforded a seeming justification to Brady; that they were placed on file by him, and that he was to make them the basis of his action, and upon these false papers was to make these orders that are claimed to be corrupt, and that through them this money was to be unlawfully obtained from the Treasury. Now, it does seem to me that if Brady is gone there can possibly be no conspiracy, under the scheme of this indictment.

The COURT. The indictment, as I remarked to the jury, consisted of five parts: One was the historical, which related to the organization of the department, prescribing the duties of the officers of the department; the second was the means contemplated by the conspiracy; the third was the conspiracy; the fourth consisted of the overt acts; and the fifth was the division of the money for its common purpose. As to the first, we shall ascribe the organization of the department. That was simply introductory. Then, the description of the views of the conspiracy was introductory too. The description of the means that were used

by the conspiracy, although not introductory, yet they belonged to the proof; and it was not necessary to set out those means precisely as the proof turned out. Then, the description of the conspiracy in the obtaining of the money.

Now, of all these five, the only essential parts established, as laid in the indictment, were the conspiracy itself and the overt acts. It was not necessary to correspond exactly in proof to the description in the indictment of the means used. Amongst the means described were false affidavits and petitions. Possibly the proof did not correspond with the description contained in the indictment. Many of the means used were by no means the same described in the indictment. That I hold not to be essential. All that it was essential to prove exactly, was the conspiracy and the overt act.

Well, now, suppose the conspiracy to be established, and there were a great many overt acts, and amongst them were false affidavits as to the number of men and horses required to carry the mails. Miner and Rerdell might have been found by the jury guilty of having filed some of these false affidavits. They are charged with having filed false affidavits in the indictment, and, for aught the court can tell, the jury may have found that those two were guilty of filing those two false affidavits. Then, if there was a conspiracy, they were capable of forming a conspiracy. So that, according to the theory of the scheme, there is nothing impossible in that verdict. The verdict might stand consistent with the theory of the conspiracy and the structure of this indictment. Whether, after a finding of the verdict, the court, looking over all the evidence in the case, would be satisfied that that was a malicious verdict, is another question altogether. But it may stand; it is capable of standing.

Mr. HENKLE. I am obliged to your honor for this expression of your views; but I hope you will not think me pertinacious if I say further it did seem to me—and it was so taken by us all—that upon the theory of the indictment there could not be any conspiring except with Mr. Brady; that is to say, that Rerdell and Miner could not conspire upon the theory of this case. Of course, this case is to be tried, and must be maintained, if at all, upon the scheme of the indictment. That is the foundation.

Now, the scheme clearly was that Brady was essential to this conspiracy. The indictment does not contemplate that Miner or Rerdell, or that any two others of the defendants, conspired to file false affidavits in the department. That is one of the means that was to be used to compass the purpose of the conspiracy, but it was not the conspiracy itself. The conspiracy itself, according to the indictment, as I understand the purpose of the conspiracy, was to get money from the Treasury, money that these parties ought not to have; to get it unlawfully. They were to do it with the semblance, the appearance, and in the form of authority; and it was to be done through Brady. They conspired with him, he being the officer having the power to make these orders. They did these things, got up the petitions and affidavits, and he made the orders; and that is the whole scheme of the indictment.

The COURT. Well, suppose the proof showed that Brady himself was imposed upon?

Mr. HENKLE. I suppose that would not be the case in the indictment. There might, undoubtedly, have been such a case. These contractors might have conspired among themselves to impose upon the Post-Office Department by false affidavits and false petitions, and that would have

been indictable undoubtedly. But that, your honor, is not the scheme of the indictment.

The COURT. The scheme of the indictment was to impose upon the Postmaster-General.

Mr. HENKLE. That was a part of it; but Brady was to be used to impose upon the Postmaster-General.

The COURT. But suppose Brady was not in it.

Mr. HENKLE. Then the indictment must fall.

The COURT. No, I think not.

Mr. HENKLE. The whole thing is embraced in that. When your honor said that he was the key of the arch——

The COURT. I was talking about the facts then. The facts must prove the theory of the case. I am talking about the indictment in the hands of the jury.

Mr. HENKLE. I am talking about the possibilities of a verdict under the indictment. That is what we are dealing with. As your honor remarked, I believe this is a very extraordinary verdict. If your honor has not remarked that this is a very extraordinary verdict, I think I have seen it in your face. It is a most extraordinary verdict. It is a gymnastic performance that I never saw before in a jury.

But the question before your honor is as to whether it can be sustained under the indictment; and it does seem to me that it cannot be sustained by your honor under any principle. Your honor did say that they could not find two conspiracies, but must find one conspiracy under the indictment; that they could find two were guilty of that conspiracy, but it must be the conspiracy charged in the indictment.

The COURT. That is what I told the jury. The proof of two conspiracies would break up the theory of the one conspiracy.

Mr. HENKLE. Now, it seems to me that that view is sound, and that view sustains the position I have taken. If the theory of the verdict is that Rerdell and Miner conspired, that is not the conspiracy of the indictment. There must have been some other conspiracy, if there was any at all, than that found by the verdict. It does not seem to me possible, under your honor's charge, that these two parties could have been found guilty of conspiracy alone.

The COURT. I will put another case. Suppose, instead of finding Rerdell and Miner guilty, they had found Brady and Dorsey guilty?

Mr. HENKLE. Then, upon the theory of the indictment, it could be sustained. Of course, on our side we look at the case from a different standpoint, and our interests may bias our judgment; but we all of us think that the theory of this indictment is that way. I do not think any of us would maintain that ordinarily, for a conspiracy where a dozen were charged, that you could not find that two of them were guilty and the others not guilty. But the structure of this indictment is united, and you cannot segregate it. That is not the view of this case.

But your honor has said that any two of them might conspire. Now, I say if Brady and Dorsey had conspired, upon the law which your honor held to apply in this case, that could be the verdict; because Dorsey might get up these false affidavits and petitions and present them to Brady, and Brady might make these false orders and present them to the Postmaster-General and get his signature. But without Brady, according to the theory of the indictment, that could not be done. Brady would have to be there himself. It runs through every single allegation of the means to be employed in the charge of conspiracy, that by means of Brady these orders were to be made, and by

means of this imposition upon the Postmaster-General, and by means of Brady, this money was to be paid; and all that.

Therefore, in every single feature of the means to be employed, Brady is necessary and essential to it, and without his concurrence it cannot be done; that is, upon the theory of this indictment.

The COURT. I do not comprehend the indictment in that sense at all. The theory of the indictment was to obtain certain orders from the Postmaster-General, by which this compensation was allowed and the money drawn. It was to impose upon the Postmaster-General. Brady, to be sure, was charged with being in an influential position for that purpose. But the proof turns out that Brady himself was imposed upon; that he made the orders in consequence of himself having been imposed upon. That would relieve him from the conspiracy, but the conspiracy would still subsist as to the others.

Mr. HENKLE. I concede that a conspiracy might be formed just such as that; that these defendants might be charged with a conspiracy to obtain money from the Post-Office Department by means of false affidavits and false petitions, and then Brady would not be an essential party to it nor an element in it. But, if your honor please, that is not what the prosecution has done. They have gone beyond that; and I need not remind your honor that the authorities are uniform that whatever becomes descriptive of the offense is necessary to be proven, and is a necessary element in the offense, and it must be proven as charged, or it must fall entirely. I understand that to be the rule in all the authorities. I do not think there are any authorities but sustain precisely that view. What they might have done is this: They might have constructed an indictment leaving out Brady entirely, and charging that any two or all of these men conspired to obtain money from the Treasury by means of false petitions and false orders. It is undoubtedly true that any two of them who were found to have so conspired, for that purpose, might be found guilty by the jury. But, your honor, they did not do that here. They started out with the view that a public officer had abused his trust, because that was the scheme, the foundation upon which this indictment was built; that a public officer had been abusing his trust, and that he had conspired with persons who had relations to the department as contractors. Upon their presenting to him false papers to file in the office, which would present a seeming justification for extraordinary orders to be made, and upon which large sums of money were to be drawn from the Treasury, he was to make these orders. That was the scheme of the case, that Brady made these orders and they were simply approved by the Postmaster-General; that by means of these false orders Brady, not these other men, was to impose upon the Postmaster-General and get his concurrence in the orders he would make.

Now, it seems to me, if the court please, that it is necessary and essential to this indictment that Brady must be in it; and if you knock him out, it is all gone. If that be so, then there can be no conspiracy under this indictment that does not include him. Although the jury might find that Rerdell and Miner conspired, or that Dorsey and Vaile conspired, or that any two or three of them conspired for the purpose of getting money from the Treasury—while that would be an indictable conspiracy, it would not be the scheme of this indictment; and, therefore, it must fall. Upon your honor's theory of the case—and of course we accept it as the law; we do not cavil at it at all—any two of these parties could be found guilty of conspiracy, provided one of them was Brady; but no other two could be found guilty under the indictment.

That is the view that I have of it. If your honor is of a different opinion, the authorities that I submit would not be germane to the question.

The COURT. As a simple trial of the question of law my opinion does not determine your motion. The court has a discretion in setting aside a verdict which is not limited by the confines of the law. But you are not prepared with your affidavits?

Mr. HENKLE. I have presumed upon the idea that your honor was of the opinion that Brady was necessary to the conspiracy, and I had supposed that the only question that was before the court was that.

The COURT. I have always regarded him as a conspicuous figure, but I have never said to the jury that in my judgment they could not find a verdict without finding against him.

Mr. HENKLE. Your honor has not said that, I concede; yet I thought that was the logic of what your honor did say.

The COURT. Perhaps I spoke a little stronger than I should have done. I called him the key of the conspiracy. I did not call him the keystone of the arch——

Mr. HENKLE. By which it was to be opened.

The COURT. My expression of views in the course of the trial, if they are not accurate, I do not claim are obligatory.

Mr. HENKLE. No lawyer will claim to be infallible, and, of course, your honor may at some time express an opinion which would be erroneous.

Taking that view of the subject, and supposing it to be the view of the court, I had calculated that two or three authorities would be sufficient to submit to the court upon that point. But, as I said, if your honor takes a different view of it, that any two of them may be convicted, notwithstanding the character of the indictment, then perhaps my authorities may not be employed. I have in my hand a case, with which your honor is familiar, a case in which the court held there could not be a final judgment against one of two joint defendants.

The COURT. Authorities of that class are very numerous on the civil side of the court; I do not regard them as controlling in this case.

Mr. HENKLE. I have a case in Devereux's North Carolina Reports, Vol. 2, page 569. It is a case where Tom and Donum, two slaves, with six others, were indicted for conspiracy. Upon this indictment Donum was first tried and acquitted. Subsequently Tom was tried. The inquiry of the court on this trial was confined solely to the plot alleged to have been made between the prisoner and Donum. The record of Donum's acquittal was given in evidence, his counsel contending that it required two persons to commit the crime charged, and, if the jury should think that the evidence inculcating the prisoner related only to conspiracy with Donum and with no other, the record of Donum's acquittal was conclusive evidence that he was innocent, and, therefore, they could not find the prisoner guilty. The court instructed the jury that the record of Donum's acquittal was not upon the trial of Tom conclusive, but was strong *prima facie* evidence that Donum was not guilty, as far as his guilt was a necessary fact in establishing the guilt of the prisoner Tom; that the prisoner could not be found guilty from the very nature of the charge, unless the jury were satisfied of the guilt of the persons charged in the indictment, as it required the concurrent guilt of two to commit the offense. The court said the only weight to which this verdict of acquittal was entitled was that it was the finding of another jury on the very point in issue; that they should still be satisfied from all the evidence before them of the guilt of the prisoner in plotting with Donum. The prisoner was convicted, and

judgment of death pronounced, from which an appeal was taken. The supreme court held that the verdict of acquittal in the case of Donum, the party with whom the conspiracy was, if there was any at all, was conclusive evidence of his innocence, and logically and necessarily the other man should be acquitted also.

The COURT. Yes; that is so.

Mr. HENKLE. But with the leave of the court, I may want to amend the motion I filed, and will present it at a subsequent day, on the subject of affidavits.

The COURT. I certainly shall give you an opportunity.

Mr. HENKLE. Now, I want to make an appeal to your honor to allow these parties, till the hearing of this motion, to remain out of jail. Mr. Miner has deposited here a check for \$5,000, and there is no danger that these men are going away. They cannot escape the Government if they wanted to. And whatever may be the end of this case, they are going to stand up to the end. They claim that they are not guilty; but, if the jury and the court find them guilty, they are going to stand up to it like men. It seems to me, while this case is pending, it is a great hardship to make them stay in jail. I have an authority showing that it is a matter of discretion with the court to admit to bail or not.

The COURT. I do not know what authorities you have there; but it has never been the practice here.

Mr. HENKLE. Will your honor allow me?

The COURT. Of course; I may be entirely wrong about the matter.

Mr. HENKLE. Here is a case where the party was admitted to bail after a verdict and pending a question of appeal on a writ of error. It is the case of *Corbett vs. The State*, in the 24th Georgia Reports, page 391:

A true bill was found against Edmund C. Corbett, charged with demanding payment of a forged note. Corbett gave a bond with ample sureties, as required by the court, to appear and abide the judgment of the court. Upon the trial, at November term, 1857, the jury returned a verdict of guilty against Corbett, and, upon the return of this verdict, the judge ordered him into the custody of the sheriff. To this order Corbett and his sureties objected. After this order, and during the pending of a motion in arrest of judgment, Corbett moved the court to be admitted to bail, offering to give a bond to any amount the court might require, with good sureties. This motion the court refused, on the ground that the case was not bailable at law after a verdict of guilty had been rendered. To this order and decision Corbett, by his counsel, excepted.

Now says the supreme court, Lumpkin, judge:

It never has been doubted but that the superior courts in this State have the same power, in relation to bail in criminal cases, as the Court of King's Bench in England. And it seems that that court may, in its discretion, admit to bail persons attainted of felony, or convicted thereof, by verdict general or special, where there is some special motive to induce the court to grant it. And this power continues until the person is in execution, or punished with imprisonment for the offense.

It will be readily perceived that it is impossible for this court to specify the circumstances which will authorize the court to act. Each case must depend on its own merits. We will cite the examples which are mentioned in the books by way of illustration.

If one be convicted of felony, upon evidence, by which it plainly appears to the court that he is not guilty of the crime, or where the prisoner may be in danger of losing his life, either by famine or dangerous distemper, unless he be bailed, in such cases the authorities are that the court will admit to bail after verdict.

In short, the law is this: The court has the power to grant bail in all bailable cases, until the accused is in execution. But this discretion must be exercised or refused in each particular case according to the facts which attend it.

Understanding the judgment as we do, that the court based its decision upon the want of power in the court to admit to bail in an infamous crime, after verdict, we reverse the judgment for the purpose of settling the law as we understand it.

The whole subject is under the control of the court. It may order a new bond or

the old bond to be strengthened. The end being, not punishment before finding judgment, but security that the offender shall not escape. In many cases ample bail would, perhaps, afford better security than the four walls of one of our rickety jails, but few of which are proof against internal and external assaults, and still fewer to the *golden key* which unlocks prisons at pleasure.

The COURT. That is a decision under peculiar circumstances in that State.

Mr. HENKLE. The court reversed that judgment simply because the court below refused to exercise its discretion, basing it upon the ground that the court had no power in an infamous case to admit to bail after verdict, and they sent the case back.

The COURT. To allow the court to exercise its discretion?

Mr. HENKLE. Yes, sir. Now I call your attention to the case of *Ex parte Dyson*, in 25th Mississippi Reports, page 356:

This was an application by James H. Dyson, who had been convicted of manslaughter in the circuit court of Panola County, and sentenced to fifteen years in the penitentiary, to be discharged on bail until his case can be reargued in this court, having had the sentence of the circuit court confirmed by the high court; on application, a reargument was granted.

Mr. Justice Yerger delivered the opinion of the court.

James H. Dyson was indicted for murder in the circuit court of Panola County, and at the May term, in the year 1852, was convicted of manslaughter in the first degree, and sentenced to imprisonment in the penitentiary for fifteen years. A writ of error was prosecuted by him to this court, and, after argument, the judgment of the circuit court was affirmed, two of the judges being of opinion that there was no error in the record, and one of them believing that there was. An application for a reargument was made, and a reargument granted, the judgment of affirmance being set aside. This reargument cannot be had until the October term of this court, and an application is now made by the prisoner to be discharged on bail, till his case can be reargued in this court.

By the constitution and laws of this State, "all prisoners, before conviction, are bailable by sufficient securities, except for capital offenses, where the proof is evident or the presumption great." * * * There are numerous English statutes, providing that bail might be allowed; but it was decided that that had no application to the the Court of King's Bench, and they might admit to bail in any case.

The right of a prisoner to bail, after conviction, is not regulated by the constitution or by statute, and is governed by the rules and practice of common law. It seems to be fully and clearly established, that the Court of King's Bench could bail in all cases whatsoever, according to the principles of the common law; the action of that court not being controlled by the various statutes enacted on the subject of bail, but regulated and governed entirely by a sound, judicial discretion on the subject. * * *

In the exercise of this discretion, the court in some instances admitted to bail, even after verdict, in cases of felony, wherever a special motive existed to induce the court to grant it. * * *

In this State it has been held that the circuit courts now possess and may exercise the power of bailing after conviction, in all cases not capital, whenever a sound discretion will warrant it. In cases of misdemeanor, whenever the party obtains a writ of error and supersedeas, we think this discretion ought always to be exercised in favor of bail.

But in felonies not capital, while we admit the power of circuit judges to take bail after conviction, we think it should be exercised with great caution not only where the peculiar circumstances of the case render it right and proper.

Now, in the case of *The State vs. Connor*, 2d of Bay, page 34:

Upon an indictment for forgery, at common law, by altering the date of a receipt. The defendant in this case was convicted of the offense on very clear testimony, and as soon as the verdict was recorded the *attorney-general* (as is usual on such occasions) moved the court that he might be taken into custody and committed to close prison (having been out on bail before); but as soon as he heard the verdict he slipped out of court through the crowd and got off before the sheriff or his officers could lay hold of him. On the meeting of the court next morning Mr. *Holmes*, his counsel, moved that he might still be continued on bail until a motion he had to make before the constitutional court of appeals could be argued in his favor, in arrest of judgment, which he then gave notice he would bring forward before the judges at the next meeting of that court, as also a motion for a new trial.

In support of this motion Mr. *Holmes* contended that if the defendant was bailable originally, he was still entitled to this privilege until the final decision of the court of appeals was known upon this case; that a conviction by a jury was not final and conclusive in a case of this kind; that it was possible a jury might find without evidence, or contrary to evidence; that some of the jury might be prejudiced, and carry their prejudices with them into a jury box. It sometimes happened that the court suffered irregular, or, perhaps, illegal testimony to be given to a jury. The Constitution of our country had, therefore, wisely established another and higher tribunal than this court for the purpose of investigating and determining all those points, and ordering new trials in all such cases. He further said that in some cases the indictment might be faulty, and not so framed as to embrace the defendant's case, which formed a good ground for a motion in arrest of judgment on principles of law. This, also, was another point for the consideration of the court of appeals, who had a power to quash such indictments and discharge the defendants. To confine a defendant, therefore, in prison, without bail or mainprize, after the finding of the jury, might and often would deprive him of the means of pursuing all or any of these constitutional modes of redress, which had been so wisely provided on his behalf.

The attorney-general maintained that the defendant in this case had been convicted of a *crimen falsi*. The presiding judge laid down the rule in such cases to be this:

That in all dubious cases (under the degree of treason or felony, plainly set forth in the warrant of commitment), as long as it was uncertain whether the party was guilty or innocent of the charge alleged against him, such was the humanity of the law that he ought to be bailed. But when a prosecution was so far advanced as to establish the guilt of the party accused by a conviction of the jury, the probability of innocence no longer existed; on the contrary, the law would and ought to presume him guilty. The discretionary power of the court then ceases, in all cases where infamous corporal punishment is, or ought to be, inflicted on the accused person, found guilty of the offense.

That from the very nature of man, who was not lost to all shame, there was nothing he would not forfeit of a pecuniary nature rather than suffer infamy and disgraceful punishment. Unfortunately, the welfare of society called, in some cases, for such examples, to prevent the repetition of offenses. In all such cases, therefore, no bail could or ought to be taken, or continued. The defendant must stand committed. There could be no other sufficient security to the community, until his case can ultimately be decided by the constitutional court of appeals; though it had been usual in cases of assaults, batteries, and misdemeanors, where only fine and imprisonment was to be the punishment, to admit persons convicted of those minor offenses to bail, for their appearance at the constitutional court, where motions for new trial, or in arrest of judgment, were made on their behalf, to abide the final determination of such appellate court, which additional bail was generally proportioned to the nature and circumstances of the case as appeared upon trial.

The motion was therefore overruled, and the defendant ordered into the sheriff's custody.

At the next meeting of the constitutional court of appeals the two motions, in arrest of judgment and for a new trial, were argued by Mr. *Holmes*, on behalf of the prisoner, and opposed by the attorney-general; but as there were no sufficient grounds to support either of them, they were both dismissed.

After which the defendant was sentenced to fine and imprisonment by the judge who presided on the trial in the circuit court.

On this occasion the judges took an opportunity of expressing their opinions in favor of the refusal of the circuit court to admit a defendant to bail after his conviction in a case so highly criminal, but admitted the necessity of an exercise of a discretionary power, even after conviction, in cases for lower offenses, to bail for the appearance of offenders at the constitutional court of appeals, to abide the final sentence of that court.

I read from 8th Iredell, the case of *The State vs. William Daniel*. I will merely read the syllabus of this case:

Where, in a criminal case in which, after conviction, the defendant has been sentenced to imprisonment, and he appeals merely for delay, without filing any exceptions or making any defense in point of law, the supreme court thinks this an abuse of the right of appeal, and that the superior court should not admit the convict to bail during the pendency of the appeal.

Now I read from the case of *The State vs. Ward, Hawks' North Caro-*

lina Reports, volume 2, page 443. This was an indictment for passing counterfeit money, and the defendant was convicted.

The motion for a new trial was overruled.

It was then moved in arrest of judgment, that the indictment did not aver that there was such a bank as the Bank of South Carolina.

This was also overruled, and sentence was passed, from which there was an appeal.

Another point in the case arose on the defendant's prayer to be bailed; the solicitor contending that, as there was a conviction, the defendant could not be bailed unless by consent of the prosecuting officer of the State; and the court refused to bail.

Upon the question of bailing the defendant after the allowance of an appeal, I am of the opinion that the conduct of the presiding judge was right. I think that the clause in the constitution, which declares that all prisoners shall be bailable by sufficient securities, unless for capital offenses, where the proof is evident, or the presumption great, relates entirely to prisoners before conviction; for, although the words, "where the proof is evident, or the presumption great," relate to capital cases only—that is, to prisoners in capital cases—the meaning is evidently prisoners before conviction; for after conviction there is no such thing as proof and presumption; all is certainty, and that the word "prisoners" must be understood alike in each member of the sentence, that is, prisoners before conviction; and persons remained convicted of the offense notwithstanding the appeal; for the appeal is for matter of law only; the facts remain unaffected by the appeal, unlike the cases of appeals for matters of fact as well as for matters of law, and where a new trial *de novo* as on appeals from the county to the superior courts, or from a single justice to the county court, where the appeal annihilates the verdict and judgment both: it seems that in England, the defendant, after conviction, cannot be bailed, even in petty misdemeanors, without the consent of the attorney-general, not even after writ of error brought; but as a writ of error is not matter of right in a criminal case, but matter of favor extended by the attorney-general, it is not so inconsistent to vest in him the power of assenting to bail; but here an appeal is matter of right. To compel the defendant, in all cases of appeal, even for the most petty misdemeanors, to go to jail but by permission of the prosecuting officer would render useless the right of appeal; and an indiscriminate right of going at large, upon giving bail, after an appeal, would be rendering the criminal law a dead letter. We think the spirit of our law requires a middle course, to leave it to the sound discretion of the judge before whom the appeal is taken. The court below will proceed to judgment.

I had, I thought, upon the table a case in 48th California. That case is based upon a statute. Allow me to say in passing that nearly all the States have statutes in which it is provided that in criminal cases, in suspension of judgment, just as the act of Congress does here, until the case can be heard in the court above, the party may be admitted to bail. In all such cases—and I have not been able to find an exception—the courts have held that a right to bail follows.

Now, I call your honor's attention to the case of McNeill, in 1st Caine's Reports, page 72:

The prisoner had, together with two other persons, been convicted of a conspiracy at the last oyer and terminer for the city and county of New York, but had not appeared on his recognizance in time to receive sentence; he afterwards came in, and was now brought up, on his own petition, to have judgment pronounced, but the record of the conviction not being made up and brought into court, the bench said they had nothing before them on which to proceed, and therefore admitted him to bail.

Mr. MERRICK. Have you filed a motion for a new trial?

Mr. HENKLE. I have, directed to the discretion of the court. I filed it yesterday.

Then, in the case of Davis *vs.* The State, in 7th Mississippi Reports (6th Howard), 399:

At the November term of the circuit court for the county of Hinds an indictment was found by the grand jury against one J. G. Davis for larceny. A capias was issued and a recognizance given, which was satisfied by the appearance and surrender of the prisoner at the November term of the circuit court for Hinds County, 1863. After the surrender of the prisoner he was arraigned, pleaded, put upon his trial, and convicted. Before the circuit court pronounced the judgment of the law, upon the finding of the

jury, the prisoner made application for bail, which the circuit court judge granted the prisoner, and took his recognizance, with William Davis his security, conditioned that he would attend upon the court from day to day, and abide by and perform the judgment of the court when rendered.

On the 26th day of November, 1836, the prisoner, J. G. Davis, upon being called to receive the judgment of the court, made default, his recognizance was declared forfeited, and judgment *nisi* rendered against the prisoner and William Davis, his security, and a *scire facias* ordered to be issued. At the January special term, 1838, the *scire facias* was returned executed on William Davis, the security, and plaintiff in error, who demurred to the *scire facias*, assigning but one cause of demurrer, denying the power of the court to grant bail to the prisoner after conviction and before judgment, insisting that a recognizance so taken was void in law, and could not be the foundation of a judgment, which demurrer the court overruled, and this is the error assigned.

* * * * *

The only question which this court can properly consider is the one raised by the demurrer in the circuit court. Does (as is insisted by counsel) the 17th section of the 1st article of the constitution of the State of Mississippi, which declares that all persons before conviction shall be bailable by sufficient securities, except for capital cases, operate as an inhibition upon the powers of the circuit court to take bail from prisoners after conviction and before judgment? We think not. It is believed that that clause of the constitution was intended by its framers for the better security of the citizen against an improper exercise of discretion with which the common law clothed the judges of the courts; and to take from them all discretion whatever before conviction, only when it becomes necessary to discriminate between capital and minor offenses; leaving the discretion of the judges to take bail after conviction and before judgment as it stood at common law. There was a great necessity for that provision of the constitution, originating in the fact that judges, under the common law, were in the daily practice of committing prisoners to jail for offenses less than capital.

It is insisted by the counsel for the plaintiff in error, that the cases of *The Commonwealth vs. Trask*, 15 Mass. Rep., 277; *Ex-parte Taylor*, 5 Cow., 39; *State vs. Connor*, 2 Bay's S. C. Rep., 38, settle the doctrine that at common law the power to bail after conviction did not exist, and that all discretion ceased upon the part of the judges. After a very careful examination of those cases, we believe they do not warrant such a construction, but establish the very reverse of the proposition, so far as they are analogous to this case. The only point raised in the case of *Trask* was in relation to the power of the court to allow bail to the prisoner before conviction upon the facts presented by the testimony. The same question arose in the case of *Ex parte Taylor*. It must, therefore, be true that they cannot be relied on to deprive the courts of the country of a power founded in justice, and intended in many instances that may arise to protect the citizens of the country from manifest oppression.

Conner's case is in all its features the same with the case now before the court, and must be conclusive in establishing the powers of the court to grant bail after conviction and before judgment, when, from any peculiar circumstances, the court may think justice requires its interposition. *Conner* was convicted, and before the court passed sentence upon him the attorney-general moved the court to order the prisoner to jail. The application was resisted by the prisoner upon the grounds that he desired an appeal to the supreme court of the State. The prisoner's right to bail was fully considered by the court and refused. It was not denied in that case, however, even by the attorney-general, but that the court possessed the power to grant bail after conviction; nor did the court so determine. But, on the contrary, the court determined that, in cases where the punishment was only fine and imprisonment, the court would exercise its discretion, so far as to allow bail when the peculiar circumstances of the case would seem to justify it. While we admit the power of the judges to take bail after conviction, we think it should be exercised with great caution, and only in minor offenses, where the peculiar circumstances of the case render it necessary and proper.

I now call the attention of the court to the case of *The People vs. Folmsbee*, 60th Barbour, New York Reports, page 480. There is a statute in New York which provides in criminal cases that judgment shall be stayed until the hearing by the appellate court.

THE COURT. Our laws are of the same kind.

MR. HENKLE. Yes, sir. In this case the application for bail was not made until the execution of the judgment, and he was in the penitentiary; and upon a writ of *habeas corpus* there was a motion to admit to bail. I want to read from what the court said:

If it be true, as claimed, that there is no power to bail after execution of the sentence has commenced, the prisoner, however erroneous or illegal may be his

conviction and sentence, is very much at the mercy of the district-attorney. It must of necessity occupy some considerable time after conviction and sentence to obtain the settlement of the bill of exceptions, the writ of error, and the stay of judgment. In the meantime the district attorney, if so inclined, may his subject in prison under the sentence, after which, as is claimed, the prisoner is wholly without redress. Then a stay of proceedings is valueless to him, for his prayer to be let to bail cannot be heard; and, if judgment be thereafter reversed, he is put in a condition to be retried and again sentenced. On this point Judge Edmonds pertinently remarks as follows in the case above cited: "It is impossible that even the best-regulated court should always be certain that its judgments are right. The imperfection of human testimony, the haste and excitement of a trial, and the want of familiarity with the questions of law which suddenly arise, all operate, at times, to throw doubts around the decisions of our very best courts. In such cases it is always wise that time and opportunity for a calm review should be taken, for the administration of justice wins confidence only when it is discreetly and dispassionately performed. For such a review our statutes have amply provided, in such manner that in cases like this it is a matter of absolute right, of which the prisoner cannot be deprived." The learned judge adds: "Of what avail would this right be if the execution of judgment could not be stayed until the completion of the review? What sort of justice would it be to reverse the judgment of conviction after the prisoner had served his time, in whole or in part, in the prison?" The learned judge further adds: "And it is by no means an unfrequent occurrence that prisoners are discharged from State prison by a reversal of the judgments against them." "These things," he says, "are, if possible, to be avoided, if respect for the administration of justice is to be preserved."

I call the attention of the court to the case of *Rex vs. Reader*, in 1st Strange's Reports, page 530:

The defendant was convicted for keeping an ale house without license, and was thereupon committed for a month, as the act directs. After he had lain a fortnight he brought a *certiorari*, and upon the return of it he was admitted to bail, the court being of opinion that if the conviction was confirmed they could commit him in execution for the residue of the time.

And in summing up a review of the authorities in his Criminal Procedure, paragraph 253, of his third edition, Bishop says:

And the later English doctrine in cases of misdemeanor seems to be that if it is probable the objections raised in behalf of the prisoner after verdict may prevail, the court will accept bail, though not as, of course, even where bail was his right, before verdict. And since the result of a litigation can never be known till the day of sentence, as well as for other obvious reasons, the American courts accept bail after sentence in cases not capital when a sound and cautious discretion prompts, though not so freely as before verdict. This more merciful conclusion has in some of our States been aided by express legislation.

Now, I believe, your honor, the result of it all is that it is discretionary with the court in all cases to be exercised favorably in cases of misdemeanor and the lesser crimes. Before I sit down, however, I want to call your honor's attention to the fact that this is in conformity with the policy of the Federal legislation, so far as it has gone upon the subject. Section 1017 of the Revised Statutes provides that:

When a writ of error is issued for the revision of the judgment of a State court in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such State, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error.

Then, in the State courts, where a statute of the United States is involved, or any order or matter that is Federal in its character, on a writ of error to the Supreme Court of the United States, the statute expressly provides in such cases that the party may be bailed where the offense is bailable itself under the laws of the State. The act of Congress creating the police court of this District, perhaps I need not

remind your honor, provides that the police court shall have original jurisdiction of all the offenses in the District not capital or otherwise infamous; that is to say, all assaults and batteries. But of all other misdemeanors not punishable by imprisonment in the penitentiary it has jurisdiction. It has exclusive jurisdiction of all misdemeanors that are not punishable by imprisonment in the penitentiary, and there is a right of appeal to this court. It provides also for a bond. So that when a judgment is rendered in the police court, which is a court of original jurisdiction of all misdemeanors not punishable by imprisonment in the penitentiary, the defendant has the right to give his bond and to be at large until the determination of his appeal in this court.

Now, I say that is legislative construction as to what the policy ought to be. The law creating this court, I need not remind your honor, provides that an appeal may be taken to the court in general term from any order, decree, or judgment of this court affecting a controversy; and that applies to criminal judgments as well as to civil judgments on the civil side of the court, and the act of Congress requires a suspension of the judgment until thirty days after the expiration of the next term of the court in *banc*.

The COURT. Until some day not more than thirty days.

Mr. HENKLE. I did not attempt to quote the exact language. This looks to the observance of the rights of the defendant until the final determination of the case against him. He is not to be presumed guilty, although a verdict has been rendered against him and the judgment rendered on the verdict, where he desires to and does take an appeal to the appellate court, until the appellate court pronounces final judgment; and he has a right under the policy of this legislation and under the common law, as I claim, to be admitted to bail. In cases of misdemeanor he has the right; in cases of felony it is a matter of discretion with the court.

Mr. MERRICK. I had prepared a few remarks on the subject, but I hardly think it necessary to present them. I have the notes of the authorities that I desire to present, and will simply hand them up to the court. The last entry upon the memorandum is in reference to a case, which your honor will remember, to which my attention was called by Mr. Corkhill. It was the case of the United States *vs.* Sawyer and others, a conspiracy, in which this matter was fully argued before your honor, and where bail was refused. Subsequently it was discovered there were some irregularities in the proceedings, which induced the court to reverse the judgment below, and on the second trial the parties were found not guilty; they were acquitted. But it is a case showing the practice of the court.

The COURT. When an act of Congress declares that on any conviction for a penitentiary offense the execution of the sentence shall be suspended until the termination of the next term of the general term, does it not cover this point? There should be no execution of the verdict; the execution should be suspended.

Mr. MERRICK. The execution shall be suspended and the party shall not be sent to the penitentiary. But it does not change the rule of law in reference to bail, which rule of law had its origin, and still has its origin, in the protection of the doubt about the guilt of the party under a charge. After verdict, say all the books, that is then changed; the court passes sentence.

The COURT. The court is prohibited from passing sentence.

Mr. MERRICK. Not prohibited from passing sentence.

The COURT. But the execution of the sentence.

Mr. MERRICK. You cannot execute it, but you can pass the sentence.

The COURT. The execution of the sentence is imprisonment in the penitentiary for a certain time. If the court says there shall be no imprisonment, the man is at large. If the sentence of the court must be imprisonment in the penitentiary, what, then, becomes of the man?

Mr. MERRICK. He sits in jail. If my brethren can point me to any one case in which what they claim was ever done in this court, why, I shall feel more respect for the proposition submitted this morning. Under neither of the administrations of the present and preceding district attorney has this been so; and in this case to which I last referred, it is stated by the district attorney the same question was elaborately argued before your honor, and your honor settled it then in accordance with the precedents in this court.

The COURT. Was bail offered in that case?

The DISTRICT ATTORNEY. Yes, sir; and there was an examination of your honor's ruling in the general term. I recollect your honor's ruling very distinctly. On that occasion the prisoner passed into the custody of the marshal, and was not in the hands of the court as under bail.

Mr. WILSON. I think my friends on the other side are mistaken about the history of that case. The case is one that was tried before Judge MacArthur. Judge MacArthur granted a new trial. After that your honor came on the bench, and it was tried by your honor. That is my recollection about it. This question that is now before the court was not before your honor.

The DISTRICT ATTORNEY. They went to jail pending the hearing of the motion to admit to bail.

The COURT. I do not remember about it.

Mr. WILSON. It was the case of Sawyer, Haines, and Brooks. Sawyer was Assistant Secretary of the Treasury, Haines was in the customs service, and Mr. Brooks was in New York. Mr. McVeagh, if you will recollect, appeared as counsel in that case. That was tried before Judge MacArthur.

The COURT. And when they were tried before me they were acquitted?

Mr. WILSON. Yes, sir. They were in jail, but the question was not decided.

Mr. MERRICK. In another case, one which Judge Price tried in this court, application was made for bail after verdict, and it was refused. Pending the re-examination, the defendant went to jail. Your honor will observe while some of these courts say the power exists, they say it must be exercised with great caution and under peculiar circumstances. Some deny the power, some concede the power, and some limit it to peculiar circumstances.

Mr. HENKLE. None of them deny the power.

Mr. MERRICK. In Archibald's Criminal Practice bail in criminal cases is founded on the doubt which may exist as to the prisoner's guilt, and not on the grace or favor of the court. If his guilt is past dispute, he ought not to be bailed. Where it appears his conviction was unjust and there is a serious doubt as to his guilt, his application may be granted. I do not see that there is anything in the authorities that have been read to vary the rule. I have various authorities here, some of which Mr. Henkle read.

The DISTRICT ATTORNEY. Does your honor recollect the case of the United States *vs.* Pugh, where he was tried for taking illegal fees? He offered to give bail, but went to jail.

The COURT. I recollect it, I think.

Mr. MEKRICK. I defer to these gentlemen who are more familiar with the practice and the law; but I do not think there is any case in this court where it has been otherwise than I have stated. I believe the jail was deprived a short time back of a person which the Government was very anxious to hold, and who was charged with a very serious offense.

The COURT. He escaped before trial.

Mr. MERRICK. I only say that there have been escapes; but, of course, where a man by a verdict of a jury is adjudged guilty, the desire for escape becomes stronger and more earnest; and I submit that bail ought not to be taken by the court in its exercise of discretionary power, if it exists, unless the court is pretty well satisfied the party is not guilty, or unless his being in jail imperils his life. There may be some extraordinary condition of things, as stated in the books, that will permit it; but certainly in no case ought it to be done without strong reason. Then, as far as I understand the authorities, it ought never to be done unless the court is well satisfied that he is not guilty.

[Mr. Merrick having sent for Mr. Ross Perry, and having asked him for his recollection of the rulings of the court on the occasions heretofore referred to:]

Mr. PERRY. The question was argued, I think, before your honor, but perhaps it may have been before Justice MacArthur. Whichever justice heard it refused bail after conviction.

The COURT. I do not think it was argued before me, because when the case came on for second trial before me the defendants were acquitted.

Mr. PERRY. In the case of Judge Wright the same question was argued by Mr. Stanton before Mr. Justice James, and he refused to accept bail.

The COURT. In the Pugh case the defendant went to jail for violating the pension laws; but whether it was after he offered bail or not I do not know.

Mr. INGERSOLL. I do not remember his offering any bail or asking any bail. The court will remember that I made an argument for a new trial. I will not say it was not, but I do not remember.

Mr. WILSON. Colonel Cook is here in court and he understands this case just as I do.

Mr. COOK. I was in the case where Sawyer, Brooks, and others were tried. My client was fortunately acquitted. Mr. Brooks and Mr. Sawyer were convicted. The case was tried before Justice MacArthur. He granted a new trial, and afterwards your honor came on the bench and the case was carried on before your honor by the late Senator Carpenter and Wayne McVeagh; and under your peremptory instructions there was an acquittal of the defendants. Your rulings differed in many particulars from your brother, Mr. Justice MacArthur. They did go to jail, but the subject of bail was never fully discussed. It passed off finally on a motion for a new trial. The second trial was before your honor, and it passed off on a question of law. The question of bail was not before your honor.

Mr. HENKLE. Judge Case reminds me of a case, the case of the United States *vs.* Simkins, charged with rape. I defended him and succeeded in getting a verdict against him of guilty. I retired from the case and Colonel Corkhill took charge of it. The defendant was permitted to give bail pending a motion for a new trial. I was in that case with brother Corkhill, and we did get him out of jail on bail.

Mr. CORKHILL. A new trial had been granted.

The COURT. The bail was not accepted pending the motion for a new trial.

Mr. HENKLE. [Speaking to Judge Case.] How is that? My recollection is that he never went to jail at all; not an hour.

Mr. MERRICK. Where is the record in the case?

Mr. INGERSOLL. It does seem to me there is only one question in this case. Of course, the punishment of the parties is not to commence until sentence. Now, there is one question: Does the court believe it would be safe to take bail; that is, does the court believe that bail would be sure to have the parties in court when wanted? It does seem to me that that is the only question. If the court thinks that bail would be sufficient—the amount that the court would fix—then it is well to take the bail; if the court thinks differently, no amount of argument would convince the court.

I believe it is in the power of the court to fix bail, and in fixing the amount of the bail but one object can be had in view, to secure the attendance of these parties. That this has been done by a great many courts there is no doubt, as the records show. I hope the parties will be admitted to bail.

Mr. MERRICK. It seems that the power exists; but it is a power with a limitation to its exercise, as laid down in all these books. It is not a right of the defendant at all after the verdict as it is before. After the verdict the court has power; but, say all the books, it is power that must be exercised very cautiously. It is never exercised simply because of its own existence. It can be exercised only, say the books as read by Mr. Henkle, under peculiar circumstances.

Now, there are no peculiar circumstances stated here at all. I do not think the power that exists before the verdict should be confounded with the power that exists after the verdict. The power that exists before the verdict is a power that the court is compelled to exercise in favor of the accused on the presumption of innocence. After verdict that presumption is gone, and then, says the law, that power shall be exercised only under peculiar circumstances.

Your honor is asked on precedents that have been established, where these peculiar circumstances existed after verdict, to admit to bail where no peculiar circumstances exist.

Mr. INGERSOLL. If all that is necessary is a peculiar circumstance, the verdict furnishes a peculiarity.

Mr. HENKLE. In 25 Mississippi Reports, the court say it is a matter of discretion with the court in the case of misdemeanor, and think this discretion ought always to be exercised in favor of bail. Now, I think, if the court please, that so far as there has been any legislation in the District touching this subject and cognate subjects, the policy of Congress is, that in the cases where an appeal is allowed there shall be a suspension of judgment until final decision of the case. It is so in civil cases. After the judgment is rendered upon a verdict in a civil case, the court, upon the defendant giving his supersedeas bond, suspends the execution of the judgment until the court in general term establish the judgment. It is so in equity cases, where the chancellor pronounces a decree and the supersedeas bond is put in, the execution of the decree is suspended until the court of last resort affirms the decree. And the same principle is intended to apply, and with much greater reason and force, to the criminal cases, where the liberty of the citizens is involved, which is of much more value than his goods, his lands, or his money.

Mr. MERRICK. Not after verdict.

Mr. HENKLE. Yes, sir; after verdict. If he has a right to appeal, and has a right to a suspension of the judgment until the court above

passes upon the legality of the judgment, you have no right to punish him in the meantime by denying him the right to bail. That is putting in execution the final judgment before it is rendered. That is against all the legislation on this subject.

Mr. McSWEENEY. As we are holding a sort of experience meeting, I will give mine. Judge Swayne, of the United States court, was in the habit of coming out and presiding with Judge Welker, who is our district judge in Cleveland. Judge Swayne would come out and hold circuit court with him. I know the practice there was not even to surrender the defendant in many cases where his bail was ample, not even ordering, as we have been ordered here, into custody. I remember a case—I forget the names of the parties; I was not in it; I was on another case, but during the trial my attention was called to it. A gentleman of some standing was involved with a lot of counterfeiters. It was in the days when our money was first issued, our new style of notes, and there were large counterfeiting gangs. He was under a \$10,000 bond. Judge Swayne presided in that case. He was brought in, received the verdict of the jury—"guilty." Judge Raney was one of his counsel. The defendant lived in Ashtabula and desired to go home. The bail was ample. He said he would return at the order of the court; that he had to go home to see about his business. Judge Swayne said, "All right; this bond still holds good, and you will abide the order of the court." He went home, and returned to receive a ten years' sentence. During the rebellion I defended some parties for what was called treason. They resisted the draft, and it was called treason, not merely conspiracy. They were under heavy bail. Judge Swayne—that was the same court at which I was present—heard their trials. There was one, perhaps two, convicted. He paid no attention to ordering them to jail, but let them go down home and see about their matters on that same bond. A motion was heard for a new trial and the verdict was set aside, and they were not even present when he was prepared to announce his decision. We immediately telegraphed that the court had reversed the verdict of the jury and permitted them to have another trial. The second trial never came off.

Before Judge Welker, the district judge, it is very common—nothing more common in the world. In Ohio our practice is regulated by statute. In misdemeanors, you have the right on giving good bail. The court will accept as sufficient the word of the attorney, upon the assurance of the attorney that he intends to carry the case to the supreme court; because it takes some time to go down and get your petition. The court will take the professional statement of the attorney, "Do you mean to take this up?" "I do." "That is sufficient. Give bail, and abide the order of the court."

Now, as I understand your honor, you say this is a case of misdemeanor. The penalty may be two years or it may be no imprisonment; or it may be fine and imprisonment. There is a provision in the United States law as to misdemeanors and felonies. I believe it has been laid down—and your honor will know if I am correct about it—that the court, where the act is not described in the enacting clause as feloniously done, or some word perforce making it felony, has the power (and it is a terrific power), by its own motion as evidenced in its judgment, to say whether it is a felony or a misdemeanor. Am I correct in that? In some cases the court makes the offense a misdemeanor or felony, as it may determine, in its discretion, in fixing the sentence.

The COURT. This court, I believe, has laid down the doctrine that the line which divides misdemeanor from felony is the line which divides the punishment in the jail from capital execution and punishment

in the penitentiary; that is, all crimes that are punishable in the penitentiary are felonies.

Mr. McSWEENY. But where your statute does not say where punishable, simply two years?

The COURT. Where the imprisonment exceeds a year it must be in the penitentiary.

Mr. McSWEENY. But if you make it six months?

The COURT. If it is only six months it is not a misdemeanor.

Mr. McSWEENY. Does not the court make it a misdemeanor or felony in its own discretion?

The COURT. The decision of the general term was this: Where it was in the power of the court to punish by imprisonment in the penitentiary, that constituted a felony, although the court might have inflicted a lighter punishment—less than a year in the county jail.

Mr. McSWEENY. Or no imprisonment at all, as in this case. This is alternative. Then, am I not correct?

The COURT. I must acknowledge that I never concurred in that judgment.

Mr. HENKLE. I think your honor is mistaken about the case; that was a penitentiary case.

Mr. McSWEENY. The distinction that we used to talk about at home in our circuit was when the word labor was inserted.

The COURT. The case is in 3d Leigh. I think Judge Wilson showed me a case in which Benjamin Watkins Leigh made an argument, *amicus curiæ*, before the court of appeals in Virginia. In that argument he speaks as a matter of course of the degree of punishment; but he does not speak at all of the difference between misdemeanor and felony. That was my idea until the court in general term decided otherwise. They reversed me upon that question, I remember; but I was always of the opinion that the penitentiary or no penitentiary was not the test of felony.

Mr. HENKLE. I used that authority before Justice Hagner since that, in a case where my client was convicted of perjury, and he held that it was a misdemeanor.

The COURT. Judge Hagner and myself do not constitute a majority of the court.

Mr. McSWEENY. Where the word labor is not mentioned in the sentence, he has no power to imprison in the penitentiary. Now, what I was going to say about that is this: The court regarded that as a misdemeanor; because, when charging the jury, the court so said.

The COURT. I had forgotten the decision of the general term.

Mr. McSWEENY. Well, as this is a case where you might imprison even for an hour, it may be in jail and it may be no imprisonment at all—we are asking nothing extraordinary in view of the conceded power that you have—we ask that these defendants be permitted to come out on bail, when we assure you, on our professional honors, that the case is to be carried up to the superior court. This is a case bristling with so many points, occupying so many days, and with a great many exceptions taken; and we assure you that we intend to go further. I know there is a doctrine of going further and faring worse; but we expect to fare better. In Bishop's Criminal Procedure, paragraph 253—and he cites in the foot-note many of the authorities read and a great many not read—we find the following:

And the later English doctrine in cases of misdemeanor seems to be, that, if it is probable the objections raised in behalf of the prisoner after verdict may prevail, the court will accept bail.

That we all understand.

THE COURT. There is no difference between your position and Mr. Merrick's.

MR. MCSWEENEY (reading):

Though not, as of course, or even where bail was his right before verdict. And since the result of a litigation can never be known until the day of sentence, as well as for other obvious reasons, the American courts accept bail after sentence in cases not capital, when a sound and cautious discretion prompts, though not so freely as before verdict. This more merciful conclusion has in some of our States been aided by express legislation.

And again, as coming on Brother Ingersoll's idea, do you think that the parties will be here, or do you think it is a mere ruse to escape?

These two elements, therefore, should be taken into account together on the questions of accepting of bail and the amount. And where the probabilities of flight are overwhelming, there should be no bail. A capital crime, with guilt and conviction certain, is of this sort; for, in the language of Scripture, "all that a man hath will he give for his life;" still, by the common law, prevailing to the present time in a part of our States, all offenses, not excepting treason, and the capital and other felonies, are bailable; though these high crimes are so only in the discretion of the court, not of right, &c.

THE COURT. It just amounts to this: The right before trial to give bail is a right; after trial it is a privilege.

MR. MCSWEENEY. Now, we ask the exercise of that discretion. Mr. Rerdell is under \$5,000 bail. Does the court think that a sufficient bond, and will he abide the order of the court? This man has some business to attend to; he has some contracts, has some exigencies as a family man; his family need his care and sustenance and protection, as long as he may be out in the light of liberty, before the final determination of his fate. That appears to me sufficient. When this sentence comes to be executed, it may be that he will be put in jail; it may be that he will be fined, or it may be both. We now say that we have no idea of his escaping or intending by this bail proceeding to escape.

Brother Miner has a family, and he is a great many miles from them. He has been here many days. I know those people, and it must be of interest to him, even if he has to suffer under your afflicting hand, to see his wife and little ones, and that he should at least get ready to set his house in order. Again, there are rumors coming to them in prison as to certain attempts made upon the jury; and it is necessary that these men should be free to assist their counsel in preparing the facts in the case. There are not only mere matters of law that require the attention of the counsel, but there are other matters to be looked into, and they need the assistance of their clients. There are parties to see, and they are the ones to do it. It is in the interest of justice; and I think in the merciful considerations of the court the exercise of this discretion should be turned in the defendants' favor.

THE DISTRICT ATTORNEY. Without any special reference to this case now before the court, it is of great interest to me that this matter should not be decided in this way.

Your honor has stated the law exactly as it is. The right to admit to bail before the verdict of the jury is a right; after the verdict it is a matter addressed to the discretion of the court. If your honor admits it in one case, unless there are extraordinary circumstances, we will have it asked in every case; and the complications that will grow out of establishing this precedent will be very great.

I am very certain that during the time I have held this office this discretion has never been exercised by a judge in this way. Justice Cox, in a case in which Mr. Browning was counsel, the defendant was con-

victed of larceny. An earnest appeal was made to the judge to let him go. Judge Cox held that there was nothing in the statement made that appealed to the discretion of the court, and the man would have to take the consequence, although in a few days afterward he granted a new trial. In the case of Wright, before Justice James, the claim was made that he was suffering from a disease, yet Mr. Justice James said that was not sufficient, because he believed his instructions were right. In the case of Mr. Simkins the verdict came in Saturday night, but Mr. Justice MacArthur was so thoroughly convinced that he was wrong a new recognizance was entered into.

Mr. HENKLE. Justice MacArthur was decidedly of the opinion that he was guilty.

The DISTRICT ATTORNEY. I only recollect that Mr. Justice MacArthur stated himself, in granting the motion for a new trial, that from the conduct of the witness upon the stand the witness was not to be believed.

These cases have been uniformly decided in that way. If your honor decides that merely because there is a conviction and no sentence a man is entitled to the right of bail, we will have every man who is convicted at large.

The COURT. I do not understand the counsel in this case to have taken any such stand as that. Before trial bail is a right. They concede themselves that after trial it is a privilege to be granted by the court.

The DISTRICT ATTORNEY. Under special circumstances appealing to the court itself.

Mr. HENKLE. The court judges of that.

Mr. MERRICK. Certainly, the court judges of that.

Mr. MCSWEENEY. Mr. Rerdell does not understand that the court is deciding now the granting or refusal of a new trial. Information has come to him which will make some affidavits necessary in order to decide matters that never came before your honor.

The COURT. The motions presented to the court on behalf of the defendants Rerdell and Miner are for two different purposes. One is the motion for a new trial. The motion in arrest of judgment has not been argued or alluded to, but the motion for a new trial has been spoken to by counsel. The other motion on behalf of both is, that they may be admitted to the privilege of bail pending an appeal that they purpose to take to the court in general term. Should the court come to the conclusion that the first motion (that is, the motion for a new trial) should be granted, the granting of that motion would entirely supersede and render unnecessary the decision of the other; because if a new trial is granted the gentlemen will go at large upon ordinary bail, and we need not pass upon the other question.

Now, I think it is better to express no opinion upon the second motion until the first question is disposed of—that is, the motion for a new trial. As to Rerdell, the court, of course, cannot forget the evidence in regard to his confessions; he has confessed pretty strongly in this case. As to Miner there are no confessions that can bind him. Rerdell's confessions apply only to his own participation in the conspiracy, and the court will not allow Rerdell's confessions to have any weight as to Miner. But the jury have found Miner guilty. The jury, as I have said already, has a right to find them guilty. There is nothing in the law to prevent their finding these two particular defendants guilty, although we all may wonder how it was. [Laughter.]

Mr. MCSWEENEY. "And still the wonder grew."

The COURT. As I have said already, I have not read these newspa-

per stories, and do not propose to read them. I have paid no attention to the rumors afloat, and I purpose to keep my mind disabused in regard to that. Counsel, however, have said that they expected to prepare some affidavits on this motion for new trial, affecting the verdict that has been rendered, the irregularity of that verdict, the irregularity of the organization of the jury, and to show that there was some influence or other prevailing whilst this jury were sitting which disturbed the regularity of their findings. I do not wish to pass upon this motion for a new trial, therefore, until I have these grounds laid before the court, and I presume that everything that the counsel wish to furnish in that matter will be furnished by Friday. [To counsel for defendants.] Is that as much time as you wish?

Mr. CARPENTER. We think so, sir.

Mr. HENKLE. I think, your honor, that probably, to suit the convenience of the court, we had better say Saturday.

The COURT. I have no other business pressing, and I can as well come Saturday as Friday.

Mr. HENKLE. I wish your honor would pass upon the question whether these parties may give bail pending the hearing of this motion for a new trial.

The COURT. No; I cannot accept any bail until this matter is settled; I cannot forget Rerdell's confession.

Mr. HENKLE. How is it as to Miner?

The COURT. I say there are no confessions as to Miner, but the jury have said that Miner was guilty of a combination or conspiracy with Rerdell. The court must entertain respect for the finding of the jury.

Mr. HENKLE. We do not care what amount of bail your honor fixes. [After consultation with other counsel for defendants.] We will try to be ready by Friday at 10 o'clock.

Mr. MERRICK. If your honor please, and if that matter is disposed of, it is proper for me to say to the court that we have instructions from the Attorney-General to bring on the case for trial as to the parties in regard to whom the jury disagreed as soon as practicable, and when we come on to argue this question of new trial I shall ask your honor to either fix the 6th of November or the first Monday of December.

The COURT. That is notice to the other side.

Mr. MERRICK. That is all, sir.

Mr. CARPENTER. That can be settled hereafter.

The COURT. I think you might give notice for next April or May, because my year will be out.

Mr. MERRICK. I am only obeying my instructions. I gave notice so that the gentlemen may understand it.

The COURT. Well, gentlemen, I shall take this motion up on Friday, with any affidavits you may have, and I shall decide it on that day. I want no time to consider it. Both sides must be ready on Friday.

(To the marshal.) Adjourn the court until Friday.

Thereupon (at 1 o'clock and 30 minutes p. m.) the court adjourned until Friday at 10 o'clock a. m.

FRIDAY, SEPTEMBER 15, 1882.

The court met at 10 o'clock a. m.

Present, counsel for the Government and for the defendants.

The COURT. Mr. Henkle, have you filed any affidavits?

Mr. HENKLE. I have not filed them, your honor. I have brought them into court this morning; I did not get them until last evening.

The COURT. You can file them.

[Mr. Henkle here filed with the clerk separate affidavits of William Dickson, Frederick A. Tscheffely, Charles A. Fox, and William T. Jones.]

Mr. HENKLE. If your honor please, I sent for one of the jurors, Mr. Holmead, who, I understood, had made an affidavit, to come and see me. He came yesterday morning, and after stating his experience with the jury and what he knew, I asked him if he would give me an affidavit to be used in court this morning. He said that he had made an affidavit and filed it in the district attorney's office; that it had been prepared by Mr. Moore, of the district attorney's office, and that Mr. Moore had promised him when he did so to give him a copy of it, but that he had not given him the copy; that he had called on Mr. Moore yesterday and asked him for a copy, and that Mr. Moore declined to give it to him, stating that they did not want the "star route" (the defendants') counsel to have it. I then asked Mr. Holmead if he would give me a letter to your honor requesting it, and he told me to write a letter and he would sign it, and, with your honor's permission, I will read the letter that he addressed to the court.

The COURT. Let me read it.

Mr. KER. What is it? An affidavit?

Mr. HENKLE. No; it is a letter addressed to the court.

Mr. KER. Then it ought to go to the court. If it is addressed to the court it ought to go to the court.

Mr. MERRICK. It is a communication addressed to the court, not to the counsel. Let the court take it.

Mr. HENKLE. I have no objection to that.

[Letter handed to the court by Mr. Henkle.]

The Clerk, Mr. CAMP. (To Mr. Henkle.) Are these papers which you have filed this morning filed on behalf of Rerdell?

Mr. HENKLE. Filed on behalf of Rerdell and Miner; all of the papers are filed on behalf of both of them.

The COURT. I have read the letter.

Mr. HENKLE. I intended to read it publicly. [To the bailiff.] Please give that letter to Mr. Merriok.

The COURT. I do not care to have the letter filed. It is simply a letter the purport of which is that, at the time, he declined to furnish you with an affidavit for the reason that he had furnished one already to the district attorney.

Mr. HENKLE. And requesting your honor to send for that affidavit and use it at the hearing.

The COURT. Yes.

Mr. MERRICK. If your honor please, I have not had an opportunity of personal communication with the Attorney-General, but, in any emergency arising in a case, counsel must perform his duty, for himself, according to his sense of duty, and take the responsibility. Neither have I had much opportunity of communicating with Mr. Ker, and none with Mr. Bliss. I have had only a few moments' conversation this morning with Mr. Ker, for I have just returned from the country. I find some mo-

tions on file for a new trial in the case of the convicted defendants, accompanied by the statement of a variety of reasons and by some affidavits. Among the reasons is one, namely, that the verdict is itself unreasonable.

As counsel for the Government of the United States, I am not disposed to put on file a consent to the granting of these motions, but as counsel for the United States I feel it to be my duty not to oppose them. The Government of the United States itself is not entirely satisfied, by any means, with this verdict. It is a verdict which subjects the masters to a retrial, and convicts the servants and the minions. It is a verdict which, to all who are familiar with the testimony in the case, presupposes a finding by the jury, first, of a conspiracy to defraud the United States, and, secondly, of the conclusive and satisfactory proof of an overt act, so as to create a completed crime under the statutes of the United States. That having been found by the jury, necessarily, prior to their determination of a conviction of guilty against Rerdell and Miner, left for them the sole inquiry as to who were in the conspiracy which they had found. It is apparent to all men, that, deeply guilty in point of morals and law as Rerdell and Miner are, the guilt they did, the criminality that they perpetrated, were the scheme and device of others.

Now, sir, the Government of the United States cannot consistently with its dignity, object, by practical resistance, to the motions made to set aside such a verdict and bring to trial again both masters and servants, in order that full justice may be done. The Government of the United States, may it please your honor, seeks no victim. It seeks simply justice. When a verdict apparently trifles with justice, it cannot meet the approval of the Government of the United States.

With these brief remarks the Government counsel leave the subject of these motions to the discretion of the court, not consenting and not resisting, hoping for the purity of its record, resolved upon the prosecution of criminals to the fullest extent, and trusting that whatever your honor may decide or whatever may hereafter come, full justice will in the end be done.

The COURT. Mr. Henkle, will you be kind enough to read your motion for a new trial, with its reasons?

Mr. HENKLE:

The defendant, John R. Miner, moves the court for a new trial, and for grounds assigns the following, viz:

This is a motion, your honor will observe, which is addressed to the discretion of the court.

[Continuing:]

1. Misbehavior on the part of the Government.
2. Misbehavior of the jury.
3. That the verdict is contrary to the evidence.
4. That the verdict is unreasonable.
5. And for other manifest errors.

Those, your honor will remember, are the grounds according to the rules of the court.

Mr. MERRICK. There are others, are there not?

The COURT. What evidence is there of misbehavior on the part of the jury?

Mr. HENKLE. I have taken no testimony as to that, your honor. The statements of the jurors themselves to me will furnish abundant evidence; but I believe, your honor, that by the law the affidavits of jurors are not competent to prove misbehavior on the part of the jury.

Mr. MERRICK. Oh, certainly they are.

Mr. HENKLE. I could furnish the affidavits of several of them, I presume, but I do not care to do that.

Mr. MERRICK. I ought to have stated that, upon looking at the affidavits, I do not find one that I expected, in relation to a fact that we had information of by affidavit, namely, that a written statement of an occurrence alleged by Mr. Dickson to have taken place some time in August, was read to the jury by him in the room, and was sworn to, not as to the truth of what the statement contained, but as to the fact that that statement was read to them, notwithstanding the directions of your honor to the jury.

Mr. HENKLE. I understood that, your honor, although I do not know it as a fact. If your honor will permit me, I will state what one of the jurors said to me.

The COURT. Oh no.

Mr. MERRICK. I have no objection.

Mr. HENKLE. Mr. Merrick says he does not object. Might I say, your honor, that one of the jurors said to me that if they had been polled they would have said that that was not their verdict?

The COURT. That was not necessary.

Mr. HENKLE. I have not thought it proper to take testimony as to that point.

Mr. MERRICK. In reply to the remarks of Mr. Henkle, I will say that the verdict rendered by the jury is perfectly consistent with logic and correct principle so far as the nine are concerned who voted consistently "guilty" as to all.

Mr. HENKLE. I concede that.

Mr. MERRICK. It is perfectly consistent as to those gentlemen. Their principle is right, their logic is right; the others may reconcile it as best they can.

Mr. HENKLE. I admit that it is perfectly consistent with those. Now, your honor, I do not propose to argue this motion. I will read, if the court pleases, the affidavit of Mr. Dickson.

The COURT. I do not ask you for that.

Mr. HENKLE. Shall I read it?

The COURT. Yes; you may read it. Whether the court will entertain it or not is a question.

Mr. HENKLE:

917 G STREET NORTHWEST,

Wednesday, August 23, 1882—11.50 o'clock p. m.

While dining at the restaurant of George W. Driver, No. 1331 Pennsylvania avenue, about 7 o'clock this evening, in company with Mr. Driver, I was approached by a person named Henry A. Bowen, of New York, with whom I have a casual acquaintance dating back several years. He took a seat closely beside me, and said he desired a conversation if I was disengaged; that he was about to leave Washington with Judge Hoover and other gentlemen for the West, on the night train. I told him that I had just sat down to dine, and invited him to join me, which he declined, stating that he had concluded his dinner. He then inquired about the Star-route trial, and expressed a desire to talk with me on the subject. I replied that I had studiously refrained from conversation in reference to that matter, and preferred that no allusion be made to it: that my position as a jurymen in the case debarred me from indulging in any conversation on the subject, and I chose, while holding that position, to remain silent. He then asked if I was not aware that he wanted to see me and have a talk. I replied that I had learned that he had inquired for me on the previous evening, but as I had gone home at an early hour I did not see him as he desired. He said, then, "I am mistaken, perhaps," and was about to continue his remarks, when he was called away by a person who approached him, named Brewster Cameron, an officer of the Department of Justice, and, rising from his seat, he excused himself and walked toward the front door of the saloon with Cameron. While seated in the garden adjoining Mr. Driver's establishment, about 8 o'clock p. m., or thereabouts, reading a newspaper, several acquaintances came in, seating themselves near me, and shortly after Henry A. Bowen ap-

proached, and, taking a seat at a table close by, joined the party. He excused himself to me for his abrupt departure, and was introduced to the persons there assembled (Mr. H. I. Gregory, John Ward, Frank Cardella, Mr. Thatcher, and others) and, accepting the invitation of one of the parties, partook of some refreshments. A few moments later he indicated to me that he would like to accompany him to a seat upon the balcony of the garden to listen to the music. I did so, and we seated ourselves at a table, he ordering a bottle of wine. After conversation on various minor subjects—the weather, the performance, and Driver's enterprising spirit—he turned to me and asked if I was not aware that he was connected with and was influential with the Department of Justice. I replied that I had incidentally heard he was somewhat instrumental in obtaining the appointment of Judge Hoover. He said, "Yes, that is so; and I want to talk with you, for I am fully authorized to do." I replied, "Well, no harm can result from a talk between gentlemen at any time, and I certainly do not object." He then said that Attorney-General Brewster was deeply interested in the final result of the Star-route cases; that it was, politically, life or death to him; that the case came to him (Brewster) as a legacy from his predecessor, Wayne MacVeagh, and that it had been terribly mismanaged by MacVeagh and James; mistakes had been made and errors of counsel had jeopardized it; that the present administration did not care to press the case until Brady's papers commenced their tirade of abuse and vilification of the administration and its officers, and now, under all circumstances, the defendants, Brady and Dorsey, must be convicted. Continuing, he said that the Attorney-General had carefully studied the case, and had read the testimony throughout, and it was sufficient to convict; that he had frequently remained at the office till after midnight reading up the case, until his eyesight gave out, when he sent to Philadelphia for a young man employed there in his office to assist him in reading; that his argument had been prepared with care, and it would be the "supreme effort of his [Brewster's] life"; that an assurance would be given that after conviction the President would pardon the defendants, and possibly within thirty days.

He then said: "Dickson, you are a politician, and you know that 'politics is politics.' You are a man of superior intelligence, and the brains of the jury. The Attorney-General has a high appreciation of you, and knows all about you. If you are so disposed you can accomplish what he desires, and I will fully guarantee that there is twenty-five in it for you." "Twenty-five," I asked; "what do you mean by that?" "Why, \$25,000," he replied. "The money will be placed in escrow, satisfactory to you, and I shall give you all the assurances you can ask upon that matter." I told him that I was astounded at the proposition; that it was a startling offer, and I expressed surprise at his action. "Well," he said, "you are a man of the world, and know that when you are in a fight you must use every means in your power to win. This is now the Attorney-General's fight, and he must succeed—'tis life or death with him. He says he has a little—"

Mr. HENKLE. There is a blank there. I do not know whether it is a little "son" or "daughter."

"He says he has a little —, eight years of age, in whom he takes great pride; that he cannot live many years longer, and that he desires this trial to be his greatest triumph. He does not regard Judge Wylie, by his contrary rulings, as friendly to the prosecution. If you do not accede to the proposition I make, we will find other means to accomplish it." I then inquired: "Does Bliss, Merrick, or Ker know of this action?" He said: "They did not." I then asked: "Are you authorized to submit this proposition to me; and if so, by whom?" He replied: "I am fully authorized to act by the Attorney-General, and will satisfy you if you assent to the proposition, but if you do not, and the conversation should leak out, I'll deny every d——d word of it." He then drew from his inside pocket an official envelope addressed to himself, the envelope bearing the official red seal of the Department of Justice. It contained two letters, which he handed me to read. The first was dated August 12, 1882, and was a copy of a letter to the Department of Justice, calling the attention of the Attorney-General to the violation of the "intercourse act" in the Territory of Arizona, and referring to the depredations of marauding Indians, and requesting the appointment of a special agent to visit the Territory and inaugurate means to prevent a repetition of the outrages, or something to that purport. It was signed "F. L. Tidball, United States Marshal." The second letter shown me was written on the official letter-paper of the Department of Justice, and dated August 22, 1882, directed to Henry A. Bowen, and its contents were that he was appointed as a special agent of the department to proceed to the Territory of Arizona for the purposes as set forth in the letter of F. L. Tidball, a copy of which was therewith inclosed. It directed him to proceed forthwith to Arizona, and institute inquiries as to violation of the "intercourse act"—depredations, selling of whisky, &c.—and to make a detailed report to the department. It also provides for his pay "at the rate of \$7 per day and expenses," and was signed, "Brewster, Attorney-General."

After I had read them he said I could judge for myself as to his close relations with the Attorney-General, that he wanted to go to Arizona on a trip, and the place had been made for him. He then said he had delayed going west on purpose of seeing me, and again asked what I thought of his proposition. I told him "I would not consider the matter," and declined to say anything further. He replied, "If you doubt me and will meet me to-morrow, I'll fully satisfy you that I mean business. The Attorney-General has been telegraphed for, and will return to the city sometime to-morrow (Thursday). I will send word to your address to-morrow, and will arrange with Brewster on his arrival to meet you at Wormley's Hotel; we can meet in his private parlor undisturbed, and you can then satisfy yourself that I mean business. I would have gone west to-night with Brewster Cameron, but I remained behind solely to arrange this interview with you. You will hear from me to-morrow." Shortly afterward I separated from him and left.

The conversation detailed above was had while seated upon the balcony at Driver's Garden, and was entirely between ourselves. It was interrupted occasionally by acquaintances who came up, but resumed again when they moved away. The parties who approached us from time to time were a Mr. Shippard, Frank Morey of Louisiana, Judge Hoover, Mr. Salterwaite, George W. Driver, and a colored man—a waiter named Henry.

THURSDAY, August 24, 1882.

On my return from the criminal court this afternoon a colored boy entered my office. No. 222 Four-and-a-half street, northwest, and handed me a card, upon which was written, "Dear Colonel Dixon. Eight o'clock this evening at Driver's. BOWEN. August 24."

On reading the card I asked him who had sent him. He said, "Colonel Bowen." I told him there was no answer, and did not keep the engagement requested by Bowen in his card.

FRIDAY, August 25, 1882.

Informed Judge Wylie of the fact that an improper proposition had been made me, and by whom.

WILLIAM DICKSON.

Subscribed and sworn to this 14th day of September, 1882, A. D.

[NOTARIAL SEAL.]

JOSEPH C. ROCK,
Notary Public.

I ought to say, your honor, that this affidavit was sent to me by Mr. Dickson, and I believe it is all in his handwriting.

The COURT. It is sworn to?

Mr. HENKLE. Yes, sir; it is sworn to.

The COURT. Are there any others?

Mr. HENKLE. Well, your honor, we had some affidavits as to—

Mr. MERRICK. [Interposing.] Brother Henkle, may I ask you a question? I have no affidavits, and I have not had time to prepare one. Are you not aware that Dickson has stated that he did not believe Mr. Bowen had any authority, and had no conversation with the Attorney-General on the subject?

Mr. HENKLE. No, Mr. Merrick, I have not had any conversation with Mr. Dickson, and have not seen him since I left the court room on Monday. I sent to him and asked him if he would send me an affidavit of the facts as they occurred, and he sent me this.

Mr. CARPENTER. I am aware of the fact, Mr. Merrick.

Mr. HENKLE. Of course, I would be very sorry to suspect that the Attorney-General or any of these counsel were aware of this.

The COURT. What other affidavits are there?

Mr. HENKLE. There are some affidavits with regard to the residence of one of the jurors—McLain.

The COURT. This affidavit relates to nothing that transpired in the jury-room.

Mr. HENKLE. No, sir; nothing that transpired in the jury-room. I do not know whether I should take the time of the court to read these affidavits. I do not rely upon them at all. They simply state that one of the jurymen, McLain, was a resident of Prince George's County,

Maryland, and was a regular voter there at the November election. Of course, he might have changed his residence. We base our motion upon the ground of the affidavit that has just been read, your honor. My brother Wilson thinks that I ought to read the other affidavits.

The COURT. Before the jury retired the foreman of the jury inquired of the court—

Mr. MERRICK. [Interposing.] No. Mr. Ingersoll.

The COURT. Yes; Mr. Ingersoll. Mr. Ingersoll inquired of the court whether the members of the jury in their retirement, in their consultation, were at liberty to discuss these offers of bribery which had been made, or which it was said had been made, by persons to several of them. The court was of the opinion that such a discussion as that in the jury-room would be highly improper. It might affect the verdict, and, as a verdict ought properly to rest upon the evidence in the case, a discussion of that kind would be calculated to mislead the minds of the jury, and might produce a verdict not founded on the evidence. That is one of the reasons which influenced the court in saying to Colonel Ingersoll that that could not be allowed, and the jury was so informed. Now, whether the jury transgressed the rule laid down to them by the court or not, I am not now informed.

Mr. MERRICK. I agreed that they had, did I not?

Mr. HENKLE. Yes.

The COURT. This affidavit of Dickson relates to matters that took place between him and Bowen outside of the jury-room.

Mr. HENKLE. I know it does, your honor. I was in hopes your honor would send to the district attorney's office for the affidavit of Mr. Holmead. If your honor would permit me to state the point of it—

The COURT. I cannot do that.

Mr. HENKLE. Well, it is in the same line as Mr. Dickson's as to approaches by another party connected with the Department of Justice.

Mr. MERRICK. He does not state that he had any offer made to him.

Mr. HENKLE. I have not seen the affidavit, your honor.

Mr. MERRICK. He says there was no offer made.

Mr. HENKLE. If your honor wants any authority I think I can satisfy the court from authority that, even supposing the party himself does not employ the influence, yet, if in his name or under color of authority from him, improper advances are made to a juror that might influence him, it is ground for setting aside the verdict, although the party himself might have no knowledge of it at all.

Mr. MERRICK. As to setting aside the verdict on that ground I should resist it as unjust and improper. As to setting aside the verdict on the grounds I have stated I have no resistance to offer, but on that ground I should resist it, and ask, if your honor desires further information upon it, an opportunity to prove—if it is necessary to produce affidavits after my brother Carpenter's admission—that Dickson did not believe that this man had any authority from the Attorney-General (and he has stated that it did not influence him), and also affidavits that he read it in the jury-room, and when questioned in regard to its accuracy, swore to it immediately after receiving the directions from your honor. Now, I shall not resist a motion to set aside the verdict on that ground, or on the ground of the unreasonableness of the verdict. The verdict is utterly inconsistent with any rational theory as to the guilt of those found guilty. The rich are let go, and the poor punished; the masters free, and the servants in jail.

Mr. CARPENTER. If the court please, Mr. Merrick has referred to what I said in regard to Mr. Dickson. I did not intend to be under-

stood exactly as he has stated it. Mr. Dickson has stated to me since the trial that he did not now believe that the Attorney-General had anything to do with it, but I understood Mr. Merrick to go further and say that he did not believe it at the time. I did not draw that distinction. The fact is Mr. Dickson did not charge the Attorney-General with it at the time he was talking with me, and I understood him to say that he had addressed a communication to the Attorney-General for an investigation, and stating that fact in the communication.

Mr. MERRICK. The investigation is now in progress, I might state, Mr. Carpenter.

Mr. CARPENTER. He did not say anything to me about having read it to the jury.

Mr. MERRICK. No. I offer to produce an affidavit to that effect.

The COURT. [To Mr. Henkle.] I will hear your authorities.

Mr. HENKLE. I read from the case of *Ritchie* against *Holbrooke*, in the 7th of Sergeant and Rawle:

The verdict in this case having been for the plaintiff, a motion has been made, on the part of the defendant, for a new trial. In support of this motion, several matters have been offered, both of law and fact, but there is one which demands particular attention. An affidavit has been produced of one of the jurors by which it appears that a difficulty in the plaintiff's account having been mentioned, after the jury had received the charge of the court and retired to consider of their verdict, the foreman of the jury declared that the plaintiff had satisfied him with regard to that difficulty, in a conversation which he had with him, *out of court and after the jury had been sworn*. The plaintiff's counsel contended that the court should pay no regard to this affidavit, because it is impolitic to permit jurors to relate what passed between themselves, and for this they relied on the case of *Cluggage vs. Swan*, 4 Binn., 150. That was a very different case from the present; the jury drew lots for the verdict, and the court refused to hear the affidavit of one of the jurors to prove it. Whether jurors should be permitted to disclose their own misconduct has been a *rexata questio*. I declined giving any opinion on that point, in *Cluggage vs. Swan*, because the case did not require it; there was enough to set aside the verdict on other grounds. But my brethren, the late Judges YEATES and BRACKENRIDGE, certainly were decidedly of opinion that the affidavit of the juror should not be regarded.

But it never has been and I trust never will be doubted that the affidavit of a juror shall not be received to prove misbehavior of *one of the parties of the suit*. The holding of conversations with jurors, after they are sworn, is a practice against which the court should set its face resolutely, and put it down at once. It must be known that a party may lose, but cannot gain, by a conversation with a juror after he is sworn, unless it be open, and by permission of the court. If the verdict should be against him, it will stand; if for him, it will be set aside.

It is objected that this is hearsay evidence. To be sure, as to the fact of the foreman's conversing with the plaintiff, it is, in some sort, hearsay, because the juror who made the affidavit was not present at the conversation. But it is not hearsay that the foreman informed his fellows of the explanation of the account which has been given by the plaintiff; nor is it hearsay that, at least, one of the jurors (the foreman) declared himself satisfied by evidence which was not given in open court. But for my own part, where one of the parties is charged with a kind of misconduct which strikes at the root of trial by jury, and no attempt is made to contradict or explain it, I am not for being very scrupulous in weighing the evidence. From what has been disclosed to the court, I am satisfied in my conscience that an improper communication took place between the plaintiff and the foreman of the jury; and, therefore, I am of opinion that the verdict should be set aside.

Mr. MERRICK. That verdict was for the plaintiff, was it not?

Mr. HENKLE. For the plaintiff; yes, sir. In *The State vs. Hascall*, in the 6th N. H., an indictment for perjury—

The only remaining objection [say the Supreme Court,] is that certain papers, calculated to make an unfavorable impression upon the jury, were exhibited by Fitts, the prosecutor, at several public places, and read in the hearing of jurors, during the term and before the trial.

There can be no doubt that the papers have a tendency to produce an impression unfavorable to the prisoner. Several witnesses swear to the exhibition of these papers, and two say that in their belief they were read in the hearing of two of the jurors, but they do not give the names of the jurors who, as they believe, heard them read.

To rebut this evidence, the counsel for the State has offered the affidavits of each member of the jury that they did not hear any such papers read at any time before the trial, nor did they read, or hear read out of court, any paper whatever, in any way relating to the prisoner, or his character, or the character of the prosecutor, before the return of the verdict, and that they were induced to agree to the verdict from a consideration of the law and evidence given in at the trial, and from that only.

The prisoner's counsel have objected to the reception of these affidavits in evidence, and the first question is whether they can be considered. * * * It is evident that cases may occur where an attempt is made to impeach a verdict upon evidence founded in mistake, misapprehension, or perhaps in fraud. To exclude the testimony of jurors, therefore, in all questions affecting their verdict, would neither be just to the parties nor the jury; and, upon a full consideration of this point, we hold that the affidavits of the jurors are admissible in this case, to prove that they did not read or hear any such papers read before their verdict.

The court admitted the affidavits.

THE COURT. That was a case of misconduct on the part of the prosecuting witness.

MR. HENKLE. Yes, sir. If your honor please, I do not care to read any more than is necessary, if I can come to the point:

These affidavits then, to that extent, are to be weighed against those produced on the part of the prisoner.

Had the affidavits on the part of the prisoner named any particular jurors who were present and heard the papers read, there might be a question to be considered as to the weight of the testimony whether they were heard by those jurors or not. But it is observable that no juror is designated as having heard these papers read, although it must probably have been in the power of the witnesses to do, so if they had the knowledge that they were read in the presence of two members of the jury, as they testify to their belief. The individuals are not only not named, but no description of them is attempted, nor any circumstances stated which can lead to any supposition which of the jurors were probably the individuals alluded to; nor is it stated that they were unknown to the deponents.

All this is certainly suspicious, and we have no hesitation in holding that, under such circumstances, the affidavits of the several jurors, that they neither read nor heard read any such papers before the verdict, stand wholly unimpeached, and that the prisoner has failed of making out this fact.

But this is not all. There are other witnesses on the part of the prisoner than those who testify that the papers in their behalf were read in the hearing of two jurors, who swear that they were exhibited in several public places in Portsmouth during the term, and before the trial, and that some of the jurors boarded at those places, and the places are designated in the affidavits.

This evidence is not disproved by the Government, or in any way encountered, and it establishes the fact of conduct of a highly unwarrantable and reprehensible character on the part of one or more individuals connected with this prosecution—conduct which was directly calculated to have an improper influence upon the trial, and of a character, if tolerated, to destroy the confidence of the citizens in judicial tribunals, and the fair and impartial administration of justice according to the laws of the land.

We are not disposed to give any countenance to such a procedure in this or any other case. It is of much more importance that the community should feel assured of the purity of the trial by jury, without bias, according to law, than it is that John Hascall be now sentenced, even if he be guilty.

The exhibition of these papers was very likely to make their contents a subject of conversation, and the jury, or some of them, may have heard some of the facts contained in them, though they neither saw nor heard of the papers themselves. It is not denied in their affidavits that they did so, although it is not impossible that this may have resulted from their attention not having been called to this point. They state, generally, that they were influenced by nothing except the law and evidence given at the trial, but this we cannot consider.

It is sufficient for this case that the exhibition of those papers was highly improper, and that there is a probability that some of the jury may have heard something of the statements contained in them, in consequence of such exhibition, before the trial was had.

We should not hesitate a moment to set aside a verdict obtained by a party in a civil case under such circumstances (2 N. H. Rep., 474, *Perkins vs. Knight*; 13 Mass., 218, *Knight vs. Freeport*): and although it would be partly to punish his misconduct, and the State is here in no fault, yet we think the respondent in a criminal case, where the law humanely presumes innocence, is, within the discretion of the court, under circumstances like the present, entitled to the benefit of the same rule. And it is on this ground, and on this alone, that we set aside the verdict and order the case transferred to the common pleas for a *new trial*.

The COURT. Will you send me that authority, please?

[The volume was passed to the court.]

Mr. HENKLE. I have some more, your honor.

Mr. MERRICK. I see one or two of the jury in court, your honor, and suggest the discretionary power of the court to examine the jury as to the charge of misconduct. One of these reasons is a charge of misconduct.

Mr. HENKLE. Before your honor reads that case, let me call your attention to the case of *Joseph Knight vs. The Inhabitants of Freeport*, in the 13th Mass.:

After a verdict at the last October term for the plaintiff in review, and before judgment, the counsel for the defendants in review moved the court for a new trial, on the ground that one Abel A. Briggs, who was a witness for Knight—

Not the party, but a witness. He was a son-in-law of the plaintiff, who was a witness for Knight—

on the trial of the cause, after the impaneling of the jury and before the trial, applied to Justin Kent, one of the jurors, and stated to him that this cause was of great consequence to him, Briggs; and if it went against Knight, he, Briggs, should have to pay the costs; and that the defending the action was a spiteful thing on the part of the said inhabitants of Freeport; the said counsel declaring that they had no knowledge of the said facts, until after the jury had returned their said verdict. The juror testified to the truth of the foregoing statement, and added that Knight was not present at the time, nor did the juror know that he, Knight, had any knowledge thereof.

Knight was the plaintiff.

And it was admitted that the said Briggs was Knight's son-in-law and did assist him in supporting his cause. The said motion being continued over to this term.

Now, says the court:

Too much care and precaution cannot be used to preserve the purity of jury trials. The attempt to influence the juror in this case was grossly improper and ought to be discountenanced. It is not necessary to show that the mind of the juror thus tampered with was influenced by this attempt. Perhaps it is not in his power to say whether he was influenced or not. If he was, there is sufficient cause to set aside the verdict; and if he was not, and the party who has gained the verdict has a good cause, he will still be entitled to a verdict upon another trial. We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes, and every one ought to know that for any, even the least, intermeddling with jurors, a verdict will always be set aside.

I will now read from the case of *Cilley v. Bartlett*, commencing on page 318 of 19th N. H. It is one of the exceptions in the case:

That the defendant, out of court, in the absence of the plaintiff and his counsel, after the whole evidence in the case was closed, and the case argued on his side, and while the case was pending in this stage before the jury, in the presence and hearing of one or more of the jury, in the most direct and positive terms and manner, asserted and declared that the whole testimony of one of the most material witnesses examined on the plaintiff's side was utterly and absolutely false. This was shown by affidavit. And the defendant, by his own affidavit, denied that he knew or was aware that any one of the jury was present when he made that statement.

Say the court:

The court finds that the defendant, in the presence and hearing of one or more of the jury, asserted in the most positive terms that the testimony of one of the most material witnesses for the demandant was utterly and absolutely false. The tenant swears that he did not know any one of the jury was present at the time.

Whether he knew this fact or not is not a matter that can be readily proved. But there will be no security for the proper administration of justice if a party, while his case is on trial, can be permitted to make statements denouncing his opponent's witnesses during the adjournment, after the jury have separated, whether he is aware of the presence of a juror or not. If he will conduct in this manner he must take the risk of the consequences upon himself. The presumption is that when jurors hear such

statements they are more or less affected by them. (*The State v. Hasoall*, 6 N. H., 352.) And as it is necessary that such conduct should be discountenanced, the judgment of the court is, that for this, as well as the other causes we have stated, the demandant is entitled to a new trial.

I refer also to the case of *Shea v. Lawrence*, 1 Allen. Opinion by Judge Merrick. I hope this learned judge is a relation of my distinguished friend Merrick.

Mr. MERRICK [laughingly]. He is my brother-in-law.

Mr. HENKLE [reading]:

Upon the evidence submitted to the court in support of the motion of the plaintiff to set aside the verdict and grant a new trial, we think the conclusions of the presiding judge were correct. The utmost precaution should certainly, at all times, be observed to prevent any attempt to forestall the judgment or to bias the mind of a juror in reference to the merits of any issue or question which, in the discharge of his duties, he may be called upon to decide. All trials by jury ought to be effectually guarded against the exertion of every species of improper influence; and the law will never allow a party to derive any possible advantage from it. It is, therefore, an established and salutary rule of law, that the least intermeddling with the jurors is a sufficient cause for setting aside a verdict. Thus, where a person who was a witness for one of the parties, applied to one of the jurors, after they were impaneled and before the trial, and made statements to him of a character tending to create a bias or prejudice against the opposite party, it was held that the verdict could not be sustained, although it was not shown that the mind of the juror thus tampered with was in any degree affected by the statements addressed to him.

The COURT. What authorities does he refer to?

Mr. HENKLE. To the case I referred to a moment ago—the case of *Knight v. Freeport* (13 Mass.).

The COURT. That was where the attempt was made by the son-in-law of the plaintiff, who was active in the prosecution?

Mr. HENKLE. Yes, sir. Now, there are several other cases. I do not think I ought to take your honor's time to read them. They are stated in 1 *Graham & Waterman on New Trials*, commencing on page 49.

The COURT. Can you find any case in which the court has set aside a verdict on account of proposals or offers of bribes coming from persons not connected with the case?

Mr. HENKLE. No, sir; I do not say that. I gave but a hurried examination last evening to these authorities. I suppose I might have found an indefinite quantity in the same line, but I did not pursue it.

The COURT. If that were so, one party would be always in the power of another.

Mr. HENKLE. In the case I cited, in the 13th Mass., the witness was the son-in-law, it is true, but not the party to the record. He did not state that he represented the party to the record, and it was not shown that he did; and the juror whose affidavit was used expressly says that Knight, the plaintiff, was not present and he did not know that he, Knight, knew of it.

Now, your honor will observe that here the party approaching the foreman of the jury represented himself to be an employé of the Department of Justice, and, in order to satisfy the foreman that he was, he produced his credentials—not for this particular purpose, but to evidence his relationship to the Department of Justice in an appointment, and produced, as the juror says, papers with the seal of the Department of Justice attached. Now, it seems to me, your honor, that that was sufficient to establish, *prima facie*, his authority to do what he undertook to do; and whether it influenced the juror or not is not a question, according to these authorities. If he did it with that juror, he may have done it with some other juror who yielded to it, and it was, at all events, with a semblance of authority. I am not saying, by any means, that he had

that authority and I should be exceedingly sorry to believe it, but he comes to the juror professing to have that authority, and exhibits to him credentials which seem to justify him, and if he did not influence this juror, he may have made the same propositions to other jurors who were influenced by them. At all events, it is tampering with the juror and with the administration of justice, which is an unholy thing, and the courts, wherever they find that illegitimate influences have been used—whether by the party himself, or by others professing to act by authority of the party—if the verdict is in favor of that party, will lay their hands upon the verdict and set it aside.

The COURT. If that were true, would it not always place it in the power of a defendant who considers himself in danger to lay the foundation, in case of an adverse verdict, to have the verdict set aside? One can very easily get some friend, professing to represent the Government, to go and make an offer to bribe a juror, and then, in the event of an adverse verdict, use his own contrivance to defeat the verdict. I think the doctrine is, that where the prosecuting witness attempts to bribe a juror, the verdict will be set aside in case of conviction, and this New Hampshire case goes the furthest of any that I have ever seen, where the son-in-law of the plaintiff—this son-in-law having interested himself in the prosecution of the trial—representing to the juror that he was interested in the costs, offers inducements in the nature of a bribe to a juror, on account of which the verdict was set aside.

Mr. HENKLE. Suppose, your honor, that a person, not a party to the cause at all, but who is a friend of the party and desires to have him succeed, or an enemy—whatever motive he may have—does come to one of the jurors and say, “I will give you \$1,000 if you will render a verdict in favor of one of these parties,” and the juror takes it and renders his verdict, would not that be a good ground?

The COURT. Taking the bribe would be a good ground.

Mr. HENKLE. Well, suppose, your honor, he did not take the bribe; suppose the party said, “If you render such a verdict, after you render it I will give you \$1,000”; or suppose he holds out any other inducement that might influence the mind of a weak person, or of a dishonest person. These authorities, some of them, say, or at least one of them says, you cannot tell but that the juror may unconsciously be influenced by it himself. It is to preserve, your honor, the absolute purity of the jury box and the administration of justice. It will never do to allow jurors to be tampered with by anybody, and if you do once permit it, there is a demoralization of the administration of justice, and the people will lose their respect for it and confidence in it.

The COURT. Yes, to some extent.

Mr. HENKLE. Now, your honor, we have had in this case some extraordinary spectacles. I refer to what has transpired in the court-room. This court-room has been dotted all over with persons (I am not familiar with this kind of practice; I never knew such a case before, and I am not familiar with the technical name, but I think they call them “spotters”), whose duty it is to follow and shadow jurors and witnesses, and some of the vilest men in this community were right here, in your honor’s sight, during this trial, doing that very thing in the service of the Government.

Mr. MERRICK. Have you any affidavit or proof of that?

Mr. KER. Have you any affidavit?

Mr. HENKLE. No, sir.

Mr. KER. Then you ought not to state it.

Mr. MERRICK. Probably, if you pursue the investigation you will find that this charge of Dickson's was a got-up thing on the defendants' side.

Mr. CARPENTER. You will have a hard thing to do that, Mr. Merrick.

Mr. HENKLE. I produce these affidavits to let your honor judge whether your honor can afford to allow such a verdict to stand.

Mr. TOTTEN. I want to add a word, your honor. Suppose, in a trial even of a civil cause, some over-zealous friend or over-zealous enemy should single out a juror or two of them, and tell them privately or confidentially that he knew all about the case and that his friend ought to receive the verdict. Now, the presumption, I take it, always is in favor of the party not being guilty of an offense, and it will not do to say that it would be within the power of a defendant in a criminal case to overturn any verdict that might be given against him by getting somebody to approach a juror pending the trial. The presumption is that he does not do that, that he did not do that; and if that is a common practice, your honor, or if it is one of the evils to which society is subjected, then it is the duty of the law-making power to interpose and stop that thing, because it is not proper that private citizens who are charged with crime should even be subjected to an injury of that kind in the dark.

Now, in this case, putting aside all the offensive parts of it, this man apparently did say to one of the jurors that it was the great desire—astonishing as that statement may be!—that it was the great desire of the head of one of the great departments of this Government that a verdict should be rendered against these defendants. Now, *there* was a corruption of the channels of justice, your honor, whether that man was a volunteer in one way or another, or whatever the motive may have been; the juror may say, and he may honestly think, that it had no effect upon his mind; but it is not fair that any defendant should be subjected to the chances of his mind being left free after such a conversation as that.

Now, I submit to the court, in view of the circumstances of this case, considering the scheme of the indictment, considering the attitude occupied by these two men, viewed in the very worst light in which we can look at the case, that the verdict is unreasonable, and that it ought to be set aside at any event and at all events.

The COURT. [To Mr. Henkle.] I have sent for the affidavit of Mr. Holmead. Do you wish to file it in the case?

Mr. HENKLE. With your honor's permission I do desire to file it. I have not seen the affidavit at all, but from what Mr. Holmead told me of it I want it filed in the case. I should like to read it to your honor when it comes.

The COURT. I will look at it first. [After a pause.] Whilst we are waiting for the affidavit I should like to know if counsel have anything to say upon the question whether an affidavit of a juror is admissible to show misconduct on the part of himself and jurors, and any of them, in the jury room.

Mr. HENKLE. Your honor, I have no authorities touching that point. I confess I am inclined to the opinion that the weight of authorities is against it. There are cases both ways. Colonel Cook says that this court has decided the other way.

Mr. COOK. In the National Hotel rape case they decided that way.

The DISTRICT ATTORNEY. No, they did not.

Mr. COOK. Your honor ordered a commission to issue to Mr. Mills to take the testimony of the jurors.

The DISTRICT ATTORNEY. That was after I made an affidavit in the

case, upon which the court acted. Your honor declined to receive the affidavits of the jury, but after that affidavit was made the court took cognizance of the misconduct.

Mr. COOK. After full inquiry, your honor appointed Mr. Mills a commissioner to receive them, and upon those affidavits the court set the verdict aside.

Mr. HENKLE. I think when the attention of the court is called by the party, or by his counsel, to misconduct on the part of the jury, the court may, of its own motion, direct the jurors to be brought before it, or order a commission to take their testimony. But as to whether affidavits of jurors shall be used without the sanction of the court I am inclined to think the weight of authority is against it.

The COURT. I know that the course adopted by the court in the case referred to was adopted after an examination of the authorities and full consideration.

Mr. HENKLE. There is no doubt, your honor, that that was correct practice.

Mr. COLE. The leading case on that subject was cited at the time, and it is a case in the Ohio Reports, in which Mr. Thurman delivered the opinion of the court. The authority of the court to receive the affidavits of the jurors was fully sustained in that case. I have in my office a brief on that subject, with all the authorities referred to and used in argument on that occasion.

The COURT. I remember the rape case, and I am satisfied that the court declined to act in that case on mere affidavits.

[At this point the affidavit of Holmead was delivered to the court and by the court handed to Mr. Moore, of the District Attorney's office, to be read:]

Mr. MOORE. This affidavit was taken at Mr. Holmead's house, and is as follows:

I am acquainted with Mr. Frank H. Fall, esq., of Washington. On the second week of the so-called star-route trial Mr. Fall came out to see me. I did not know why he came. There was present Maj. Augustus Klover, Mr. Charles Wright, and Mr. C. A. Conolly. Mr. Fall called me and said he wanted to see me. We were sitting in my yard in front of my house. I went out under the locust tree in front of the house. He said the Attorney-General, Brewster, sent him to me; it was a matter of consideration whether Solicitor-General Freeman or himself should call to see me. I told him then if it was about the star-route case I would not talk to him. He said he would not talk about the merits of the case, but it was something the government had greatly at stake, and that I was the only man on the jury who was not under the ban of suspicion. The Attorney-General was very much afraid that there would be a mistrial, as they had positive proof that Mr. Brown had sold out to the defense; and Mr. Olcott was suspected, likewise Mr. Dickson and Martin, and the information he wanted from me was to know if I knew of any of this corruption going on. I told him no, and it was a surprise to me to hear that these men had been suspected. I defended with much zeal Messrs. Dickson, Olcott, and Martin, and Mr. Donifan, who was not suspected. Fall said that Dorsey and Brady were spending barrels of money to corrupt the jury, and it had come to the ears of the Attorney-General. I said if I had any knowledge of that fact I would consider it my duty to report it to the Attorney-General, and I pledged myself to do it. Mr. Fall then left me. I walked to the gate with him.

On the Sunday following, about 6 o'clock, Mr. Fall called again. Major Klover was at my place. Fall said he wanted a loaf of bread. I walked down to my store with him. On the way he talked about the corruption of the jury. I told him I had not heard of a suspicion. Mr. Fall then stated that he thought it was a shame that the government should go to the expense of the trial and then be sold out without a fair issue. I told him I thought so too, and would do all I could to ravel out any corruption I heard off. I said, as to my part, that he could tell the Attorney-General if I believed the defendants guilty I would so vote; if I believed them innocent I should vote to acquit, and I would be the judge of that and not the Attorney-General or any one else. Judge H. C. Harman and Moses Toles drove up, and Fall left me.

I met Mr. Fall about two weeks after this interview, at the City Hall. He then

said he was not connected with the case any further. He spoke to me at the City Hall two or three days before the case was given to the jury. He said he would be out to my store at eight o'clock; before I had time to answer him he left me, or I should have told him not to come.

About seven o'clock he called at my store. He said: "Mr. Holmead, they report at the Attorney-General's office that I offered you a bribe; I came to ask you if I so did." I told him I did not consider it as such; that he asked me only as to the corruption of the jury. He further said, "There may be something grow out of this," and if I was called upon to make a statement that he hoped I would tell the whole truth. I told him I would. He said he was sent to me by Brewster Cameron, with the knowledge and consent of Attorney-General Brewster. This ended the interview, and I have not seen Mr. Fall since.

WM. HOLMEAD.

Subscribed and sworn to before me this twelfth day of September, 1882.

CHAS. S. MOORE,

Assistant United States District Attorney for the District of Columbia.

The COURT. Oh, there is nothing in that.

Mr. HENKLE. Will your honor place that on file?

Mr. MOORE. I will say to your honor that I took this affidavit from Mr. Holmead for a special and particular purpose, and I have no doubt in the world that it is within the power of your honor to order this paper to be filed, but it is now a part of the District Attorney's office for the purposes of an investigation. I make the simple suggestion.

Mr. HENKLE. The District Attorney's office has access to the files of this court.

The DISTRICT ATTORNEY. In regard to all these papers in the hands of Mr. Moore, I desire to say that they are essentially private papers in investigating the question as to whether there was or not any bribery, and I think it is important to public justice that they should not be filed.

The COURT. I shall not order the affidavit to be filed. I wished it to be read merely for the purpose of seeing whether it was a paper which would induce the court to take the statement.

Mr. MOORE. I have in my custody two or three affidavits taken from jurors; they have not been called for, however.

Mr. MERRICK. You had better read those, your honor.

Mr. WILSON. They have not been called for.

Mr. HENKLE. We have not called for them.

Mr. MERRICK. Your honor asked for this.

Mr. HENKLE. The juror himself asked for it.

The COURT. I shall not ask for them. [To Mr. Henkle.] You have not shown any affidavits or other evidence to satisfy the court whether or not there was any misconduct in the jury room.

Mr. MERRICK. [Aside to Mr. Henkle.] I thought you and I had agreed to that.

Mr. HENKLE. I did not know it was addressed to me.

The COURT. I say the court has not a particle of evidence before it, by affidavit or otherwise, to show that the matter of bribery, the offer of bribes, was discussed by the several members of the jury whilst deliberating upon their verdict.

Mr. MERRICK. The court says you have no evidence that the bribery was discussed in the jury room.

Mr. HENKLE. Was that the paper that Dickson read? [Referring to the affidavit.]

Mr. MERRICK. Yes.

Mr. HENKLE. Well, I understand that Dickson read some paper.

The COURT. As to Mr. Dickson's affidavit or any other paper of that kind—

Mr. HENKLE. [Interrupting.] Mr. Merrick himself, your honor, suggested that the paper was read by Mr. Dickson in which that subject was treated. Was it not, Mr. Merrick?

Mr. MERRICK. I understood that Mr. Dickson read a paper, the same that is here to-day, the affidavit or some paper which he professed to have made after the interview at Driver's Garden, setting forth these facts, and that he read that paper to the jury. I understand that; I do not know anything about it, but I understand that he said that and swore to it.

Mr. HENKLE. I understood that Mr. Dickson did read that paper, or a paper of that character.

Mr. MERRICK. I don't care to say anything more about it, and am particular about saying anything at all about it in reference to the statement contained in the affidavit.

Mr. TOTTEN. I have no doubt that this matter was brought forward in the jury room. We have information on that subject, and we will submit an affidavit to the court in a few minutes, on information and belief, that that was done.

Mr. MERRICK. Well, we may wish to make a reply to that affidavit.

The COURT. I am of the opinion that the affidavit read is not a sufficient ground for a new trial in regard to these two defendants. Tampering with the jury is a very great offense, but, as I understand the rule, the tampering must be done by some party interested in the case. If it is a civil suit and the verdict has been for the plaintiff, and it is shown that he or any one by his authority bribed a juror or used means to influence the mind of one or more of the jury, that is a sufficient reason for setting aside the verdict, although the members of the jury may swear that the attempt was utterly without influence upon the verdict, and that they would have found the same verdict whether the attempt had been made or not. And so in regard to a defendant. If the defendant has used influence—unjust and illegal influence—or attempted to use illegal influence with the jury for the purpose of procuring a verdict, and the verdict should be in his favor, the verdict would be set aside altogether, without respect as to whether the influence so used, or attempted to be used, had any effect upon the minds of the jury or not.

But the rule does not extend to third persons, for this reason: In a civil case, if a defendant is apprehensive that the verdict will be against him, he might procure some third person to enter into conversation with a juror, representing that he came to the juror on behalf of the plaintiff in the case. That would be a very easy way for him to secure a favorable result in any event. If the verdict was in his favor, of course he would be satisfied. If the verdict happened to be against him, then he would prove that a man—some third person—had gone to a juror and had attempted to influence the mind of a juror in favor of the plaintiff, so that, by employing an artifice of that kind, he would secure himself against an adverse verdict. And the rule is so, I think, in criminal cases. If the prosecuting witness, or the counsel for the government, or an agent on behalf of the Government in conducting the prosecution, should attempt to influence the minds of jurors, that would be a good ground for setting aside a verdict of guilty. But if the person who is alleged to have attempted to exert the influence with the jury be not the prosecuting witness, be not an agent of the Government concerned in the prosecution of the case, be not counsel for the Government connected with the case, but be some person without authority from the Government, having no connection with the prose-

cution on behalf of the Government—if such a person as that should talk with a juror and represent that he was authorized to speak for the Government, and endeavor to persuade the jury to render a verdict of guilty against the defendants, I think that would not be a reason for setting aside the verdict, for the simple reason that I have given in regard to civil cases, and that is, that, if that was the rule, a defendant conscious of guilt could always have it in his power to get up a contrivance by which to defeat the verdict. He could employ a third person to go to a juror and say that, on behalf of the Government, he was willing to pay bribes to the juror for an adverse verdict, when, in fact, the money was the money of the defendant—if any money was used or promised to be used. But I think that while that is the rule in regard to promises, if the bribe was actually paid, probably the rule would be different. It would then make no difference whence the money came, because the acceptance of a bribe would prove corruption on the part of the jurors, and if a verdict of guilty were found the court would set it aside. Any other rule, it seems to me, would put it in the power of defendants always to defeat the successful prosecution of the case. This question has not been much argued. General Henkle has adduced some authorities, but the authorities that he has produced, I think, tend to establish the rule which I have indicated.

Mr. HENKLE. If the court please, I did not intend to say a word in argument. I intended to read these affidavits and, if the court desired it, these authorities, and then to leave the matter entirely with the court.

The COURT. Beyond the affidavit of Dickson, there is the misconduct, if I may so call it, of the jury, after they retired for deliberation, in their room—the discussion of this matter of bribery, which was a prohibited subject for the jury before they left the box. Counsel on both sides have conceded that such a discussion went on. It has not been proved here, but under the circumstances of this case, and considering the rather incoherent character of this verdict, I think it would be safe for the court to assume what is conceded by counsel on both sides to have taken place in the jury room—that this subject of bribery, upon one side and on the other, was talked about, discussed, and may have had an effect upon the result. I will, therefore, award a new trial in the case.

Mr. CARPENTER. If your honor please, I think that the counsel [Mr. Merrick] is laboring under a misapprehension as to the reading of that paper before the jury. I think it was read to the jury long before they went out for deliberation. I am not objecting to this. I do not understand it to be put upon that ground, but in justice to Mr. Dickson and the other jurors I wish to make that statement.

Mr. MERRICK. My information is that it was read immediately after the retiring of the jury.

Mr. CARPENTER. Well, the verdict is set aside.

The COURT. Is Mr. Tobriner here?

Mr. MERRICK. Somebody told me he was here.

[The marshal here called Mr. Tobriner.]

Mr. HENKLE. As I understand it, the court has decided the question.

The COURT. My word has not gone so far that it may not be recalled. For the purpose of being satisfied upon this matter, I will ask Mr. Tobriner a question. I would like to have Mr. Tobriner state to the court what really took place.

Mr. MERRICK. Mr. Doniphan was here just now.

The COURT. Mr. Cole, what was the name of that one-armed man who was tried here?

Mr. COLE. Curtis.

The COURT. Yes, Curtis. In that case this court held that it would not receive the affidavit of a jurymen setting forth his own misconduct, or that of his fellows, in the process of making up the verdict; but, after an examination of the decisions, came to the conclusion that it had the right to appoint a commissioner to take evidence upon that question after notice to both sides, and return the evidence to the court. I think the law allows the court to examine a juror in open court in the presence of counsel for both sides.

Mr. COLE. That is what your honor held in that case after a very full argument.

[The DISTRICT ATTORNEY. I know as much about that case and recollect as distinctly as any one else that, after the verdict was brought in, Mr. Cook and myself received information that the National Republican had been read and discussed. Your honor refused to receive an affidavit of the jurors, and I made an affidavit that I had this information, and was satisfied that it was true. Upon that your honor ordered a commission to issue to take the depositions. Mr. Mills was appointed a commissioner to take the affidavits, without the presence of any of the counsel of the parties.

The COURT. The court refused to receive it upon the affidavits.

Mr. COLE. Upon the *ex-parte* affidavits; yes, sir.

The COURT. The jurors were examined upon interrogatories which the court directed to be filed.

The DISTRICT ATTORNEY. Yes, sir.

The COURT. I know that that matter was settled at that time, after considerable examination and full deliberation.

[At this point Mr. Tobriner appeared in the court-room.]

The DISTRICT ATTORNEY. There is Mr. Tobriner, your honor.

The COURT. Mr. Tobriner, will you come forward and take the stand? [To the clerk.] Swear him to make true answers to the questions propounded to him.

ZACHARIAS TOBRINER was here sworn by the clerk and examined.

By the COURT:

Question. Mr. Tobriner, you were a member of the jury in this case?—

Answer. Yes, sir.

Q. The court wishes to be informed whether, after your retirement to consider of your verdict, this subject of bribery was spoken of and discussed before the jury, amongst the jury?—A. Yes, sir.

Q. Were any papers produced and read upon that subject?—A. Yes, sir.

Q. Who produced them?—A. Mr. Dickson.

Q. State what took place.—A. I do not recollect whether it was one or two hours after we came into the room. These papers were produced by Mr. Dickson. He took them out of his pocket and said: "That is what has happened to me," and he said that there were twenty-five thousand dollars offered on the part of the Government, and he told us that he put everything down when he came home; that he hadn't a chance to put it on paper while he was out, but that he put it down when he came home, and all that he put down he read.

Mr. CARPENTER. We cannot hear the witness.

The COURT. He states that Mr. Dickson said he did not take down, at the time, what the person said, but put it down after he went home, and what he read to the jury was what he put down after he came home.

Q. And he read the paper?—A. Yes, sir. There were about four or five or six sheets.

Q. Well, was this subject discussed amongst you?—A. Well, we did not want to at first. I recollect Mr. McLain made a motion—it was first carried by a motion whether these papers should be read or not read. Mr. McLain said these papers ought not to be read, and several of us said they ought not to be, and then it was put up and we voted on it, and it was voted that they should be read. [Laughter.]

The COURT. Well, that will do.

By Mr. MERRICK:

Q. Did he swear to the truth of the paper?—A. At the time he said——

Q. What did he say?—A. He said he believed that these papers were true, so help him God.

[The witness was here excused from the stand.]

The COURT. Well, he has sworn to the papers since. What I wanted to know was whether the jury had violated the injunction given by the court, in taking up this subject in the jury-room and discussing it. [After a pause.] That verdict of guilty, then, as to Rerdell and Miner, is set aside, not only on account of the misconduct of the jury, but, I may say, its “general unreasonableness.” Not that the court would have made this decision on the latter ground alone, because the unreasonableness of a verdict is for the jury rather than for the court, and, unless the unreasonableness shocks the court, the court will not set it aside; and in regard to these two defendants I cannot say that that was the fact. The court did instruct the jury—and is of that opinion yet—that under this indictment it was competent for the jury to find any two of the defendants guilty, although these two men seemed to be at the two ends of the line. It did not seem to my mind that they could have gone into a conspiracy without having some of the others along; but the jury thought they could, and I would not distrust the verdict on that ground.

But when I see that the verdict was made up by a jury who were discussing other matters than those before them, considering other matters whilst they were making up their verdict, which they ought not to have considered in making up the verdict, of course my duty is plain—to set it aside. And then, as to the acquittal of Peck, who is dead—I hope that he is acquitted everywhere—we were not trying him. As to Turner, of course the verdict stands. The new trial, therefore, will be as to all except Turner and Peck.

Mr. HENKLE. Will your honor be kind enough to fix the bail for these defendants?

Mr. MERRICK. I have sent for the old bonds. I want adequate security.

Mr. HENKLE. Mr. Miner and Mr. Vaile presented certified checks.

The COURT. I have considered that subject of a certified check——

Mr. HENKLE. [Interposing.] We do not propose to give a new check. I merely suggested that.

The COURT. I wish to give my views on that subject. When bail is given—when a defendant enters into a recognizance, which is bail—instead of going to jail for security he is presumed to be in the custody of his bail. His bail has it in his power at any time to bring him into court and surrender him and be discharged. That is the nature of bail. If the court, instead of requiring bail, allows the defendant to deposit his check the defendant is no longer in the custody of anybody; there is no bail with power to bring him into court and surrender him; so that the court is without the security which the law requires when it requires

bail. For that reason it was, the other day, that I directed Vaile's check to be surrendered to him and required bail. You see the difference between the deposit of a check and the custody of bail.

Mr. HENKLE. I think the discrimination is entirely sound and well taken.

Mr. MERRICK. Then, the question now is as to the amount of bail, I suppose, Brother Henkle? I ask your honor for a large and sufficient bail, and I do that influenced by the same sense of duty that controlled me when I said I would not resist their motion for a new trial. There is now really no bail. The checks are withdrawn, and I presume, of course, they will not offer Mr. Vaile as bail.

Mr. HENKLE. Why not?

Mr. MERRICK. I take for granted they will not do that, but I ask that your honor fix it in a sufficient and large amount. And none but a large amount will be sufficient, for these are men who have been convicted, although the conviction is wiped out by a new trial.

Mr. HENKLE. Well, your honor, my learned friend would hardly base any adverse conclusions as to these defendants who are convicted upon the fact that they are convicted, because he has, in fact, himself been saying to the court that the verdict was unreasonable and that they ought not to have been convicted any more than the others. So that that is hardly a predicate for his statement.

The COURT. I do not understand him to say that.

Mr. MERRICK. I say that the others are as guilty as these men, and that the rich escape while the poor are held. But as to these men, it seemed that the jury believed that they were all guilty, and therefore I did not wish the United States to hold a verdict which, to my mind, was disgraceful and contrary to the evidence.

Mr. HENKLE. I do not think that on account of this foolish verdict these men should be required to give a large bail; that the other men, who are admitted to be wealthy men, should give a small bail, and these men who are admitted to be poor men, required to give a larger bail. Of course, your honor will fix the bail at such a sum as your honor thinks will secure their attendance when this case shall be set for trial again; that is the purpose of bail, and beyond that it is unconstitutional as being excessive; and of course your honor will take into consideration that they are poor men.

Mr. MERRICK. Comparatively; Vaile is worth a million and a half.

The COURT. Well, we have no evidence as to Vaile, except that he is "a good liver." [Laughter.]

Mr. HENKLE. I leave it to your honor. Mr. Miner gave \$5,000 before; I think that is as much as he or Mr. Rerdell should be required to give. I think there is no question about their responding when they are wanted; but that, perhaps, will not be considered.

Mr. WILLIAMS. I will state that Mr. Rerdell is able to give bail in the sum of \$5,000. I do not think he can give beyond that, and I think that is sufficient for this charge.

Mr. MERRICK. In response to that I beg leave to protest, with all the emphasis that becomes an attorney. I think that ordinarily, in a matter of this kind, it is proper for the prosecuting attorney to stand aloof, but in response to that suggestion I must enter a solemn objection to any such paltry sum as \$5,000.

The COURT. The court is now pretty well informed as to the circumstances of this charge. In fixing bail, the court very often inquires in a superficial way as to what the Government expects to prove, what the Government will prove to sustain its charge. We have gone over that

ground, and the subject is not as strange as it was before. As I said day before yesterday, in regard to Rerdell the court cannot forget that, although he was comparatively a subordinate in this business, yet he has made admissions which, if they do not make out a clear, absolute case of guilt on his part, still sustain the verdict. As to Miner, he is a young man, active and energetic, and represented Vaile as well as others, in carrying on the business in Washington City, with authority to use their names, which he actively did use, and sometimes in what seemed to be a most extraordinary way; and although he may not have been one of the chiefs in this conspiracy, yet he was an active and energetic instrument in carrying out the objects of the conspiracy. I think, under these circumstances, that each of these defendants ought give \$10,000 bail.

Mr. HENKLE. Now, your honor, I propose Mr. Williamson, Mr. A. H. Brown, and Mr. Vaile. They are present in court and I would like to have them come forward and qualify.

Mr. MERRICK. I object to Mr. Vaile.

The COURT. I think you had better take all the securities you can get.

Mr. MERRICK. Mr. Williamson is on Vaile's bond now.

Mr. HENKLE. Mr. Williamson is a very modest man. He is worth \$150,000, I presume.

Mr. MERRICK. How much is Vaile worth?

Mr. HENKLE. You say he is worth a million and a half.

Mr. MERRICK. That is what I got from you the other day.

Mr. HENKLE. No, you are mistaken, brother Merrick, I never told you that.

The COURT. Where are these gentlemen? They will come forward and enter, if they are going to enter into this recognizance.

[Mr. L. P. Williamson and Mr. H. M. Vaile here advanced to the bar and were sworn by the clerk.]

Mr. HENKLE. Your honor, Mr. Williamson made a very modest statement the other day. I suppose he thought it was sufficient for the purpose.

The COURT. Mr. Williamson are you worth as much to-day as you were the other day? Have you disposed of any of your property since?

Mr. HENKLE. I think if your honor will ask him if he is worth three times that amount—

The COURT. [Interposing.] No, I do not think that is necessary.

Mr. WILLIAMSON. [In response to question by the court.] No, sir.

The COURT. [To Mr. Vaile.] How is it with you, Mr. Vaile?

Mr. VAILE. Well, I would be willing to qualify in \$100,000—\$50,000 in real estate.

The COURT. Is that a modest estimate?

Mr. VAILE. Well, I do not want to talk about it.

Mr. MERRICK. I ask your honor to ask Mr. Vaile to swear how much he is worth.

The COURT. No. He says he is worth \$100,000.

Mr. MERRICK. [To Mr. Vaile.] Have you parted with any of your property since the verdict has been rendered in this case?

Mr. VAILE. I have not.

Mr. MERRICK. Neither by deed nor otherwise?

Mr. VAILE. No, sir.

Mr. HENKLE. I can say that he does not intend to, either, Mr. Merrick.

Mr. MERRICK. I am sorry for Henkle if that is the case. [Laughter.]

Mr. HENKLE. Well, of course, *reasonable estovers*.

The COURT. These two are sufficient.

[The defendant John R. Miner, with Mr. Vaile and Mr. Williamson as sureties, thereupon entered into a recognizance in the sum of \$10,000.]

Mr. WILLIAMS. We offer Mr. A. C. Richards.

Mr. RICHARDS was here sworn and examined by the court.

Question. Major Richards, how much are you worth after your debts are paid?—Answer. Fifteen or twenty thousand dollars and upwards.

Q. Does it consist in real estate?—A. Mostly; yes, sir.

Q. In this city?—A. Yes, sir.

Q. You say fifteen or twenty thousand?—A. Say, fifteen thousand.

Q. You speak confidently in regard to that?—A. Yes, sir.

The COURT. [To Mr. Merrick.] You can ask him any question if you are not satisfied.

Mr. MERRICK. It is for the court, your honor. I do not desire to express satisfaction or dissatisfaction in such a question. I do not think it becomes me.

The COURT. I shall accept him.

[The defendant Montfort C. Rerdell, with Mr. Richards as surety, here entered into a recognizance in the sum of \$10,000.]

Mr. MERRICK. Now, your honor, the next business in order would be to assign a time for the trial of the case. I indicated one of two days—the 6th of November or the first Monday of December. The Attorney-General has directed me, your honor, to proceed as soon as practicable. I ask your honor——

Mr. HENKLE. [Interposing.] Oh! don't fix it now.

Mr. MERRICK. Yes, I will fix it now. I ask your honor, then, to fix the first Monday of December, as there are some other criminal matters which ought to be brought to attention of the court. The District Attorney concedes the importance of this case, and consents to that day.

The COURT. Are there any objections to fixing a day?

Mr. HENKLE. We have just gone through a trial that has prostrated us all. We want to get a little time and a little rest, to look after our temporal affairs before we are required to go into this thing again.

Mr. WILLIAMS. In addition to that, Colonel Ingersoll and Mr. McSweeny, who are interested in the case, are not present this morning. Their convenience ought to be consulted.

Mr. HENKLE. I was going to suggest to your honor that on the first day of the next October term—the court might fix it then. We have had no time for consultation.

The COURT. Oh! the longer notice you have the better. [After a pause.] The new trial of this case is fixed for the first Monday of December.

Mr. MERRICK. That ends it for the present.

The proceedings of this court were thereupon, at 1.50 o'clock p. m., adjourned *sine die*.

ALPHABETICAL INDEX.

Abbott, S. H. :

Receipt of, to Vaile, Miner & Co. (15 X), 2245.

Adams, Joseph B., post-trader :

Testimony of, on route 38113, 1142, 1144, 1149. Contents of letter written by Rerdell to Taylor, 1142-3, 1149; circulated petitions, some of the Army officers refused to sign, 1144; desirability of frequent and expeditious mails, 1144.

Adamson, George, page :

Testimony of, for the defense, 2167-2168.

Address, opening, to the jury :

On behalf of the Government, by George Bliss, 57-147.

For the defense, by Jeremiah M. Wilson, 147-209; L. G. Hine, 209-224; John McSweeny, 225-250.

Closing, to the jury :

On behalf of the Government, of Benjamin Harris Brewster, Attorney-General, 3108-3149; of Richard T. Merrick, 2781-2874; of George Bliss, 2575-2648; of William W. Ker, 2312-2423.

On the part of the defense, of ——— Carpenter, 2424-2534; of Jeff. Chandler, 2534-2575; of Solomon G. Henkle, 2951-3053; of Robert G. Ingersoll, 3054-3107; of John McSweeny, 2721-2780; of Enoch Tottou, 2667-2721; of A. B. Williams, 2648-2667; of Jeremiah M. Wilson, 2874-2951.

Advertisements, for proposals :

November 1, 1877, proved, 269; manner in which prepared, 273.

Affidavit :

Of A. E. Boone, June 25, 1878, for discontinuance of route (5 O), 1202.

Of A. S. Powers, subcontractor, William Gebhart and P. C. Renfrew, postmasters, as to causes of failure (28 T), 1526, 7.

Agate :

Accounts of postmaster at, fourth quarter, 1880 (37 and 38 B), 541-5; recoupment of amount paid for supplying, 562-72.

Alfalfa, formerly Raton :

Testimony of postmaster at, 1085-1101, 1156-1158.

Ames, E. M. :

Letter of, November 19, 1878, withdrawal of subcontract (28 B), 525; subcontract of (26 B), 525; receipt of, for warrant, 583.

Animas City :

Order to curtail route 38145 to end at (4 E), 809; testimony of postmaster at, 924-936; letter of postmaster at (1 F), 948-949; order of French, January 23, 1879, to embrace on route 38156 (3 F), 949.

Atkinson, H. M. :

Letter of, April 14, 1879, daily service (32 E), 823.

Attorneys-General :

Criminal cases in which they have appeared, 3110-3112.

Barlow and Sanderson :

Letter of, February 8, 1879, to postmaster, Los Pinos, service has not been discontinued (2 M), 1179.

Barnes, Sidney M. :

Letter of, April 24, 1879; daily service with fast time (10 E), 813; May 15, 1879, asking increase of service and fast time, 1501-2.

Barnum :

Order of Brady, October 1, 1878, curtail route 38150 to end at (8 R), 1413; August 24, 1880, increase from Powderhorn to (12 R), 1472.

Beene, Horace D. :

Letter of, August 25, 1879, average mail is less than 6 letters a day; better supplied by another route (23 P), 1308-9.

Belford, James B., M. C. :

Letters of, April 28, 1879; improvement of service, both as to trips and speed (23 K), 1103; May 5, 1879, transmits letter of State officers of Colorado (10 F), 952; indorsement of, on petitions (24 I and 26 I), 1051; and (27 I), 1052; and (15 B), 519; and on letter (3 I), 1021.

Bennet, G. G., Delegate :

Letter of, June 18, 1879; daily service (41 O), 1214-5; indorsement of, on petition (11 N), 1198.

Bergman, Jacob, mail-carrier :

Testimony of (route 46132), 986-992; recognizes papers (6 G to 13 G), 987; 26 hours schedule not petitioned for and missed connections, 987; men and animals, 988-9; distances, 988; petitions, 989-90; fines, 991.

Berry, C. P., M. C. :

Testimony of, for the defense (route 46247), 2194-2196; identifies papers (46 and 47 H), 2194; urged restoration of trips, 2194-5; indorsement of, on petitions (47 H), 2169; (56 H), 2252.

Bids of J. W. Dorsey, Miner, and Peck, 1927-1990.

Billings, Frederick :

Letter of, July 1, 1879; daily mail (47 O), 1217.

Bingham, Henry H., M. C. :

Letter of, June 11, 1879, increase of service (42 O), 1215.

Bishop, William J., mail-carrier :

Testimony of (route 35051), 1259-62; employed by Miner, Vaile & Co., 1261; men and animals, 1259-62.

Blackburn, Joseph S. C., M. C. :

Testimony of, 2291-2293; was chairman subcommittee on postal deficiency, 2291; date the investigation commenced, 2291; cannot state the date the Walsh route was considered, 2292; postal deficiency, 2292-3.

Bliss, George :

Opening address to the jury of, 57-147; closing address to the jury of, 2575-2648.

Blois, J. F. H. :

Produces receipts for warrants, 503-4; handwriting, letter of John M. Peck (83 A), 1845, 6; oath of J. M. Peck (2 A), 1480, 1496; of petitions 12 B, 13 B, and 15 B, 1465-7; 16 B, 17 B, and 18 B, 1467-8, 1482; 26 B and 28 B, 1468; of 8 C, 1468; 10 C, 16 C, 20 C, 22 C, 1470; 24 C, 26 C, 27 C, 28 C, 1471; of papers marked 50 A and 14 D, 1475, 1496; 21 D, 1475; 23 D, 1475, 1498, 1850; 30 D, 1475; 39 D and 41 Q, 1481; 40 D and 42 Q, 1481; 38 D and 40 Q, 1481, 1496-7, 1849; 36 D and 38 Q, 1481, 1496; 35 D and 37 Q, 1481, 1497; 32 D and 35 Q, 1481; 41 D and 43 Q, 1481; 46 D, 1496; of 15 E, 16 E, and 41 E, 1475; of 15 F, 1475-6; 7 S (F?), 6 F, and 26 F, 1476; of 1 G, 1476, 1496-7; of 15 G, 1476, 1496; of 3 G, 1477; of 52 A, 1477, 1497; of 1 H, 4 H, 29 H, and 53 H, 1479; of 3 I, 9 I, 10 I, 11 I, 12 D (I?), 1477; and 4 I, 1477-8; of 34 L, 30 L, 28 L, 14 L, 13 L, 1478; and 11 L, 1479; of 14 M, 1479; of 10 N, 1479; of 8 P, 11 P, and 12 P, 1845; 13 P, 14 P, 19 P, 37 P, 41 P, 1846; of 12, 1479-80; 15 and 16 Q, 1480; 41 D and 43 Q, 1480; 39 Q, 1480 81, 1497; 39 D and 41 Q, 1481; 40 D and 42 Q, 1481; 38 D and 40 Q, 1481, 1497, 1849; 36 D and 38 Q, 1481, 1496; 35 D and 37 Q, 1481, 1497; 36 Q, 1481; 32 D and 35 Q, 1481; 20 Q, 1481-2, 1498; 19 Q and 21 Q, 1482; 26 Q, 1498; 33 Q, 1847; of 2 S and 12 S, 1846; of 13 S, 14 S, and 20 S, 1847; of 5 T, 1844; 17 T, 1844; 19 T, 20 T, and 48 T, 1844; 24 T and 27 T, 1844; 26 T, 1845.

Boone, A. E., mail contractor :

Affidavit of, June 25, 1878, for discontinuance of route (5 O), 1202; letter of, June 25, 1878, discontinuance of route (4 O), 1201; testimony of 1422-1423, 1440-1461, 2263, 2271; knows all the defendants except Peck, 1422-3; his call at

Boone, A. E., mail contractor—Continued.

Senator Dorsey's, 1423, 1443; who were to be interested in putting in bids, 1443; time Miner arrived here, 1444; time John W. Dorsey came, 1444; form of proposal prepared by witness, 1445; where proposals were filled out, 1445; Peck was supposed to be here, 1445; draft of subcontract blank prepared by witness, 1446; new clause for expedition inserted, 1446; S. W. Dorsey's instructions to send proposals to postmasters, 1447-8; what Brady said about declaring them failing contractors, 1448; identifies Vaile's signature to paper (1 X), 1450; S. W. Dorsey furnished the security, 1451; the person who represented himself as Peck not him, 1452; case where Miner took paper out of the room and brought it back with Peck's signature, 1453; identifies letter attached to bond as in Senator Dorsey's handwriting (excluded), 1455; Senator Dorsey did not state he had any interest in these routes, 1458; subcontract law, 1460; rebutting testimony as to witness meeting Miner and Vaile at Senator Dorsey's house in April, 1878, 2266, 71.

Booth, Newton, U. S. Senator:

Letter of, April 10, 1877, concurred in by J. T. Farley, increase of service (4 G), 982.

Borden, James M., draughtsman:

Testimony of, 559-562, 610-611, 749-750; map of route 38135, 559-62; map of route 41119, 610-1; map of route 44155, 749; different colored lines indicate the number of trips; black, 6 times a week; blue, 3 times a week; yellow, 2 times a week; red, 1 time a week, 749.

Bosler, J. W.:

Letter of, January 30, 1882, no further interest in draft (55 C), 638.

Bowen, Thomas M.:

Letter of, April, 16, 1879, daily mail (23 E), 818.

Bowling, Charles:

Letter of, December 14, 1878, contractor not yet reported (7 Q), 1352.

Boynton, A.:

Letter of, January 1, 1878, error in distance in advertisement (2 N), 1196.

Brewer, George J., clerk contract office:

Testimony of, 300-306, 362-363, 463-464, 344-347, 1192-1194, 1196, 1199, 1218-1221, 1214-1216; detail of business in contract office, 300-6; identifies files (route 34149), 345-7, 463-4; jacket indorsed: "Do this—Brady," 362-3; identifies files (route 35015), 1192-3; custom as to embracing special offices on routes, 1194; identifies files (route 35051), 1194-6; custom of the office as to taking the oath of the subcontractor, 1218-21; oath that it would require 37 men and 73 horses to perform expedition, lost, 1219; identifies calculation based on lost oath, 1220; order for expedition was based on oath for 150 men and 150 horses, 1220; on route 38150, explains method of computing expedition, 1414; error of Turner's in computing expedition, 1415; memorandum of, that he had notified Brady that Vaile's oath instead of contractor's was filed (13 N), 1199.

Brewster, Benjamin Harris, Attorney-General:

Closing address of, to the jury, 3108-3149.

Briefed, manner in which papers were, 271.**Brighton:**

Order of Brady, May 2, 1878, to embrace, on route 35015 (3 N), 1196; testimony of William A. Leech as to, 1161.

Brown, Charles S.:

Testimony of, 1587-1588; identifies papers (route 44140), 1587-1588.

Brown, James F.:

Letter of, per J. S. C. B., May 20, 1879, addressed to lock-box 714, inclosing petitions (27 Q), 1359; testimony of, 1362, 1376; subcontract with Vaile, 1362; men and animals, 1363, 1366, 1369, 70; schedule time, 1362, 1367, 8; quantity of mail, 1363; Indians, 1363; identifies letter (27 Q), 1363; petition (28 Q and 25 Q), 1364; 21 Q and 24 Q, 1365; passengers, 1365-6; fines and failures, 1366-7; petitions, 1364-5, 1368-72, 1374-6; subcontract pay, 1365.

Buell, A. C., editor of The Capital:

Motion of a rule upon, 1883; testimony of, for the defense, 2117, 2154; what Walsh paid him for, 2121; Congressional investigation, 2122, 2140-1; arrangement with Walsh, 2121-3; acquaintance with Brady, 2123; conversation with Henry L. Nelson, 2124-8; arrangement with Salisbury, 2129, 2142-3; conversation with H. V. Boynton, 2129-30; transactions with Walsh, 2131; resignation as printing clerk, 2131-6, 2138-9; identifies his signature to checks 4 X, 5 X, and 6 X, 2132; relations to The Capital and Critic, 2132; Brady's interest in the Critic, 2133-5; Brady loans witness money to buy The Capital, 2135; witness's control of Capital, 2136; negotiations with Brady, 2137; payment of Walsh, 2142; Brady surrenders notes, 2144; card in Capital "Somewhat Personal," 2144-5; editorials from Critic, 2147-50; none of defendants, except Brady, interested in Capital or Critic, 2154; corrects his testimony, 2196.

Burgner, William C., mail-carrier:

Testimony of, 1074-84; men and animals, 1074-9; distances, 1074; failures, 1080; identifies letters (12 and 13 K), 1080, 1; admitted subject to proof of signature, 1083.

Burns, W. T.:

Letter of, March 2, 1880, special mail-carriers (20 K), 1102.

Burns, Wilbur A., mail-carrier:

Testimony of, 1251-1254; route 35051; men and animals, 1251-3; time made, 1252-3; weight of mail, 1254.

Bush, C. C.:

Letter of, August 17, 1878, 6 times a week service (15 H), 1003.

Calleghan, John T., inspection clerk:

Testimony of, 562-73, 907-12, 977-80, 1330-31; recoupment and procedure as to fines and deductions, 562-73; identifies files, route 38145, 907; course of business as to fines and deductions, 908-12; case of deductions and remissions, route 38156, 977; excluded, 978-80; identifies files, route 40104, 1330; deductions for failures, 1331.

Campbell, John G., Delegate:

Letter of, increase to 3 trips on shorter schedule (9 S), 1501.

Cannon, George Q.:

Indorsement on petitions (6 C), 602-3; on 7 C, 625.

Canyon City:

Testimony of the postmaster at, 769-72, 795, 799.

Capital:

Card from, "Somewhat Personal," 2144-5; motion for a rule upon the editor of, 1883.

Carbon:

Letter of the county officers of, January 20, 1879, increase of service, indorsed petition for increase and expedition of service (7 L), 1119-20.

Carpenter, ———:

Closing address of, to the jury, 2424-2534.

Carrey, John:

Subcontract of (32 Q), 1377; testimony of, route 44160, 1377-84; Miner paid him, 1378; fines, 1383-4; subcontract pay, 1384.

Carson, Albert, mail-carrier:

Testimony of, route 38156, 962-4; men and animals, 963-4; time made, 963.

Cases cited:

Allcott *vs.* Strong, 9 Cush., 327-1666; Alsabrooks *et al. vs.* The State, 52 Alabama, 26-1629; Ballard *vs.* Castle, 24 Howard, 184-1632-1633; Bayard *vs.* Holmes, 34 New Jersey, 296-3163; Black *vs.* United States, 7 Court of Claims, 312; Blackburn *vs.* Beale, 21 Maryland, 246-1614; Butler *vs.* Commonwealth, 2 Duval, 1799; Butler *vs.* Maples, 9th Wallace, 1585; Butler *vs.* Watkins, 13 Wallace, 464-1632-1633; Case in 40th New York, 238-3099; Chaffee *vs.* United States, 18 Wallace, 545-2539; Clark *vs.* Commonwealth, 13 B. Monroe, 213-3059; Clawson *v.* The State, 14 Ohio State, 230, 237, 239, 283, 284, 288, 291-

Cases cited—Continued.

1651, 1679; Commonwealth *vs.* Dejardin, 126 Massachusetts, 44—2939; Commonwealth *vs.* Judd, 2 Massachusetts, 3127; Commonwealth *vs.* Livermore, 4 Gray, 18—2939; Commonwealth *vs.* Shedd, 7th Cushing, 514—2955, 3060; Commonwealth *vs.* Malibone Briggs *et al.*, 5 Pickering (Mass.), 429—1629; Commonwealth *vs.* Bosworth *et al.*, 6 Gray (Mass.), 481—1628; Commonwealth *vs.* Maloney, 412; Commonwealth *vs.* Hardy, 7th Metcalf, 506—2545; Commonwealth *vs.* Hudson, 11 Gray, 64—1278; Commonwealth *vs.* Hector Ingraham and Joseph Clements, 7 Gray (Mass.), 46—1628; Commonwealth *vs.* Kelly, 7th Cushing, 463—2545; Commonwealth *vs.* Robinson, 1 Gray (Mass.), 561—1626; Cope's case, 1st Strange, 716—3118; Cornet *vs.* Williams, 20th Wallace, 1586; Cowles *vs.* Cole, 21 Connecticut, 235—1798, 3100; Cox, L., *vs.* Hill, 8 Otto., 224—1798; Crenshaw *vs.* Davenport, 6 Alabama, 390—1614; Cuyler *vs.* McCartney, 40 New York, 227—283; Dominus Rex *vs.* Copen, Strange's reports, 3194; Dorsett's case, 5th Rogers Record, 77—3059; Dutton *et al.* *vs.* Woodman, 1666; Fife *et al.* *vs.* The Commonwealth, 5 Casey, Pennsylvania, 437—1630; French *vs.* Millard, 2d Ohio State Reports, 52—2603; Fuller *vs.* Clark, 3 ed. Smith, 302—1614; Garfielde *vs.* United States, 3 Otto, 62; Gise *vs.* Commonwealth, 81 Pennsylvania, 1424; Harman *vs.* Tappenden *et al.*, East's Reports, vol. 1, page 555—2390; Hartman *vs.* Commonwealth, 5th Pennsylvania, 60—2956; Hastings *vs.* Livermore, 15 Gray, 10—2031; Jenkins *vs.* The State, 41 Mississippi, 1799; Jenneys *vs.* Fowler, 3170; Jones *vs.* Herbert, 39 Barbour's Reports, 408—1800; Kane *vs.* The Commonwealth, 89 Pennsylvania, 524—2570; Kelsoe *vs.* The State, 47 Alabama, 600—1630; King, The, *vs.* Hardy, 1678; King, The, *vs.* Parsons *et al.*, 3125; Lincoln *vs.* Claflin, 7 Wallace, 138—1632; Lord Bacon's Case, 3193; Metcalfe *vs.* O'Connor and wife, Little's Select Cases, 497—3097; Moore *vs.* United States, 1 Otto, 270—449—450; McKenna's Case, Irish Circuit Reports, 461—1681, 1698; Murphy *vs.* Kelley, 5 Abbott's New Cases, 450—2567; Nathan Smith *vs.* Jacob Baker, 3 Day, 312—2543; O'Connor *vs.* The Queen, 12 Clarke and Finney, 236—2560, 2816, 3124; Ohio *vs.* Dresback, 1614; Page *vs.* Burnstine, 12 Otto, 668—17, 26, 29; Page *vs.* Parker, 40 New Hampshire, 62—1656; Patton, John, *vs.* The State of Ohio, 6 Ohio State Reports, 468—1651, 1680, 1693—1694; Peacock *vs.* Spooner, 2 Vern., 43, 195; 2 Freem., 114—3124; People, The, *vs.* Bennett, 49 New York, 143—2966; People, The, *vs.* Mather, 4 Wendell, 230—2815; People, The, *vs.* William Porter, 2nd Parker's Criminal Reports, 14—2966; People, The, *vs.* Powell, 63 New York, 92—3096; People *vs.* Murray, 1572; People *vs.* Jones, 31 California, 1799; People *vs.* The Parish, 5 Denio, 156—283; People *vs.* Safford, 5 Denio, 1282; Queen, The, *vs.* Blake and Tye, 6th Adolphus and Ellis, new series, 126, 290, 293—2389—2390; Regina *vs.* Murphy & Douglass, Carrington & Paine, 8 vol., pp. 397, 404—3127; Rex *vs.* Appleby, 3 Sharkey, 3 Common Law Reports, 582—1656; Rex *vs.* Pollman, *et al.*, 2 Campbell, 239—3081; Rex *vs.* Whelpley, 4th Carrington & Paine, 132—3060; Republica *vs.* James Burns, Yeates's Reports, vol. 1, page 370, —; State, The, *vs.* Clark, 3 Foster, New Hampshire, 429—3058; State, The, *vs.* Copp, 15 New Hampshire, 3060; State, The, *vs.* Langley, 34 New Hampshire, 530—3060; State, The, *vs.* Noble, 15 Maine, 476—3057; State, The, *vs.* Beluski, 3 Minnesota, 246—1614; State, The, *vs.* John Brite, 73 North Carolina, 26—1629; State, The, *vs.* Bryant, 55 Missouri, 1769; State, The, *vs.* Larkin, 49 New Hampshire, 44—1656; State, The, *vs.* Sargent, 22 Maine, 2031; State, The, *vs.* Scott, 39 Missouri, 1798; State, The, *vs.* George Fuller and Hiram S. Wiley, 39 Vermont, 75—77—1627; State, The, *vs.* Phillips *et al.*, 24 Missouri, 484—1627; State, The, *vs.* Thibeau, 1 Shaw, 30 Vermont, 104—1626; Strady, Alexander, *vs.* The State, 5 Coldwell's Reports, Tennessee, 308—1627; Tong's Case, Sir John Kelyng's Crown Cases, 17—18—1655; Tuzzle *vs.* Barkley, 6 Alabama, 406—1614; Tryan *vs.* Whitmarch, 1 Met., 1—3163; United States *vs.* Cole, 5 McLean, 610—2814; United States *vs.* Crnikshank *et al.*, 2 Otto, 2957; United States *vs.* Deane *et al.*, 3 Wood, 48—3060; United States *vs.* Foye, 1st Curtiss' Circuit Court Reports, 368—3059; United States *vs.* Swallowant and Bollman, 3110; United States *vs.* Walsh, 5 Dillon, 58—2958; United States *vs.* Babcock, 3 Dillon Roscoe, 416, 585, 7 Greaves, 846—1631, 1676, 2815; United States *vs.* Butler, 32, 34, 37, 38; United States *vs.* Cook, 17 Wallace, 168—1430, 2957; United States *vs.* Hirsh, 100 United States, 33, 203, 281—1424, 1427, 1691, 1692, 2882; United States *vs.* Graff, 14 Blatchford Circuit Court Reports, 385—1685, 1698; United States *vs.* Grant, 14 Blatchford, 381—1630; United States *vs.* Goldberg, 7 Bissel, 183—1671; United States *vs.* McKee, 3 Dillon, 566—2539; United States *vs.* Porter, 2545; United States *vs.* Wilson, 2571—2; Webster's Case, Mass. Reports, 2870; Whitney *vs.* Boston, 98 Mass., 312—2031; Whitney *vs.* Ferris, 10 Johnson, 67—1797; Wicks *vs.* Smith, 18 Kansas, 1614; Wiggins *vs.* Leonard, 9 Iowa, 197—1670—1671; Wilkes, John, Case of, 2426.

Cedarville, supply of :

Letters relative to (45 A), 460; 26 A, 419; 24 A, 418; testimony of C. H. French as to, 423-5, 427-31, 443, 445; from Ralph Grimes, 480-83.

Certificates :

For temporary service (3 D and 4 D), 675; of postmasters, failure to make schedule time (109 E), 913; of service, sent to the Sixth Auditor, 320; signed by the Second Assistant Postmaster-General, 321.

Chaffee, J. B. :

Letters of, April 14, 1879, 3 trips and faster schedule (22 E), 818; April 21, 1879, tri-weekly service and trip to be made in 1 day (22 K), 1102; April 22, 1879, 7 times a week service, with good time (2 I), 1021; April 23, 1879, for daily mail, (8 B), 516; April 23, 1879, daily mail with a fast schedule (12 F), 953; indorses petition (4 L), 1118.

Challenges, peremptory :

The number to which each side is entitled, 30.

Chandler, Jeff :

Closing address of, to the jury, 2534-2575.

Changes :

Sometimes made after contract is executed and before service begins, 273-4, 304-5; in contracts affecting pay, certified to the Sixth Auditor, 320.

Charge of the court to the jury, 3183-3196.**Charles, John H. :**

Letter of, June 30, 1878, 3 trips and faster time, indorsed by J. P. Kidder (23 O), 1207.

Chilcott, G. M. :

Letter of, April 30, 1879, daily mail (5 I), 1022.

Chilcott, J. G. :

Letter of, to H. M. Teller, May 6, 1879, for daily mail (9 B), 516-17.

Clayton, Powell, Ex U. S. Senator :

Testimony of, 1839-1842; Rerdell's confession—Rerdell stated he was employed by the Dorsey combination under a salary, 1839; Rerdell's interest in a steamboat route, 1839-40; Jennings's claim, 1839-40; Rerdell's father-in-law, 1840; Rerdell asks to be put in communication with the authorities, 1840; asks Clayton not to inform Gibson or Cook, 1841.

Clendening, James H., postmaster, Fort Smith, Ark. :

Testimony of, 1463-1464; identifies two letters of Senator Dorsey's as received by him, excluded, 1463-4.

Cole, John W., mail-carrier (route 35051) :

Testimony of, 1254-1256; men and animals, 1254-5; distances, 1254-5; carriers did not always connect, 1256.

Colorado :

Letter of State officers of, April 28, 1879, 3 trips and faster schedule, indorsed by H. M. Teller (89 E), 952.

Collection orders, prior to June 30, 1880 :

Payment, to contractors made by, 321.

Contract office :

Detail of business in, 2084-2112, 2258-60; duties of, as prescribed by the Postmaster-General in the Regulations; letter of, and answer of postmaster at Camp McDermitt, July 29, 1878, contractor has failed to report (3 Q), 1351; August 21, 1880, and answer of postmaster at Mineral Park, average mail (84 P), 1341-2; August 21, 1880, and answer of postmaster at Pioche, average mail (85 P), 1342; July 18, 1878, and answer of postmaster at Saguache, July 27, 1878, service commenced (2 R), 1405-6; and reply of postmaster, service commenced July 7, 1878 (9 O), 1203.

Contractors :

Customary for them to employ attorneys, 2089, 339.

Contracts :

Of John W. Dorsey with the United States, route 35015 (17 N), 1199-1200 ; route 38145 (1E), 809 ; route 38152 (15 M), 1200 ; route 38156 (30 F), 960 ; route 40104 (44 P), 1319 ; route 40113 (1 S), 1499 ; of John R. Miner with the United States, route 35051 (1 O), 1201 ; route 38134 (17 I), 1034 ; route 38135 (in full), 490-3 ; route 38140 (1 K), 1065 ; route 38150 (1 R), 1405 ; of John M. Peck with the United States, route 34149 (84 A), 1853-4 ; route 41119, 593 ; route 44140 (2 T), 1518 ; route 44155, 652 ; route 44160 (1Q), 1351 ; route 46132 (1 G), 980 ; route 46247 (1 H), 1001 ; original, covered by indictment, put in evidence, 315-8 ; duplicates of original, filed in Sixth Auditor's office, 319-20 ; practice to loan to the Third Assistant for entry, 336.

Coon, Byron C., contract clerk :

Testimony of, 1404-5, 1348-50, 1005, 1297-8, 1507 ; identifies files (route 38150), 1404-5, 1407 ; route 40104, 1297-8 ; route 40113, 1505 ; route 44140, 1506-7 ; route 44160, 1348-50 ; course of business as to allowing one month's extra pay, 663-9 ; as to jacket and order (9 C) allowing one month's extra pay before it went into effect, 663-4.

Corey, E. N. :

Letter of, July 20, 1878, 3 trips, 65 hours schedule (29 O), 1209.

Corlett, W. W. :

Indorsement on petition (4 L), 1118.

Cornell, Clarence W., mail-carrier (route 38156) :

Testimony of, 938-943 ; men and animals, 939, 941-42 ; schedule time, 939 ; population, 943.

Corresponding clerk :

Duties of, 270-8, 302-3.

Counsel :

But one on each side to examine and cross-examine the same witness.

Cowne, William, mail-carrier (route 44155) :

Testimony of, 761-5 ; men and animals, 762-5 ; distances, 763.

Cox, George W. :

Accepted as a juror, 50.

Craig, Scipio :

Letter of, April 1, 1879, increase of service (5 G), 982-3.

Critic :

Editorials from, 2147-50 ; motion for a rule upon the representatives and trustees of, 1883.

Culverhouse, Jerry :

Letter of, April 23, 1879, indorsed by Luttrell (58 H), 2253.

De Busk, S. W., postmaster at Alfalfa, formerly Raton :

Testimony of, 1085-1101, 1156-1158 ; distances, 1086 ; identifies letter (2 K), as written by him ; salary as postmaster at Raton, 1093 ; men and animals, 1083-4 ; mail connections at Trinidad, 1095 ; identifies letters (16 and 17 K), 1095 ; supply of Raton, 1096-7, 1157 ; remissions, 1158.

Decrease and curtailment of service and pay :

Section of regulations relative to, 256.

Deductions :

Argument as to admission of papers showing, and remissions, 977-980 ; custom as to making, for failures, 2107 ; table of, and fines and remissions, 2273, 2274.

Deficiency appropriation :

Letter of Postmaster-General asking, 344 ; testimony of J. S. C. Blackburn, M. C., as to, 2292-2293.

Dillon, Sidney, letter of :

Received May 20, 1879, daily service from Pioche to Prescott (21 P), 1307.

Dickson, William, foreman of jury :

Accepted, 33-34.

Distance circulars :

Route 34149 (71 A), 485 ; route 35015 of September 16, 1878 (5 N), 1196-7 ; route 38135 (35 B), 528 ; route 38140, 1066 ; route 38156, 949 ; practice of the office as to error in advertised, 2098.

Dodge, Capt. F. S. :

Letter of, March 4, 1879, inefficiency of service (8 E), 811-812.

Doniphan, Edwin D. :

Accepted as juror, 47.

Dorsey, John W. :

Letters of, to Brady, May 3, 1879, inclosing petition (2 S), 1499 ; May 3, 1879, inclosing petition (12 S), 1502 ; May 7, 1879, proposition for 3 trips on a reduced schedule (13 S), 1502 ; April 14, 1879, proposition for expedited schedule (11 L), 1122 ; April 26, 1879, relative to sworn statement (12 L), 1122 ; February 6, 1879, withdrawal of subcontract (28 L), 1172 ; May 5, 1879, address care M. C. Rerdell, box 706 (30 L), 1172 ; J. W. and S. W. Dorsey to Brady, October 19, 1880, withdrawal of subcontract (34 L), 1173 ; April 28, 1879, inclosing proposition for expediting schedule (14 K), 1085 ; *subcontractor*, May 5, 1879, proposition for expediting schedule (9 I), 1032 ; May 8, 1879, withdrawal of oath (11 I), 1032 ; November 26, 1878, for schedule of 60 hours (14 P), 1305 ; May 5, 1879, to address care M. C. Rerdell, box 706 (19 P), 1306 ; M. C. Rerdell, July 29, 1880, withdrawal of subcontract (37 P), 1314 ; and Joseph McKibben, August 12, 1880, withdrawal of the subcontract (41 P), 1315 ; May 5, 1879, proposition for expedited schedule (7 F), 951 ; November 15, 1880, extension of schedule to 24 hours (15 F), 954 ; April 14, 1879, proposition for expedition (15 E), 814 ; April 23, 1879, second oath attached (17 E), 815 ; December 23, 1878, inclosing telegram from subcontractor (41 E), 826 ; no date, amendment of order (73 E), 846 ; August 16, 1878, with inclosures, remissions (108 E), 912-13 ; and S. W., January 7, 1880, withdrawal of subcontract, 958 ; to French, C. H., April 25, 1878, bid is too high (18 A), 416 ; May 5, 1878, making proposition (28 A), 417 ; May 24, 1878, inclosing subcontract (19 A), 417 ; May 31, 1878, meet him at Kearney (21 A), 417 ; September 25, 1878, inclosing schedule (22 A), 418 ; to Nephi Johnson, July 9, 1879, error in contract (30 C), 619 ; to C. F. Perkins, March 7, 1879, inclosing form of petition (10 L), 1122 ; April 15, 1879, address care M. C. Rerdell, box 706 (14 L), 1127.

Oaths of, sworn to April 26, 1879 (13 L), route 38113, 1122 ; sworn to April 21, 1879 (14 S), route 40113, 1502 ; sworn to November 26, 1878 (13 P), route 40104, 1305 ; contractor, sworn to April 21, 1879 (6 F), route 38156, 950 ; contractor, sworn to March 11, 1879 (16 E), route 38145, 814-5 ; second oath sworn to April 26, 1879 (17 E), same route, 815 ; *John W. Dorsey*, sworn to April 26, 1879, Miner was contractor (15 K), route 38140, 1085 ; *subcontractor*, sworn to April 21, 1879 (10 I), route 38134, 1032 ; second oath, same route, sworn to April 21, 1879 (12 I), 1032-3.

Dorsey, S. W. :

Letters of, to Brady, December 6, 1878 (?), withdrawal of subcontract (20 S), 1504 ; June 10, 1878, to 7 trips, fast schedule (5 E), 810 ; April 24, 1879, inclosing petition (14 E), 814 ; to Johnson, Nephi, May 5, 1879, dissolution of firm (34 C), 623 ; to Joseph, Anthony, April 9, 1879, to send protests against discontinuance, and get letters asking daily line with fast schedule, not two petitions to be written by the same person (19 E), 855 ; excluded as to Brady and Turner, 854-5 ; April 30, 1879, notifying Joseph of increase to 3 trips, schedule 50 hours, daily, July 1, 1879, personally responsible for all dues (94 E), 856 ; excluded as to Brady, Turner, Miner, and Vaile, 855 ; June 22, 1879, good horse will walk 4 miles an hour, average cost of service (95 E), 857 ; excluded as to Brady, Turner, and Vaile, 857 ; to General Rosser, April 20, 1878, asking distance (2 O), 1201.

Subcontracts of, dated April 1, 1879 (18 S), route 40113, 1504 ; April 1, 1879 (30 B), route 38135, 526 ; April 1, 1879 (24 F), route 38156, 957 ; dated April 1, 1879 (10 K), route 38140, 1069 ; April 1, 1879 (32 L), route 38113, 1172.

Douglas Grove :

Letter relative to (44 A), 437 ; the same (25 A), 418.

Draft office :

One designated by department to receive and pay out money, 323.

Drafts, contractor's :

Paid by the auditor when no objection is made, 322 ; drawn by John W. Dorsey, route 35015, 1859-60 ; route 38113, 1173-5 ; route 38145, 937 ; route 38152, 1180 ;

Drafts, contractor's—Continued.

route 38156, 960; route 40104, 1862-3; route 40113, 1499; drawn by John R. Miner, route 35051, 1299-1300; route 38134, 1034; route 38135, 490-3; route 38140, 1109-11; drawn by John M. Peck, route 41119, 635-7; route 44140, 1863-4; route 44155, 702-4; route 44160, 1857; route 46132, 1102-9; route 46247, 1860-1. Post-Office Department, drawn by Third Assistant, 322.

Dunbar, Thomas:

Letter of March 10, 1879. Opinion is that contractor will fail (11 S), 1502.

Duplicates of all contracts filed with the Sixth Auditor, 320.

Durango:

Jacket relative to supply of (19 F), 956; letter of N. P. Hill, April 20, 1881 (37 E), relative to supply of, 824.

Exceptions:

To the admission of the Regulations of the Post-Office Department, 256; of the original contracts, 315; to letters of John W. Dorsey & Co., John R. Miner, and John M. Peck (18 A to 41 A), 410, 11; to letter of C. H. French (42 A), 452; to oath of John M. Peck (2 A), 373; to order of French, July 10, 1879, 357-61; to petition "*schedule 13 hours*," 366-9; to revenues (14 A), 380; to subcontract of Vaile (8 A), 380; of French (16 A), 397-9; to question as to men and animals, 404-6; as to pay for expedition, 402; as to increase of horses, 406; as to whether defendants inquired the men and animals necessary, 409; ruling of court excluding question as to time it would take with an ordinary team to go to Cedarville, 460; to letter of William Ingersoll, December 15, 1877 (4 B), 512-13; letter of Miner, May 8, 1879 (16 B), 521; April 16, 1879 (17 B), 521; oath of Miner, sworn to April 17, 1879 (18 B), 521; order of Brady, May 9, 1879 (2 B), 495; revenues, 584; to question as to distance, 531-3; as to schedule time, 548; to revenues, 641; to subcontract of Nephi Johnson, 611; to conversation with J. W. Dorsey, 622; to letter of S. W. Dorsey (34 C), 622; to, was not inquired of by any of the defendants as to number of men and animals, 634; as to words and figure 7 in petition (6 C), 645-6; to ruling admitting papers (1 D to 8 D), 677; to question as to schedule time, 723; men and animals, 726, 741, 750; to oaths, 815; to subcontract of Watts, 845; to question as to whether subcontractor received remissions, 891; as to men and animals, 864; as to subcontract pay, 868; as to possibility of making schedule time, 871; to the admission of the revenue, 992; to the oaths of John W. Dorsey (10 I and 12 I), 1033; to subcontract of Eli Hanson (14 I), 1034; to letter of J. W. Walters (15 I), 1034; to contract (17 I), 1035; to letters (19 and 21 I), 1041; to table of payments, 1052; to question as to number of men and animals, 1036-7 and 1043; to oath of John M. Peck (53 A), 1006; to revenues, 1119; to contract, 1065; to order of Brady (11 K), 1071; to question as to postmaster's compensation, 1093; to letter (11 K), 1101; to witness stating conversation of J. W. Dorsey, 1224; to reason for building ranches, 1224; to cost of ranches, 1225; to conversation of Rerdell, 1223; to estimate of men and animals, 1225; to ruling of court excluding question as to dispute of witness with the agent of one of the defendants; to ruling allowing affidavit to be shown witness to refresh his memory, 1282; to refusal to allow counsel for the defense to see affidavit before examination of witness, 1282; to the admission of the subcontract of John A. Wright (22 L), 1171; to ruling excluding question as to price of hay, 2232; to subcontract of J. C. McKibben (39 P), 1314; to petition, 1321; to all papers dated prior to May 20, 1879, 1846; to oath, 1354; to subcontract pay, 1365; to letter of Miner (31 Q), 1374; to letter of Miner (33 Q), 1381; to men and animals, 1386; to revenues, 1397; to admission of any further evidence on the ground that Miner had sold out the route, 1411; to oath, 1412; to subcontract pay, 1531; to telegram of Woodward and Woodward, 1597; to witness stating relations of defendants in 1877, 1423; to witness stating conversation with S. W. Dorsey, 1443; to question was there any other reason than you have stated that caused your withdrawal from the combination? 1449; to question as to who went into the association after witness went out, 1450; to question whether witness had any reason to believe that Peck was not here, 1452; to ruling of court excluding question asking witness to state wherein the Herald interview was inaccurate, 1707; to admission of evidence as to cause of Walsh's failure to perform service, 1761; to letters of Hine to Walsh, with bill of particulars, 1777; to the admission of the testimony of Wayne MacVeagh, 1806; to witness stating the names of persons other than those making the confession, 1809; to admission of the testimony of Thomas L. James, 1822; to witness stating from whom Rerdell said he had received dispatch, 1826; to the admission of the testimony of Powell Clayton, 1839; to the admission of Reighby's testimony to prove a

Exceptions—Continued.

deposit of Brady's with Hatch & Foote, 1901; to ruling of court excluding question asked witness as to whether there was not a great deal of ill feeling manifested between H. M. Vaile and S. W. Dorsey, 1911; to witness stating circumstances under which S. W. Dorsey's name was stricken out of agreement marked (10 X) defense, 1915; to bids of Dorsey, Miner, and Peck, 1927; to ruling of court excluding testimony of Samuel Bell Maxey, 2058; to ruling of court excluding question as to whether the witness had ever detected Brady in endeavoring to hide any testimony or fact, or any paper, concerned in this indictment, 2067; to ruling excluding question as to how many members of Congress visited the department for the purpose of urging increase of service, 2070; to ruling excluding question asked witness as to what other circumstances than productiveness he took into consideration, 2073; to ruling of court excluding question asked witness which, in his judgment, would be the most expensive to use, the Army for gathering this information or frequent mails, 2078; to ruling of court asked witness if there was a general movement among the officers on the frontier to have more frequent and faster mail service, 2082; to ruling of court excluding question asked witness whether he had soldiers enough to spare the number of men that would be necessary to picket the country properly and have enough left to deal with the Indians, 2083; to ruling of court excluding question asked witness as to whether there was any difference between the old and new section of the country, with reference to the manner of making changes, and if there is what it is and the reason for it, 2085; to ruling of court asked witness whether Senators and Members called upon him to urge increase and expedition of service, 2086; to ruling of court excluding question asked witness as to whether, when he was acting Second Assistant, Brady was about the department, 2087; to ruling of court excluding evidence in regard to the passage of the fifty per cent. law, 2089; to exclusion of evidence offering to show a rule giving each county-seat a daily mail, &c., 2090; to ruling of court excluding question as to the number of star routes west of the Mississippi River in 1878, 2091; to ruling of court excluding question as to whether witness knew what Turner's sentiments were with regard to expedition of the routes in the indictment, 2092; to ruling of court excluding question as to custom of the department with reference to the time to which a route would be expedited where expedition was determined upon, 2102; to question, "Does not Brady own that stock?" (meaning in the "Capital"), 2132; to question whether Brady owns nearly all the stock of the "Critic," 2133; to ruling of court excluding offer to prove that Walsh had a contract depending upon Congressional investigation, 2153; to ruling of court excluding letter written by Totton as attorney for Walsh, to Brady, 2185; to ruling of court excluding testimony of McGrew, 2193; to question as to the witness's knowledge as to the orders and papers filed on the several routes enumerated in the question asked witness, 2235; to ruling of court excluding a portion of the report of General Brady for the fiscal year ending June 30, 1877, recommending legislation for the protection of subcontractors, 2254; also, to excluding that portion of the report commencing with the subhead, "Defects in the present laws," on page 54, 2255; to ruling of court excluding table No. 3, page 64, of the report of the Postmaster-General for the fiscal year ending June 30, 1881, 2255; also, to ruling excluding table No. 8, page 67, same report, 2255; to ruling of court excluding question asked witness as to price of hay on route 38113, 2262; to admission of rebutting testimony of Boone, 2266.

Expedition:

Calculations for (25 K), 1104; (8 L), 1120; (15 S), 1503; (20 E), 817; (21 T), 1523-4; (13 C), 606; not marked, 1031; journal of the Postmaster-General shows no general order relating to, from January 1, 1879, to July 1, 1881, 257; practice of office as to entering orders for, upon the journal, 262-3; certification of orders for, to the Sixth Auditor, 263; cases where certified before the Postmaster-General had signed the journal, 265; orders for, certified to the Sixth Auditor once a week by the Second Assistant, 266, 326; course of, in the office of the Second Assistant, 302-3, 265-8, 272; record of orders for, signed by the Postmaster-General about once in two weeks, 267; no change during Brady's administration, 267; orders and calculations for, made by corresponding clerk, 270-1, 302; obtained at present by readvertisement, which has always been the practice to greater or less extent, 274; all the papers upon which orders for, were made, were inclosed in a jacket upon which the orders for, were made, 270; and increase, how explained, 372-3; method of computing, 1414; error of Turner's in computing, 1415; custom as to making changes in contract with reference to, 2105-5.

Earl, William E. :

Subcontract of route 38156 (21 F), 956-7.

Failures, what is a reasonable excuse for, 2107-8.

Fairhurst, James:

Letter of, August 15, 1878, Pueblo should be head of route (6 B), 514-15.

Falconer, John H., statistician :

Testimony of, statistics of mail service, 260-261, 299-300.

Farish, William B., mail-carrier :

Testimony of, route 38135, 530-540; distances, 351-3; pay (excluded), 353; men and animals, 534-9; weight of mail, 536-7.

Farley, J. P. :

Indorsement on petitions (53 H), 2251; (57 H), 2252.

Fines and deductions:

Charged against subcontractor's pay, 321; in case they exceed subcontract pay charged to contractor, 321; account of, furnished the Sixth Auditor, by the Second Assistant Postmaster-General, 324; amount of, stated in Sixth Auditor's report, 338; and remissions, table of, 2273-4; course of business as to, 562-73, 908-12.

Finn, B. F. :

Letter of, May 10, 1879, to S. W. Dorsey, daily mail (14 T), 152.

Fisk, John M., mail-carrier :

Route 44155, 709-30, 788-790; distances, 709; schedule time, 723; men and animals, 726; quantity of mail, 726-7, 729; failure of carriers to connect, 788-9.

Fitzalon, supply of, 431.

Flannery, George F. :

Letter of, July 20, 1878, increase of trips and 65 hours time (28 O), 1209.

Foote and Dalton:

Subcontract of, route 38113 (20 L), 1100.

Foote, John F. :

Subcontractor, route 38113, 1149-53; subcontract, 1150; men and animals, 1151-3.

Frémont, J. C. :

Letter of, October 21, 1878, two trips and 60-hour schedule (17 P), 1306.

French, C. H. :

Letters of, to John M. Peck, January 23, 1879, returning schedule (42 A), 437-8; same date, supply of Cedarville (45 A), 460; to Vale, Miner & Co., April 18, 1881, relative to Douglas Grove (44 A), 437; to John R. Miner, December 29, 1879, inclosing affidavit (46 A), 461; excluded, 461; subcontract of route 34149 (16 A), 400; testimony of, 396-446; subcontract, 397, 400-1; pay, 400-1; schedule time, 401-2; distances, 204, 421, 425, 428, 431; received no pay for expedition, 402; men and animals, 404-6, 408-9, 424, 427, 431-6, 441-2; petition, "schedule 13 hours" (3 A), 406, 7, 437-40; fines, 407; Vaile's subcontract (8 A), 408-10; circular advertisement, 410; increased his horses only on account of increased trips, 406; defendants never inquired of him number of men and animals necessary, 408; identifies letters (18 A to 41 A), 410-11 (42 A), 438; passengers and express, 425-7, 440; quantity of mail, 432, 445-6; supply of Cedarville, 423-5, 427-31, 443, 445; Fitzalon, 431; recalled, question as to what was meant by travel of 60 miles in letter (45 A) excluded, 478.

French, J. L., late chief clerk contract office:

Testimony of, for the defense, 2084-2112, 2258-2260; detail of business in contract office, as to contracts and proposals, 2084; customary for contractors to have attorneys, 2089; Turner's duties, 2091; basis of allowance to subcontractors, 2096-2097; custom as to error in advertised distances, 2098; error in distance route 38135, 2098-100; identifies table, showing bids of J. W. Dorsey, Miner, and Peck, as made by him (11 X), 2103; custom as to making changes in contracts, 2105-06; as to deductions for failures, 2107; as to what is a "reasonable excuse" for failures, 2107-8; method of allowance for subcontract pay, 2108; precautions against bids being tampered with, 2111; reasons for his removal, 2112; practice for contractors to procure blank schedule, 2259; why route 38113 was expedited to 45 hours, instead of 48 hours as asked, 2259; witness acted as Second Assistant Postmaster-General on the 28th December, 1880, 2087; Brady's page named George Adamson, 2088; corrects his testimony, 2258-59; letter of July 23, 1879, notifying postmaster Mineral Park of increase of 4 trips (24 P), 1309; orders, see orders.

Gooch, James A. :

Testimony of, on route 38134, 1044-52; through mail carried on route 38132, 1045; recognizes several petitions, 1048-9; arrivals of the mails, 1045; population Rosita, 1046.

Greenwood :

Testimony of postmaster at, route 38134, 1057-65.

Grimes, Ralph :

Testimony of, 480; distances, 480-1, 484-6; supply of Cedarville, 480-3; schedule time, 481; expedition, 482; distance circular (71 A), 485; report of failure, 487-8.

Grover, L. F. :

Indorsement on petition (19 Q), 1357.

Hailey, John :

Receipt of, to John M. Peck in full for temporary service, route 44155 (19 D), 680

Hale, Nightingale :

Letter of, April 26, 1879, additional service, indorsed by Senator Saunders (5 A), 375.

Hall, Edwin :

Letters of, July 4, 1878, failure of contractor (2 Q), 1351; October 24, 1878; failure of contractor (4 Q), 1351-2; November 1, 1878, service commenced as far as Camp Harney (6 Q), 1352; testimony of, on route 44155, 769-72, 795-9; failures of carriers to connect, 769; population, 770; his name signed to petition, not written or authorized by him, and the names of Robinson and Max Metcham not their signatures, 795; identifies his name signed to several papers as his signature, and to some as not his, 796-8; through mail from Baker City to The Dalles was sent by Pendleton, 770.

Hanson, Eli :

Subcontract of, October, 4, 1879, signed by John R. Miner, by M. C. Rerdell (14 I), 1033.

Hatch, Edward :

Letter of, to S. W. Dorsey, April 17, 1879; daily line to Pagoa (21 E), 817.

Hendricks, A. L. :

Letter of, asking restoration of service (49 H), 2170.

Henkle, Solomon G. :

Closing address of, to the jury, 2951-3053.

Hernandez, J. :

Letters of, July 19, 1879, 5 days in summer, cannot be made in winter (34 E), 824; and J. M. Trew, extension of schedule to 60 hours (53 E), 838; February 13, 1881, mail from Animas City (59 E), 840; March 10, 1881, connection of Ojo Caliente with railroad (60 E), 841.

Higgason, William :

Subcontractor on route 38135; testimony of, 576-7; men and animals, 576-7; pay, 577.

Hill, N. P. :

Letters of, November 8, 1880, petition for extension of schedule (17 F), 955; April 20, 1881, supply of Durango (37 E), 824; indorsement on petitions (15 B), 519; on 25 E, 820; on 26 E, 821.

Holmead, William :

Accepted as juror, 47.

Hull, Alvah A., mail-carrier (route 38134) :

Testimony of, 1042-4; men and animals, 1042-3; length of route, 1043; subcontract pay, 1043; weight of mail, 1044.

Hunt, William L., superintendent railway mail service, July 10, 1880, schedule (35 B), 527-8.

Indictment :

Motion on behalf of J. W. Dorsey to quash, 1-3.

Ingersoll, Robert G. :

Closing address of, to the jury, 3054-3107.

Ingersoll, William:

Letter of, December 15, 1877, error in advertisement (4 B), 514; July 18, 1878, mail should be carried to Pueblo (7 B), 515-16; December 2, 1880, carrier will not stop at Agate (24 B), 524.

Inspection division:

Papers relating to the performance or non-performance referred to the, 272; makes up statement of fines and deductions for failures, 323-4.

Jacket:

Described, 302; inclosing petitions (22 O), 1207; 1879, inclosed with brief of letters (40 O), 1214; December, 1878, indorsed "Do this—Brady" (10 P), 1304; inclosing petitions indorsed "Do this—Brady" (6 T), 1519; no date, no papers on file recommending additional service (22 T), 1524; no date, inclosing petition (9 Q), 1352-3; indorsed "Do this—Brady" (6 E), 810-11; no date, increase of schedule in winter and decrease in summer (14 F), 954; February 16, 1881, supply of Durango (19 F), 956; no date, indorsed "Do this—Brady" (18 I), 1035-6; indorsed "Do this—Brady" (7 D), 676.

James, Thomas L.:

Appointment of, as Postmaster-General, 251-2; testimony of, 1821-39; Rerdell confession—Rerdell stated that he was secretary of Senator Dorsey; that he had prepared the proposals, and attended to getting up petitions for expedition, 1822; that Senator Dorsey, John W. Dorsey, Miner, Peck, Vaile (and Boone for awhile) were in the combination, 1822; false set of books and fictitious names for Brady and Turner, 1822; petitions were sent out to be signed and names also filled in here, 1822; Brady's percentage for increase and expedition, 1822; met Rerdell on the train, 1823; Rerdell's telegrams from Dorsey, 1823; conspiracy formed while Senator Dorsey was in the Senate, 1832; McGrew and Lilley referred to, 1829-30; false petitions, 1832; Rerdell's statement as to what he had done, 1836-7; the book in which the fictitious entries were made was Rerdell's personal property, 1838; James directed Brady to revoke order for expedition on route 38113, 1827-8.

Jaramillo, Pedro J.:

Letters of, relative to 50 hours schedule (57 E), 837; September 22, 1879, filing his subcontract (70½ E), 845-6; June 26, 1880, withdrawal of subcontract (74 E), 847; subcontract of (71 E), 846; subcontractor, route 38145, testimony of, 887-99; subcontract, 888; failure to make schedule time, 888, 892-96, 898; quantity of mail, 888-93; pay, 889; men and animals, 889; release, 889, 894; never received remissions, 891 (excluded as to Vaile and Miner, 891); subcontract with Sanderson, 894-5; resolution of the legislature, N. Mex., 897-8; identifies letter of D. J. Miller, 900.

Jennings, ———:

Subcontract of, route 40104 (88 P), 1862-3.

Johnson, M. D.:

Letter of, to George Q. Cannon, December 8, 1879, deductions (14 C), 607.

Johnson, Nephi:

Subcontract of, July 10, 1879, guaranteed by S. W. Dorsey (24 C), 612; May 27, 1878 (35 C), 1613-14; subcontractor, testimony of, 612-33; subcontractor (25 C), 613; population, 614-15; quantity of mail, 616, 625; petitions (6 C), 625; 7 C, 626, 616; men and animals, 617, 628-9; subcontract (24 C), 617; identifies letters of Peck (26, 27, and 28 C), 617-18; of Rerdell (29 C), 618; 31 C, 619; 32 and 33 C, 620; of J. W. Dorsey (30 C), 619; conversation with J. W. Dorsey, 621, 629-30; excluded as to Vaile, 621; as to Miner, 630; identifies letter of S. W. Dorsey (34 C), 623; carried the mail on 41122 and 41120; fines and deductions, 627-8, 631; identifies a number of letters not offered, 633; petitions asked for 48 hours and got 33; was not inquired of by any of the defendants as to men and horses, 633.

Johnson, W. D.:

Testimony of, petition (6 C), word and figure 7 not in it, 645-6; petition (7 C), 647-50; petition (4 C), 647; petition (12 C), 651.

Joseph, Anthony:

Letters of, April 2, 1879, impossible to carry mail inside 100 hours (9 E), 812; May 5, 1879, distance circulars (50 E), 836-7; to John W. Dorsey, January 6, 1879, proposition (99 E, defense), 880; January 15, 1879, commenced service, January 1 (100 E, defense), 880; to S. W. Dorsey, January 20, 1879,

Joseph, Anthony—Continued.

stocked the route (101 E, defense), 880-1; to John W. Dorsey, February 10, 1879, increase of service (102 E, defense), 881; March 5, 1879, accumulation of mail matter (103 E, defense), 881-2; March 6, 1879, petitions, will commence tri-weekly service (104 E, defense), 882; March 26, 1879, certificates for service, blunder in taking subcontract (105 E, defense), 883; subcontract of (1182), 922; subcontractor on route 38145, testimony of, 851-87; identifies letters, 852-3, 874-5; contents of letter of S. W. Dorsey, 861 (excluded as to Vaile, Miner, Brady, and Turner); subcontract, 861 (excluded as to Brady and Turner); men and animals, 864-65, 874-6, 878-9, 881, 886-7; papers, 45 E, 47 E, 48 E, 49 E, and 12 E, 865; impracticable to make 50-hour schedule, 855, 869, 876; paid by S. W. Dorsey, 868; subcontract pay, 868-9; conversation with S. W. Dorsey, 878-9, 873; distances, 872-4, 878; fines, 872; weather, 877; quantity of mail, 878; petition (15 E), 883; 28 E and 29 E, 884; resolution, legislature N. Mex., 884; conversation with Rerdell, 885; prepared petitions at the request of ex-Senator Dorsey, 887.

Journal of the Postmaster-General:

Contains no general order relating to expedition from January 1, 1879, to July 1, 1881, 257-8; manner of signing, 257; all orders affecting increase or reduction of service entered upon, 330; custom of the Postmaster-General to sign about once in two weeks, 330-363; not customary to read before signing, 330, 333; extract of orders from, affecting routes in the indictment, read, 2158, 2163, 2167-9.

Journal room:

Detail of business in, 333.

Jury:

Proceedings incident to impaneling, 3-56.

Jurors:

Names of, as sworn, 53; argument of the right of the Government to stand aside, 36-9.

Kearney:

Testimony of postmaster at, 480-8.

Ker, William W.:

Closing address of, to the jury, 2312-2423.

Ketchum, Alvah:

Mail-carrier and superintendent route 35051, 1263-1291; employed by Vaile, Miner & Co., 1263; time made, 1263, 1266, 1283; men and animals, 1265-72, 1284-6, 1289; ranches, 1265, 1272; Indians, 1269-70; epizootic, 1272, 1284; distances, 1274-6; method of performing service, 1275-7; passengers and express, 1277, 1286; corrects his answer on page 1268, 1284; affidavit made before post-office inspector, 1287-9.

Key, David M.:

Certified copy of appointment of, as Postmaster-General, 251; testimony of, for defense, 2058-2074; cannot say he advised with Brady specifically as to any of the routes in the indictment, 2059.

Keyser, Benjamin U., receiver German-American National Bank:

Testimony of, 1882, 1915, 16, 1903-12; indorsement of S. W. Dorsey as to the indorsement on the notes of J. W. Dorsey & Co. and Miner, Peck & Co., 1904; dealings with Miner, Vaile, and S. W. Dorsey, 1904; overdraft of S. W. Dorsey, 1905, 6; balance due on notes paid by H. M. Vaile, 1906; agreement between Vaile, Miner & Co. and witness (10 X defense), 1906; circumstances under which S. W. Dorsey erased his indorsement, 1915-16.

Kidder, J. P.:

Letter of, May 1, 1879, daily service, indorsed by M. Maginnis (46 O), 1216-17; indorsement of, on letter of J. W. Raymond (26 O), 1208-9; indorsement of, on letter of John H. Charles (23 O), 1207.

King, Matthew:

Mail-carrier route 35051, testimony of, 1291-2; employed by John W. Dorsey, 1291; men and animals, 1291.

Kirby, Thomas B.:

Clerk railway mail service, testimony of, as to regulation of the Post-Office Department for 1873 and 1879, 253-6.

Krider, W. M. :

Letter of, July 15, 1878, no service; that old schedule be restored (4 P), 1303; testimony of, 1319-30, 1334, 1342-43; no mail on this route in 1878, 1320, 1325; in 1879 very often nothing except the mail bill was received, at other times from 2 to 4 letters, 1320; no through mail for Signal passed by Mineral Park, 1320, 1327-9; population, 1320; distances, 1320; Signal, 1320; identifies signatures to petition (11 P) as residents of Signal, 1321; signatures on 12 P identical with those on 11 P, 1324; they drew a line on a map and called it a mail route, 1325; failures, 1326; did not write any portion of petition, 11 or 12 P, 1329; identifies 39 mail bills, 1330; all matter was put on mail bill, 1342; salary as postmaster, 1342.

Lambert, Howard T., mail-carrier :

Route 35051, 1247-51; time made, 1247; quantity of mail, 1247; men and animals, 1248-9, 1251.

Lawrenson, James, notary public :

Testimony of, 308-9; administered the oaths to Key, Maynard, James, and Brady, 309.

Leech, William A., subcontractor :

Testimony of, on route 35015, 1160-5; Brighton and Kidder post-offices, 1161; men and animals, 1162-5; population, 1162; Worthing, 1165.

Lilley, ——— :

Referred to in Rerdell's confession, 1830, 1809, 1813-14.

Los Pinos :

Testimony of postmaster at, 1167-70.

Lownsberry, C. A. :

Telegram, January 5, 1880, failure of service (12 O), 1204; letter July 19, 1878, 65 hours schedule (30 O), 1210; October 18, 1878, asking that mail for Tongue River be sent by Bismarck (34 O), 1211.

Luttrell, J. K., M. C. :

Indorsement on petitions (54 H), 2251; 57 H, 2252.

Lyman, Henry D., chief clerk, contract office :

Testimony of, for defense, 2156-58; lost letter-books of Brady, 2156-58.

McKibben :**McKnsick, superintendent railway mail service :**

Recommends increase to 6 trips. (46 H), 2165.

MacVeagh, Wayne, late Attorney-General :

Argument as to the admission of testimony of, 279-299, 1796-1803; decision of the court admitting, 1803-5; Rerdell confession—Rerdell stated he was secretary to Senator Dorsey, 1807; Brady's percentage for expedition, 1809-10, and remissions, 1815; false set of books, 1810; payments credited under assumed names, 1810; route on which they drew pay and performed no service, 1812; as to money paid by Senator Dorsey to Brady, 1812; assistance in Sixth Auditor's Office, 1809; McGrew, Lilley, and Turner, 1809, 1813-14; Senator Dorsey, John W. Dorsey, Miner, Peck (Boone for awhile), and afterwards Vaile, members of the combination, 1807-8; Rerdell helped to fill up the bids; combination awarded between 90 and 100 routes; subdivision of contracts by which Senator Dorsey and Bosler became interested in some 30, 1809; petitions and oaths, 1809; when it was inconvenient to get signatures they made them up here, 1809; the book from which the false set was made up was sent to New York, 1811; Rerdell was manager and cashier, 1812; three-fourths of the expedited service never performed, 1812.

Maginnis, Martin, Delegate :

Letter of July 3, 1878, tri-weekly service, schedule 65 hours (27 O), 1209; indorsement on letter (46 O), 1216-17; testimony of, 2112-2116; history of the Bismarck and Tongue River route, 2113; identifies his letter of July 23, 1878, 2113-2114; circumstances under which the letter was written, 2115; had no knowledge when the increase was commenced or the probable cost, 2116.

Major & Culverhouse :

Subcontract of, route 46247, 1009.

Major, John M., subcontractor :

Testimony of, 46247, 1010-12; carried the mail in passenger coaches, also express, 1010; always carried it in from 41 to 45 hours in summer, and 65 hours in winter, 1010; weight of mail, 1011; subcontract pay, 1012.

Maps:

Different colored lines indicate number of trips; black 6 times a week, blue 3 times a week, yellow 2 times a week, red 1 time a week, 749.

Mark, Cyrus E. :

Testimony of, on route 38135, 1598-1602; departure of the mails from Pueblo, 1598; time of arrival from Greenhorn, 1599; quantity of mail, 1599; schedules recommended by postmasters, 1601.

Masterton, Joseph G., mail-carrier :

Testimony of, on route 44155, 730-49; men and animals, 742-8; no expedition until the fall of 1879, 742; quantity of mail, 745.

Maxey, Samnel Bell, United States Senator :

Testimony excluded, 2050.

Maxwell, W. S. :

Letter of, no date, daily service and fast time, indorsed by Whiteaker (9 T), 1520.

Megrue, N. M. :

Letter of, August 20, 1878, increased service not to accommodate the people (1 I), 1021.

McBean, Frank, subcontractor :

Testimony of, route 44160, 1384-97; as to subcontract with John M. Peck, 1385; with H. M. Vaile, 1385; men and animals, 1387-91; commencement of service, 1386, 7; identifies letter (33 Q), 1391; 20 Q, 1393; 15 Q, 1394; 19 Q, 1396; Miner paid him, 1392; subcontract pay, 1392; Indians, 1393; expeditious mails, 1394-5.

McCormick, James :

Testimony of, route 46247, 1012-15; mails were carried in passenger coaches in 42 hours in summer, and 60 hours in winter, 1013.

McCarthy, John B. :

Accepted as juror, 45.

McCrary, George W., Secretary of War :

Letter of, March 25, 1879, inclosing letter of Captain Dodge (7 E), 811. !

McDonald, A. :

Letter of, April 24, 1879, daily fast line (9 F), 952.

McDonald, A. J. :

Letters of, March 18, 1879, to department, service on route 38152 is quite superfluous (4 M), 1177, 8; to Sanderson, January 27, 1879, performance of service (5 M), 1179; testimony of, route 38152, 1167-70; from Los Pinos to Ouray, routes 38146 and 38152 were identical, 1168; identifies letters, 1168; service on route 38152 was not discontinued for a year or two after he had notified the department, 1169.

McGrew, ——— :

Referred to in Rerdell confession, 1809, 1813-14, 1829.

McGrew, J. M. :

Late Sixth Auditor, testimony of, for defense (excluded), 2185.

McLellan, Coll., mail-carrier :

Testimony of, route 35051, 1241-7; distances, 1241; men and animals, 1242-6.

McLain, Edwin J. :

Accepted as juror, 46.

McNally, Mathew :

Accepted as juror, 45.

McSweeney, John :

Closing address of, to the jury, 2721-2780.

Memoranda :

Penciled (12 and 13 D), 678.

Merrick, Richard T. :

Closing address of, to the jury, 2781-2874.

Metschan, Phil. :

Letter of, September 21, 1878, to J. H. Mitchell, more and faster service (13 Q), 1355.

Meyers, Charles F. :

Letters of, July 31, 1878, contractor has failed to report (3 P), 1302; service not yet commenced (2 P), 1302; September 3, 1878, service commenced August 31, 1878 (5 P), 1303; August 5, 1879, 7 trips, not yet commenced (22 P), 1308.

Miles, Col. Nelson A. :

Letters of, July 28, 1878, increase of service (35 O), 1211; December 4, 1878, tri-weekly or daily mail (36 O), 1212.

Military officers at Camp Harney :

Letter of, July 15, 1878, no mail received for 36 days, routes and roads open (12 Q), 1354.

Miller, David J. :

Letter of, to Rerdell, February 21, 1880, failures of Jaramillo (110 E), 913.

Miner, John R. :

Letters of, to Brady, Thomas J., no date, discontinuance of route (6 O), 1202; October 4, 1878, proposition for a schedule of 65 hours (8 O), 1203; and H. M. Vaile, January 29, 1879, withdrawal of subcontract (16 O), 1205; February 3, 1879, refiling subcontract (8 O), 1205; May 5, 1879, address care M. C. Rerdell, box 706 (2 B), 494-5; May 8, 1879, inclosing petitions (16 B), 520; April 16, 1879, proposition for expedition (17 B), 520; May 10, 1879, inclosing petition for increase (18 K), 1101; and S. W. Dorsey, December 6, 1880, withdrawal of subcontract (26 K), 1105; to Burgner, William, February 8, 1881, draft (12 K), 1083; same, July 30, 1881 (13 K), 1084; to Carrey, John, February 20, 1880, reduction of service (31 Q), 1374; April 15, 1881, asking him to see S. H. Abbott, satisfy him, pay him whatever is reasonable (33 Q), 1382; to French, C. H., agent, January 5, 1880, supply of Cedarville (26 A), 419; October 19, 1878, return schedule (27 A), 419; August 1, 1879, inclosing draft (31 A), 420; the same, November 1, 1879 (32 A), 420; January 31, 1881 (33 A), 420; May 1, 1881 (34 A), 420; July 31, 1881 (35 A), 420; —, 1880 (36 A), 420; February 1, 1881 (37 A), 420; May —, 1881 (38 A), 420; August —, 1881 (39 A), 420, and November, 1881 (40 A), 420; to Joseph, Anthony December 22, 1878, at the request of Dorsey, asks him to stock the route (90 E), 854.

Oaths of, sworn to October 4, 1878 (7 O), route 35051, 1202-3; April 17, 1879 (18 B), 38135, 521, 1115.

Miner, Peck & Co. :

Letters of, to Tuttle, F. A., August 19, 1878, accepting proposition (9 I), 1041; September 3, 1878, chance of increase not promising, Greenwood supplied by another route (21 I), 1041-2.

Mitchell :

Order of Brady April 21, 1879, curtail route 34140 to end at (3 T), 1519.

Mitchell, John H., Ex-United States Senator :

Indorsement on petitions (10 D), 677-8; on (26 D), 685; on (13 Q), 1355-6: letters of, November 16, 1878, inclosing letter of military officers at Camp Harney (14 Q), 1355; April 20, 1879, 3 trips and 100 hours (8 T), 1520; testimony of, for the defense, 2002.

Monroe, A. Q. :

Letter of, March 17, 1879, discontinuance of service (6 I), 1030.

Morgan, Charles W. :

Journal clerk, testimony of, 333, 363; detail of business in journal room, 333.

Murray, Hugh T. :

Accepted as juror (talesman), 52.

Nelson, Henry L., correspondent :

Testimony of, in rebuttal, 2280; as to conversation with A. C. Buell, 2276-8; excluded after argument, 2287.

Newspaper slip (24 K), 1103.

Nicholson, Walter L., topographer :

Testimony of, 505-7; preparation of maps, 505-7.

Nightingale, Thomas S. :

Testimony of, on route 34149, 446-63; petition, "*schedule 13 hours*" (A), 446, 7, 52; letter (42 A), 452; letters (44 A), 457 (45 A), 460; letter (46 A) excluded; letter (5 A), 463.

Norton, Hanibal D., clerk finance division :

Testimony of, 333-43; detail of business in the Third Assistant Postmaster-General's Office, 333-343; corrects his testimony, 363-365.

Oath :

Contractors required to state under, the number of men and horses required to perform service with increased speed, 256; of office administered to Brady and Turner, 309; defense admit, as to Maynard and Key, 309.

Oaths :

Of J. W. Dorsey, contractor on route 38113 (13 L), 1122; on route 38145 (16 E), 814-5, and 17 E, 815; on route 38156 (6 F), 950; on route 40104 (13 P), 1305; on route 40113 (14 S), 1502; *subcontractor* on route 38134 (10 I), 1032, and (12 I), 1232-3; on route 38140 (Miner was contractor) (15 K), 1085; of John R. Miner, contractor on route 35051 (7 O), 1202-3; on route 38135 (18 B), 521, 1115; of John M. Peck, contractor on route 34149 (2 A), 374; on route 41119 (8 C), 603; on route 44140 (20 T), 1523; on route 44155 (50 A and 14 D), 679; on route 44160 (10 Q), 1353; on route 46132 (4 G and 52 A), 981-2; on route 46247 (53 A), 1005; of Charles F. Perkins, *subcontractor* on route 38113 sworn to in blank (9 L), 1121; of J. L. Sanderson, *subcontractor* on route 38150 (7 R), 1412.

Ojo Caliente :

Order of Brady. June 26, 1878, to curtail route 38145 to end at (2 E), 809.

Olcott, Henry A. :

Accepted as juror, 47.

Olcott, John H., corresponding clerk :

Testimony of, 1294-7, 2275, 2277-8; identifies files on route 40104, 1294-7; identifies telegraph book of department containing telegram of Brady to Vaile, August 20, 1878, 2277-8.

Orders :

Of French, route 34149, July 10, 1879, for increase and expedition upon jacket, indorsed, "Do this.—Brady" (1 A), 366; March 8, 1879, recognizing subcontract of H. M. Vaile (7 A), 376.

Of Brady, route 35015, May 2, 1878, embrace Brighton (3 N), 1196; to change address to lock-box 714 (4 N), 1196; March 31, 1879, subcontract of H. M. Vaile (15 N), 1199; of French. July 10, 1879, for increase and expedition upon jacket indorsed, "Do this.—Brady" (9 N), 1198.

Of Brady, route 35051, to change schedule (10 O), 1203 and 1233; October 1, 1878 subcontract of H. M. Vaile (13 O), 1204; January 20, 1879, withdrawal of subcontract (15 O), 1204; February 3, 1879, rescinding order of January 29, 1879 (17 O), 1205; December 23, 1878, for increase and expedition (19 O), 1206, 13; September 30, 1879, to change schedule (48 O), 1217, 18; French, August 2, 1879, increase 3 trips (39 O), 1214.

Of Brady, route 38113, February 7, 1879, subcontract of C. F. Perkins (2 L), 1117; October 20, 1880, subcontract of Eugene Taylor (16 L), 1135; March 8, 1881, to increase to 7 trips (19 L), 1138; October 1, 1878 (21 L), 1170; December 21, 1878, subcontract M. C. Rerdell (23 L), 1171; January 22, 1879, stop all payments to subcontractor (25 L), 1171; February 7, 1879, stop all payments to subcontractor (27 L), 1171; May 9, 1879, change address to care M. C. Rerdell, box 706 (29 L), 1172; October 20, 1880, stop all payments to subcontractor (33 L), 1172, 3; May 1, 1879, increase 2 trips and expedite to 45 hours (6 L), 1119; June 18, 1878, to change address to lock-box 714 (56 L), 1244.

French, November 11, 1879, subcontract S. W. Dorsey (31 L), 1172.

Of Brady, route 38134, July 8, 1879, for increase and expedition (7 I), 1030; French. October 22, 1879, subcontract of Eli Hanson (13 I), 1033; October 17, 1879, to change schedule (16 I), 1034.

Orders—Continued.

- Of Brady, route 38135, June 18, 1878, to change address to lock-box 714 (1 B), 494; May 9, 1879, to change address to care M. C. Rerdell, box 706 (2 B), 494; June 26, 1879, for increase and expedition (10 B), 517; December 1, 1880, embrace Agate (19 B), 522; December 14, 1880, omit Agate (22 B), 524; October 1, 1878, recognizing subcontract of E. M. Ames (25 B), 525; December 2, 1878, to stop payments to subcontractor (27 B), 525; December 7, 1880, to stop payments to subcontractor (31 B), 526; July 23, 1880, to change schedule (34 B), 527.
- French, August 30, 1878, embrace Pueblo (5 B), 514; November 11, 1879, recognizing subcontract of S. W. Dorsey (29 B), 525; July 31, 1879, to change schedule (32 B), 526.
- Second Assistant, January 19, 1882, recoupment for Agate (39 B), 567.
- Of Brady, route 38140, June 6, 1878, to embrace Raton (3 K), 1066; January 6, 1879, to change schedule (6 K), 1067; May 9, 1879, for expedition (8 K), 1868-9; December 7, 1880, stop all payments to subcontractor (11 K), 1070; of French, November 13, 1878, to allow pay for embracing Raton retroactive (5 K), 1067; November 11, 1879, subcontract to S. W. Dorsey (9 K), 1068.
- Of Brady, route 38145, June 26, 1878, curtail to Ojo Caliente (2 E), 809; April 24, 1879, from July 1, 1878, allow for embracing Pagosa Springs, retroactive (11 E), 813; April 29, 1879, increase and expedition (13 E), 814, 1185; January 5, 1881, embrace Price (38 E), 825; December 26, 1878, termination of service of subcontractor (40 E), 825; March 21, 1879, to change schedule (42 E), 826; February 26, 1881, increase to 7 trips from January 15, 1881 (56 E), 829; retroactive, 859; October 1, 1878, recognizing subcontract of Watts (67 E), 843-4; September 29, 1879, subcontract of P. J. Jaramillo (70 E), 845; August 19, 1880, remissions (107 E), 912; August 3, 1880, deductions (116 E), 920.
- French, October 1, 1878, amending order June 26, 1878 (3 E), 809; January 23, 1879, curtail to end at Animas City (4 E), 809; April 23, 1881, embrace Durango (35 E), 824; April 25, 1880, to change schedule (54 E), 838; October 25, 1879, amending order relative to subcontract of Jaramillo (72 E), 846; July 1, 1880, to stop all payments to subcontractor (75 E), 847; no date, subcontract of Sanderson (77 E), 847.
- Of Brady, route 38150, September 18, 1878, subcontract of J. L. Sanderson (3 R), 1406; September 20, 1878, for an increase and expedition (5 R), 1407; October 1, 1878, curtail to end at Barnum (8 R), 1413; July 26, 1880, reduce to 3 trips (10 R), 1472; August 24, 1880, increase from Powderhorn to Barnum (12 R), 1472.
- Elmer, August 11, 1881, recouping amount overpaid for expedition (13 R, defense), 2000.
- Of Brady, route 38152, May 12, 1880, subcontract of J. L. Sanderson (6 M), 1179; August 3, 1880, to discontinue service (14 M), 1185.
- Of Brady, route 38156 March 17, 1879, to change schedule (4 F), 949-50; October 1, 1880, subcontract of William E. Earl (20 F), 956; January 21, 1880, to stop all payments to subcontractor (25 F), 958; January 21, 1880, subcontract of Fred. Steineger (27 F), 958.
- French, January 23, 1879, embrace Animas City (3 F), 949; April 17, 1880, reduce 1 trip (13 F), 953; November 11, 1879, subcontract of S. W. Dorsey (23 F), 957; June 12, 1879, increase and expedition (8 F), 954.
- Of Brady, route 40104, June 18, 1878, to change contractor's address to lock-box 714 (1 P), 1302; November 29, 1878, permission to sublet (7 P), 1303; December 24, 1878, increase and expedition to 60 hours (9 P), 1304; May 9, 187—, to change contractor's address to care M. C. Rerdell, box 706 (18 P), 1306; January 22, 1880, reducing service to 1 trip, on 84 hours schedule (25 P), 1309, 10; January 28, 1880, rescinding order of January 22, 1880, reduce service 4 trips (27 P), 1310; December 31, 1878, subcontract of H. M. Vaile (28 P), 1310-11; May 8, 1879, stop all payments to subcontractor (30 P), 1311; May 8, 1879, subcontract M. C. Rerdell (32 P), 1311; August 23, 1880, stop all payments to subcontractor (40 P), 1315; August 23, 1880, subcontract M. Salisbury (42 P), 1315; January 21, 1880, making deductions for failures (86 P), 1343.
- French, July 12, 1879, increased trip (20 P), 1307; June 29, 1880, stop all payments to subcontractor (36 P), 1313; June 29, 1880, subcontract of McKibben (38 P), 1314.
- Of Brady, route 40113, June 3, 1879, for increase and expedition (16 S), 1503; December 7, 1880, to stop all payments to subcontractor (19 S), 1504.
- French, November 11, 1879, subcontract of S. W. Dorsey (17 S), 1504.
- Of French, route 41119, October 10, 1878, increased trips (2 C), 601; July 10, 1879, curtail, to end at Pahreah (9 C), 604; March 8, 1879, recognizing subcontract of H. M. Vaile (15 C), 607-8.
- Elmer, January 3, 1882, terminating subcontract of Rerdell, and recognizing that of Nephi Johnson (23 C), 611-12.

Orders—Continued.

Brady, July 14, 1879, increase and expedition to 33 hours (5 C), 602; May 8, 1879, to stop payments to subcontractor (17 C), 608; the same date, subcontract of M. C. Rerdell (19 C), 609.

Of Brady, route 44140, April 21, 1879, curtail. to end at Mitchell (3 T), 1519; May 9, 1879, to change address to care M. C. Rerdell, box 706 (4 T), 1519; June 26, 1879, for increase and expedition (7 T), 1520; November 20, 1880, changing schedule to 40 hours in summer, and 50 in winter (25 T), 1525; March 29, 1881, summer and winter schedule (29 T), 1527-8.

French, October 24, 1879, to change pay of subcontractor (23 T), 1524.

Of Brady, route 44155, October 29, 1878, for increase and expedition (6 D), 675-6; January 17, 1879, to increase pay of subcontractor (15 D), 679; June 27, 1879, increase 4 trips (20 D), 681; July 16, 1880, increase to 7 trips (28 D), 689; October 1, 1878, recognizing subcontract of H. M. Vaile (29 D), 689; French, September 27, 1878, to suspend pay (5 D), 675; November 12, 1878, amending order suspending pay (17 D), 680; November 19, 1878, removing suspension of pay (18 D), 680; April 17, 1880, reduce trip (27 D), 688-9.

Of Brady, route 44160, December 23, 1878, for increase and expedition (8 Q), 1352; July 16, 1878 (9 ?), increase four trips, 1357; indorsed, "Make this daily—Brady" (18 Q), 1360; December 28, 1878, subcontract of H. M. Vaile (29 Q), 1361.

Of Brady, route 46132, June 24, 1879, increase trips and expedition to 23 hours (2 G) 981; December 12, 1878, to stop all payments to subcontractor (14 G), 985; May 24, 1879, subcontract of H. M. Vaile (16 G), 986.

Of Brady, route 46247, June 3, 1878, increase 1 trip (2 H), 1001; December 3, 1880, increase and expedition (14 H), 1003; July 31, 1878, to change schedule (21 H), 1006.

French, April 17, 1880, reduce 3 trips (24 H), 1007; August 26, 1880, increase 3 trips (26 H), 1007.

Hazen, August 6, 1879, amending order of October 1, 1878, relative to pay of subcontractor (26 H), 1009.

Page, Horace F., M. C.:

Testimony of, for defense. 2163-7; identifies his signature to letter (46 H), 2163; route 46247 not in his district, 2164; called on General Brady to urge restoration of trips on route 46247, 2165.

Pagosa Springs:

Order of Brady, April 24, 1879, to allow pay for embracing, retroactive (11 E), 813.

Pahreah:

Order of French, July 10, 1879, curtail route 41119 to end at (9 C), 604.

Pay:

Customary to allow one month's extra, when service is reduced before it goes into operation, 305.

Payee:

Address of, stated in Sixth Auditor's report, 338.

Payments:

To contractors prior to June 30, 1880, made by collection orders on postmaster, 322; and sometimes by draft or warrant on the Treasurer and assistant treasurers, 323; payments, tabulated statement of, route 34149 (5 A), 385-386; route 35015, 1186-1187; route 35051, 1292-1293; route 38113, 1188-1189; route 38134, 1053-1054; route 38135, 584-585; route 38140, 1072-1073; route 38145, 848-850; route 38150, 1418-1419; route 38152, 1190-1191; route 38156 (31 F), 973-974; route 40104, 1344-1345; route 40113, 1508-1509; route 41119, 639-640; route 44140, 1512-13; route 44155, 707-708; route 44160, 1400-1401; route 46132, 999-1000; route 46247, 1019-1020.

Peck, John M.:

Letters of, to Brady, February 2, 1879, proposition to carry the mail on expedited schedules (83 A), 1844; March 4, 1878, address lock-box 714 (47 A), 464; November 27, 1878, permission to sublet (Dorsey was the contractor) (8 P), 1303; December 23, 1878, for schedule of 96 hours (11 Q), 1353; M., October 21, 1878, proposition for expedited schedule (11 D), 678; June 23, 1879, proposition for expedited schedule (10 C), 605; and Vaile, May 5, 1879, withdrawal of subcontract (18 C), 608; December 3, 1878, schedule of 72 hours (20 H), 1005; proposition for schedule of 26 hours (3 G), 981; and J. C. Hayes, November 2 1878, withdrawal of subcontract (15 G), 986; May 5, 1879, address care of

Peck, John M.—Continued.

M. C. Rerdell, box 706 (5 T), 1519; May 24, 1879, proposition for expedited schedule (19 T), 1522; October 23, 1879, subcontractor's pay (24 T), 1525; J. M., November 15, 1880, change of schedule (26 T), 1525; November 15, 1880, remission of deductions (27 T), 1525-6; to French, C. H., October 21, 187-, collection orders (23 A), 418; January 28, 1879, little probability of increase, supply of Cedarville (24 A), 418; April 25, 1879, supply of Douglas Grove (25 A), 418; November 6, 1878, statement of account and draft (28 A), 419; February 1, 1879, inclosing draft (30 A), 419; October 22, 1878, side supply (43 A), 444; to Johnson, Nephi, October 11, 1878, notifying Johnson of increase to 3 trips (26 C), 618; November 6, 1878, petitions for 48 hours (27 C), 618. April 15, 1879, asking Johnson to address M. C. Rerdell, box 706 (25 C), 618, to Brady, February 2, 1879, proposition to carry the mail on expedited schedule (83 A), 1844; May 5, 1879, address care M. C. Rerdell, box 706 (5 T), 1519; May 24, 1879, proposition for expedited schedule (19 T), 1522; October 23, 1879, subcontractor's pay (24 T), 1525; J. M., November 15, 1880, change of schedule (26 T), 1525; November 15, 1880, remission of deductions (27 T), 1525-6; June 23, 1879, proposition for expedited schedule (10 C), 605; November 27, 1878, permission to sublet (Dorsey was the contractor) (8 P), 1303; December 23, 1878, for schedule of 96 hours (11 Q), 1353; December 3, 1878, schedule of 72 hours (20 H), 1005; proposition for schedule of 26 hours (3 G), 981; and J. C. Hayes, November 2, 1878, withdrawal of subcontract (15 G), 986; and Vaile, May 5, 1879, withdrawal of subcontract (18 C), 608; to French, C. H., October 21, 187-, collection orders (23 A), 418; January 28, 1879, little probability of increase, supply of Cedarville, (24 A), 418; April 25, 1879, supply of Douglas Grove (25 A), 418; November 6, 1878, statement of account and draft (28 A), 419; February 1, 1879, inclosing draft (30 A), 419; October 22, 1878, side supply (43 A), 444; March 4, 1878, address care lock-box 714 (47 A), 464; to Johnson, Nephi, informing him of increase to 3 trips (26 C), 618; November 6, 1878, petitions for 48 hours schedule (27 C), 618; April 15, 1879, to address care of M. C. Rerdell, box 706 (28 C), 618.

Oaths of, route 34149 (2 A), 374, 1844; route 41119 (8 C), 603; route 44140 (20 T), 1523; route 44155 (50 A and 14 D), 679; route 44160 (10 Q), 1353; route 46132 (4 G and 52 A), 981-2, route 46247 (53 A), 1005.

Pennell, Joseph :

Testimony of, on route 35051, 1222-41; employed by John W. Dorsey to help buy stock, build ranches, and locate road, 1222; ranches, 1222-3; men and animals, 1122, 1224, 1232; Dorsey drew on Peck for expenses, 1223; Rerdell petition from supposititious settlement, 1223, 1240-1; petition for increase, 1224; built ranches, expecting an increase, 1224; cost of ranches, 1225; Rerdell's estimate of men and animals, 1226; conversation with J. W. Dorsey, 1226, 1233, 1236-8; not a soul or settlement on route, 1239; Indians, 1230-1, 1239, topography of country, 1229-30; distances, 1232, 1235, 1240-1; desirability of frequent mails, 1228.

Perkins, Charles F., *subcontractor* :

Oath of, sworn to in blank (9 L), 1121; subcontract of (1 L), 1116; testimony of, on route 38113, 1111, 1116-33, 1153-6; made his subcontract with Rerdell, 1116; identifies petitions (3 L, 4 L, and 5 L) as written by Rerdell, 1117; identifies letters (10 L), 1120; 14 L, 1127; also letters marked W. E. W. I., 1124, 1126, 1133; the number of men and animals in the oath was blank when sworn to, 1121; men and animals, 1125-31; distances, 1124, 1127; reason he gave up subcontract, 1132; statements made to them by Steel, as agent for J. W. Dorsey, excluded after argument, 1153-6.

Petitions:

Route 34149, for increase to 3 trips, "*schedule 13 hours*," indorsed by A. Saunders (3 A), 370-1.

Route 35015, of postmasters for extension of schedule, indorsed, "Brewer, write Judge B. that cannot be done—Brady" (7 N), 1197-1200; for daily service and schedule of 10 hours (10 N), 1198; similar petition, indorsed and recommended by G. G. Bennett (11 N), 1198; similar petition inclosed in the last (12 N), 1199.

Route 35051, for increase to three trips, and schedule of 65 hours (20 O), 1206; similar petition from Miles City (31 and 33 O), 1210-11; from Bismarck (32 O), 1210; from Saint Paul, for daily mail, and 65 hours (43 O), 1215; similar petition from Minneapolis (44 O), 1216; for daily mail, indorsed by Nelson A. Miles (45 O), 1216.

Petitions—Continued.

- Route 38113, from Dixon, January, 1879, 3 trips and 84 *hour* schedule (3 L), 1116 similar from Rawlins, January, 1879, *for 3 trips and 84 hours*, indorsed by J. B. Chaffee and W. W. Corlett (4 L), 1118; for 3 trips and 84 *hours* (5 L), 1119; for 7 trips and 36 hours (17 L), 1137; for 7 trips and 36 hours, approved and recommended by W. T. Sherman, General (18 L), 1137-8.
- Route 38134, for daily service and shorter schedule (23 I), 1049-50; daily line and fast schedule, indorsed by J. B. Belford and H. M. Teller (24 I), 1051; for 7 trips a week and fast schedule (25 I), 1051; for daily service and increase of speed, indorsed by J. B. Belford and H. M. Teller (26 I), 1051; for daily line and fast time, indorsed by J. B. Belford and H. M. Teller (27 I), 1052.
- Route 38135, for 6 trips and schedule of 8 hours (11 B), 517; for six trips "*and a faster schedule*" (12 B), 517; for 6 trips "*on quicker time*" (13 B), 518; for daily mail (14 B), 518; for three trips "*and faster time*" indorsed by James B. Belford, H. M. Teller, and N. P. Hill (15 B), 519.
- Route 38140, for three trips and faster time (19 K), 1102.
- Route 39145, similar from Pagosa Springs, indorsed by H. M. Teller and N. P. Hill (25 E), 820; from Park View, indorsed by H. M. Teller and N. P. Hill (26 E), 821; from Pine River (27 E), 821; from Navajoe (28 E), 821; from Turia Amarilla (29 E), 822; from El Rito (30 E), 322; for weekly mail from Parrott City to Albuquerque (31 E), 822; for increase and faster time (33 E), 823-4; printed, asking daily mail from railroad to Animas City (58 E), 839-40; printed, dated Mancas, Colo., October 20, 1880 (62 E), 842; to Governor, Colo., asking change of service, indorsed by F. W. Pitkin (63 E), 842; from Parrott City, November 18, 1880 (64 E), 843; from Rico, October 20, 1880, daily mail from railroad to Animas (65 E), 843; similar, November 9, 1880 (66 E), 843; for daily line, one-third shorter time (93 E), 855; from State officers, April 28, 1879, for three trips and faster time, indorsed by H. M. Teller (89 E), 851-2; form of, in lead pencil, indorsed, "Mr. Joseph, please have this copied, signed, and sent to me at once" (92 E), 855; for daily service and increase of speed (18 E), 815-16; from Ojo Caliente for three trips and shorter schedule (24 E), 818.
- Route 38150, for a daily service and increased schedule, indorsed by H. M. Teller (6 R), 1407, 1411.
- Route 38156, of postmasters for extension of schedule (18 F), 955.
- Route 40104, December 20, 1878, to 3 trips and 60 hours schedule (11 P), 1304; December 20, 1878, for expedition of the schedule on 40105 for 48 *hours*; signatures identical with those on 11 P (12 P), 1305.
- Route 40113, of citizens of Clifton, asking for increased mail facilities, with faster time (3 S), 1499, 1500; similar (4 S), 1500; of military officers, Camp Grant, daily service (4 S), 1500; for increase to 3 trips and faster time (6 S), 1,500 citizens of Santa Fé, urging a daily or at least tri-weekly service, with fast time (7 S), 1501; from Clifton, Ariz., for 3 trips and faster time (8 S), 1501.
- Route 41119, May 24, 1879, asking that part of route 41122 be embraced upon 41119 (1 C), 600; September 23, 1878, more service (3 C), 601; September 12, 1878, for tri-weekly service (4 C), 601-2; May 6, 1879, for 7 trips *and 48 hours schedule*, indorsed by George Q. Cannon (6 C), 602-3; May 24, 1879, for 7 trips and 48 *hour* schedule (7 C), 603; indorsed by George Q. Cannon (6 C), 626; postmasters, November 12, 1879, that expedition is unnecessary (12 C), 605-6.
- Route 44140, for daily service and greatly increased speed (10 T), 1520; for daily service and greatly increased speed (15 T), 1521-2; from Eugene City, May 10, 1879, asking increase to 3 trips, and much faster speed (17 T), 1522.
- Route 44155, for daily service in expedition time of 72 *hours* (8 D), 676, 7; to 6 trips in 72 hours (9 D), 677; for 6 trips and 72 hours, indorsed by John H. Mitchell (10 D), 677-8; for daily service (21 D, 22 D, 23 D), 681-2.
- December 18, 1878, for daily service, indorsed by James H. Slater and John Whiteaker (24 D), 683; from The Dalles, for daily service (25 D), 684-5; of members of Oregon legislature, for daily service, 72 hours schedule, indorsed, John H. Mitchell (56 D), 685.
- Route 44160, from Canyon City, September 23, 1878, for daily mail and expedition to (96) *ninety-six hours*, indorsed by John H. Mitchell (15 Q), 1355-6; from Camp Harney, September 23, 1878, for daily mail and expedition to 96 hours (16 Q), 1356; for daily service and reduction of time to 60 hours, indorsed by J. H. Slater, L. F. Grow, and John Whiteaker (19 Q), 1357; by residents of Canyon City and vicinity, for daily service (20 Q), 1357-8; for daily service (21 Q and 22 Q), 1358; for daily service, presented by John Whiteaker (23 Q), 1358; for daily service, recommended by J. H. Slater and John Whiteaker (24 Q), 1359; for daily service (25 Q), 1359; for daily service (26 Q and 28 Q), 1359-60.
- Route 46132, from Temecula for continuation of route to Riverside (6 G), 983; for

Petitions—Continued.

tri-weekly service, 36 *hours* schedule (7 G), 983; for 36 *hours* schedule (8 G), 983; for tri-weekly service and 36 *hours* schedule (9 G), 984; for tri-weekly service and 38 *hours* schedule (10 G), 984; five similar petitions and one signed by postmaster for increase of service (11 G), 984; for 38 *hours* schedule (12 G), 984; for 38 *hours* schedule (13 G), 984-5.

Route 46247, for 6 trips and a schedule of 72 hours (3 H), 1001; ten similar (4 H to 13 H), 1001-2; for an increase to 6 trips (17 H and 18 H), 1004.

Protesting against reduction of service, indorsed by C. P. Berry (47 H), 2169; similar petition (48 H), 2169-70; and (50 H), 2170, 2171; for one additional trip and expedition, indorsed by J. T. Farley and P. D. Wigginton (53 H), 2251; for daily service and increased speed, indorsed by J. K. Luttrell, M. C., and P. D. Wigginton (54 H), 2251; for 7 trips, indorsed by C. P. Berry (56 H), 2252; for 7 trips indorsed by J. K. Luttrell and J. T. Farley (57 H), 2252.

Peterson, D. H., 2024-5, 2039-41.

Pierce, Clark S., mail-carrier:

Testimony of, on route 44155, 765-9; employed by Miner, Peck & Co., 766; men and animals, 766-8; schedule time, 767-8.

Piper, Jahzeel S.:

Letter of, September 30, 1880, snpply of Agate (20 B), 523; testimony of, supply of Agate (route 38135), 550-7.

Pitkin, F. W.:

Letter of, April 25, 1879, increase of service, fast time indorsed by James B. Belford (3 I), 1021.

Post, W. H.:

Letter of, received January 22, 1879, winter schedule, 6 days, summer, 5 days (35 L), 1173.

Powers of attorney:

From John M. Peck to M. C. Rerdell, September 26, 1879, authorizing him to collect amounts due on routes 41119, 44140, and 46247 (16 X), 2257; from J. M. Peck to John R. Miner, dated January 10, 1878 (13 X), 2197.

Powers, A. S., subcontractor:

Affidavits of William Gebhart and P. C. Renfrew, postmasters, as to cause of failure (28 T), 1526-7; letter of September 15, 1880, to M. C. Rerdell, cannot possibly carry the mail in winter on present schedule (31 T), 1539-40; testimony of, on route 44140, 1528-45; subcontractor under Peck, 1528; quantity of mail, 1529-30; men and animals, 1530-1, 1533; subcontract pay, 1531; petitions (10 T, 15 T, and 17 T), possibility of making a 50 hours schedule, 1531, 1536, 1538; route traveled, 1532; distances, 1532; fines and deductions, 1535; had more horses than he could use, 1536; identifies letters, 1540; deductions and remissions, 1542, 1543, 1545.

Prayers for instructions:

On the part of the Government, 2803-2808.

On the part of the defense, 3149-3180.

Price:

Order of Brady, January 5, 1881, to embrace (38 E), 825.

Price, B.:

Letter of, December 21, 1880, Price is a station on route 31145 (39 E), 925.

Productiveness.

Pryor, John H.:

Testimony of, for defense, 2274-7; 2279-80; recognizes press-copy letter-book of contract office, and identifies signature of Thomas J. Brady to office letter dated December 28, 1880, and to five letters dated December 29, 1880, and to five letters dated December 30, 1880, 2274-5; and signature of French to office letters dated from December 21 to December 28, inclusive, 2275-6; Second Assistant and Acting Second Assistant, signing on the same day, 2276; identifies signature of Thomas J. Brady to letter dated December 27, 1880, in letter-press copy-book, and also signatures of J. L. French, acting, to letters dated December 24 and December 27, 1880, 2279-80.

Putnam, Thomas G.:

Testimony of, on route 44140; 1583-7, 1591-7; snit of Wilcox against Dorsey, 1583-7; telegrams of Woodward and Woodward, 1597.

Randall, Alder :

Letter of, August 22, 1878, service commenced (6 P), 1303.

Raton :

Order of Brady, June 6, 1878, to embrace the office of, on route 38140 (3 K), 1066; of French, November 13, 1878, to allow pay for, retroactive (5 K), 1067; testimony of the postmaster at, 1085-1111, 1156-8.

Raymond, J. W. :

Letter of, July 18, 1878, increase to 3 trips, indorsed by J. J. Kidder (26 O), 1208-9.

Receipt :

Of John Hailey to John M. Peck, in full for temporary service, route 44155 (19 D), 680; of S. H. Abbott to Vaile, Miner & Co. (15 X), 2245.

Receipts for warrants :

On route 34149, 505; route 35015, 1876; route 35051, 1294; route 38134, 1055; route 38135, 583; route 38145, 851; route 38152, 1876; route 41119, 634; route 46132, 1109; route 46247, 1021.

Reconpment :

Of amount paid for supply of Agate, route 38135, 562-72; of amount overpaid for expedition on route 38150 (13 R, defense), 2000.

Redding :

Testimony of postmaster at, route 46247, 1012-15.

Reeve, James H., clerk Third Assistant Postmaster-General's office :

Testimony of, 2293-94; identifies table showing the bids and acceptances of J. W. Dorsey, Miner, and Peck, as prepared by him (18 X), 2293-4.

Register of arrivals and departures, with indorsements as to cause of failure to arrive (112 E to 115 E and 117 E), 918-20.

Regulations of the Post-Office Department proved, 253-6; section of, authorizing Second Assistant Postmaster-General to sign contracts, 306; prescribing duties of the contract office, 306-7; inspection division, 307; mail equipment division, 307; special agents and mail depredations, 307; topographical division, 307; office of the Postmaster-General, 307; First Assistant Postmaster-General, 307-8; Second Assistant Postmaster-General, 308; section of, relative to filing subcontracts, 377-8; oath required for increase of speed, 256; allowance of a month's extra pay, 256.

Reighley, Henry W. :

Book-keeper for Hatch & Foots 1891-1903, 1992-3, 1913-5; explains entry "c. k." as check, "c." as check or cash, 1913; defense admit cash-book entry under date of April 12, 1880, "Thomas J. Brady, c. \$10,000," 1913, 1993.

Release dated June 8, 1880, signed John W. Dorsey, releasing Jaramillo from his subcontract in consideration of \$500 (76 E), 847.**Remissions, table of fines, deductions, and, 2273-4.****Reports auditors :**

Certifying amounts due and to whom payable on route 34149, 476-7; route 35015, 1857, 1859; route 35051, 1209-1301; route 38113, 1173-5; route 38135, 572-522; route 38140, 1109-11; route 38145, 1857; route 38150, 1180; route 38152, 1180; route 38156, 1857; route 40104, 1861-2; route 40113, 1862-3; route 41119, 635-7; route 44140, 1863-4; route 44155, 703-5; route 44160, 1857; route 46132, 1107-9; route 46247, 1860-1.

Representatives of California and Oregon :

Letter of, for 6 trips (46 H), 2165.

Rerdell, M. C. :

Confession; see testimony of James, MacVeagh, and Clayton.

Letters of, to Brady, Thomas J., May 6, 1879, filing his subcontract (21 C), 610; and John M. Peck, May 15, 1879, asking withdrawal of subcontract (22 C), 611; May 7, 1879, filing his subcontract (33 P), 1312; and John W. Dorsey, R., May 15, 1879, withdrawal of subcontract (35 P), 1312; to De Busk, S. W., April 3, 1880, pay (16 K), 1095; October 21, 1880, pay (17 K), 1095; agent to French, J. L., November 27, 1879, provision continuance of service (22 F), 957; to Johnson, Nephi, April 3, 1880, increase of pay, objection, withdrawal of, to present schedule (31 C), 619; May 9, 1880, write Delegate to withdraw objection to schedule (32 C), 619-20; July 10, 1879, to notify him to increase to 7 trips,

Rerdell, M. C.—Continued.

schedule 33 hours (33 C), 620; as agent of J. M. Peck, April 12, 1879, inclosing form of petition (29 C), 618; to Joseph, Anthony, August 7, 1879, statement of fines (96 E), 857-8; August 22, 1879, relet the route to Jaramillo (97 E), 858; December 13, 1879, statement of account (98 E), 858-9; (96, 97, and 98 E excluded as to Brady, Miner, and Vaile, 857-8); to Powers, A. S., February 20, 1880, reduction of service (32 T), 1541; March 23, 1881, draft for remissions (33 T), 1541; April 26, 1881, compensation (34 T), 1541; July 26, 1881, reduction of service (35 T), 1542; January 5, 1882, account for third quarter 1881 (36 T), 1542.

Subcontracts of (24 L), route 38113, 1171; 34 P, route 40104, 1312; 20 C, 41119, 609.

Retroactive orders of French:

November 13, 1878, to allow pay for embracing Raton on route 38140 (5 K), 1067; of Brady, April 24, 1879, to allow pay for embracing Pagosa Springs (11 E), 813; and February 26, 1881, to increase to 7 trips from January 15, 1881 (56 E), 839.

Revenues, certified transcript of:

On route 34140 (14 A), 381-384; route 35015 (1 N), 1181-1185; route 35051, 1317-1347-1348; route 38113 (54 L), 1176-1177; route 38134, 1056-1057; route 38135, 586-587; route 38140, 1105-1107; route 13145, 903-907; route 38150, 1418-1419; route 38156, 993-994; route 40104 (87 P), 1346-1347; route 40113, 1510-1512; route 41119, 642-643; route 44140, 1514-1518; route 44155, 615-700; route 44160, 1399-1400; route 46132, 975-976; route 46247 (28 H), 1016-1019.

Reynolds, A. E.:

Letter of, April 26, 1879, daily service and fast time (11 F), 953.

Rich, W. G.:

Letter of, April 15, 1879, daily mail (214 E), 817, 931.

Rifenburg, W. G.:

May 5, 1879, forged petition (21 K), 1102.

Rive, N. B.:

Letters of, August 12, 1878, increase to 6 trips, schedule 72 hours (16 H), 1033-4; June 21, 1878, letter attached to schedule (23 H), 1007.

Rosita:

Testimony of postmaster at, route 38134, 1044-52.

Ross, Samuel R., mail-carrier, route 44155:

Testimony of, 784-7; as to men and animals, 784-6.

Rosser, Thomas S.:

Letter of, April 21, 1878, distance (3 O), 1201.

Salisbury, M., subcontract of, dated August 20, 1880, signed John W. Dorsey by M. C. Rerdell (43 P), 1315.

Sanderson, J. L.:

Letters of, January 21, 1879, to postmaster at Los Pinos, performance of service (3 M), 1178; April 23, 1881, supply of Durango without increase of pay (36 E), 824; subcontractor, oath of, sworn to September 19, 1878, on route 38150, 1412; subcontracts of June 12, 1880, signed John W. Dorsey by M. C. Rerdell, route 38145 (78 E), 848; on route 38150 (4 R), 1406; on route 38152 (7 M), 1179-80.

Saunders, Alvin, U. S. Senator:

Indorsement on letter (5 A), 371-1, 375; testimony of, on route 34149, 387-96, as to petition, "schedule 13 hours" (3 A), and letters (4 A and 5 A), 387-90; expedition, 391; population of Kearney, 395.

Schedule:

Custom for contractors to fill up blank, 2259; original of each route in the indictment set out, 318-19; recommended by postmasters on route 35051 (49 O), 1218; on route 46247, dated June 13, 1878, (22 H), 1006; circulars on route 38145, April 29, 1879, (12 E), 1813-14; January 23, 1879 (43 E), 826-7; May 26, 1879 (45 E), 834; June 23, 1879 (46 E), 834; no date (47 E), 835; no date, indorsed, allows only 37 hours (48 E), 835; October 17, 1879 (49 E), 836; January 8, 1880 (55 E), 838; on route 38156, January 23, 1879 (5 F), 950; on route 38135, (33 B), 526-7; on route 38140, November 13, 1878 (7 K), 1067; on route 44140, June 26, 1879 (30 T), 1528.

Schutz, Emil, stock-keeper:

Testimony of, route 41155, 750-61; stocked the route, 750; men and animals, 751-5; quantity of mail, 754; carried passengers, 753; Indians, 758-9; petitions (10 and 26 D), 756-7.

Seaman, John D.:

Letter of, to Senator Saunders, April 14, 1879, tri-weekly mail (4 A), 374; the same to E. K. Valentine, April 14, 1879 (6 A), 375.

Sears, George:

Testimony of, route 38135, 546-9, 589-91; distances, 540-6; men and animals, 541-2; schedule time, 541, 548; no mines, 542; petition (13 B), *quicker time*, 543-4, 549; population, Pueblo, 545-6; Rosita mail, 547; carrier could lay over half a day and make schedule, 549; recalled for cross-examination; failure to receive the mail from the D. and R. G. R. R. water-tank, 589-91.

Secretary of the Interior:

Letters of H. M. Teller, November 18, 1880, service from railroad to Animas City (57 E), 839; November 13, 1880, inclosing petitions (61 E), 841; November 22, 1880, service to Animas City (69 E), 845; indorsement of, on petitions (24 I and 26 I), 1051; 27 I, 1052; and 15 B, 519; and 25 E, 820; and 26 E, 821; and 89 E, 851-3, 953; testimony of, for the defense, 2021, 2024.

Shaw, C. G.:

Letter of February 19, 1881, failure of contractor; route cannot be run on schedule time (8 N), 1197-8.

Shaw, C. C.:

Testimony of, route 35015, 1159-60; identifies petition forwarded to C. G. Bennett; department replies that to grant it would do injustice to competing bidders, 1159; length of route 70 miles, advertised as 50 miles, 1160.

Sherman, William T., General:

Testimony of, for defense, 2074-83; recognizes petition (18 L), 2074-5; Indian troubles on route 38113, 2075, 2077; effect of mail in preventing Indian troubles, 2078; 38 O, 2078; recommended tri-weekly mail on Bismarck and Fort Keogh, 2078; circumstances why he did so, 2078; Indian troubles on 35051, 2079; Indian troubles on 40113, 2081-2; multiplication of trips more important than speed, 2083; indorsement on petition (18 L), 1137-8.

Signal:**Sixth Auditor:**

Certifies to the Third Assistant's amounts due contractor, subcontractor, or assignee, 322; certificate of amount due based upon the contract and orders certified by Second Assistant, 327.

Slater, J. H.:

Indorsement on petitions (19 Q), 1357; 24 Q, 1359; on 24 D, 683

Sleman, John B., chief bay division:

Testimony of, detail of business in Sixth Auditor's office, 319-29; produces warrants on route 34149, 472-8; produces warrants, reports, and drafts, 38135, 577-84; produces letter of Vaile to McGrew, excluded, 1787-8; afterwards admitted, 2247-8; for defense, 2197; produces power of attorney of J. M. Peck with John R. Miner, dated January 10, 1878 (13 X), 2197.

Smith, George C., notary public:

Testimony of, route 38113, 1144-8; identifies oath (9 L), the place for men and horses left blank when sworn to, 1144; contents of letter received by Taylor from Rerdell, 1145-8.

Smithson, Nephi:

Letter of, December 16, 1879, informs department that expedition is not needed (11 C), 605.

Snyder, Frank L., mail-carrier:

Testimony of, route 35015, 1166-67; distance to Worthing, 1166; men and animals, 1166-7.

Special offices:

Supply of, not to exceed two-thirds the postmaster's salary, section 3971, Revised Statutes, 1087.

Spencer, George E. :

Called, does not respond, 1351.

Star routes :

Statistics of, 260.

Statistics of railroad, steamboat, and star service :

June 30, 1878, 260-1; the same, June 30, 1879, 299-300.

Statutes cited :

22 Henry VIII, C. 14, relative to peremptory challenges, 22; 32 Henry VIII, C. 3, relative to peremptory challenges, 22; act of 1792, 1st Stat. at Large, Sec. 3 234, productiveness and other circumstances, 190; 1825, 4th Stat. at Large, Sec. 2, 100, one mail to each county-seat, 69, 190; 1835 or 1836, 70; 1845, 5th Stat. at Large, Sec. 22, 739, deficiency in postal revenue, 190-191; 1851, March 3, 9th Stat. at Large, Sec. 7, 590, mail service not to be diminished on account of diminution revenues, 191; 1857, March 3, 11th Stat. at Large, 190, letter-mail to San Francisco, 68; 1865, March 3, 13th Stat. at Large, 500, peremptory challenges, 27; 1866, R. S. of D. C., 14; 1872, June 8, 17th Stat. at Large, 242, peremptory challenges, 27-29, 1877, March 3, Sec. 3, 49, Second Asst. P. M. General to sign contracts, 306; 1878, March 16, Vol. 20, page 30, persons charged with crimes, competent witnesses, 2369; 1878, May 17, subcontract law, 159; 1880, April 7, allowances for expedition not to exceed 50 per cent. of pay, 2796-2798, 3186; Sec. 93, R. S. of D. C., peremptory challenges, 29; Sec. 161 R. S., Postmaster-General to prescribe regulations, 58; Sec. 388 R. S., establishment of P. O. Dept., 58; Sec. 389 R. S., provides for three assistant postmasters-general, 58; Sec. 543 R. S., productiveness and other circumstances, 2072; Sec. 819 R. S., peremptory challenges, 20-21; Sec. 838 R. S., defendant entitled to four peremptory challenges, 7-10, 15, 28-30; Sec. 858 R. S., competency of witnesses, 17-18; Sec. 876 R. S. of D. C., competency of witnesses, 17; Sec. 877 R. S., of D. C., competency of witnesses, 18; Sec. 882 R. S., copies of record as evidence, 1923; Sec. 986 R. S. of D. C., power of notaries public, 2256; Sec. 1296 R. S. of D. C., peremptory challenges, 30; Sec. 1778 R. S. of D. C., power of notaries public, 2256; Sec. 3679 R. S., no contracts to be made in excess of appropriations, 2794, 3185; Sec. 3941 R. S., all general mail lettings to be advertised, 60; Sec. 3944 R. S., opening of proposals, 60; Sec. 3943 R. S., railroad and steamboat service, 61; Sec. 3945 R. S., productiveness and other circumstances, 2801; Sec. 3949 R. S., contracts to be awarded to the lowest bidder, 63; Sec. 3950 R. S., combinations to prevent bidding, 60; Sec. 3951 R. S., failure to enter into contract or perform service, 61; Sec. 3951 R. S., regular contract may be continued for six months beyond the time of its expiration, 64; Sec. 3954 R. S., failure to enter into contract or perform service, 2824-2825; Sec. 3956 R. S., railroad and steamboat service, 61; Sec. 3957 R. S., error or omission to advertise, 60; Sec. 3958 R. S., to change terms of existing contract, 60; Sec. 3960 R. S., compensation for additional service, 64; Sec. 3961 R. S., extra allowance for expedition, 64; Sec. 3962 R. S., fines and deductions, 916; Sec. 3965 R. S., productiveness and other circumstances, 59-60; Sec. 3970 R. S., railroad and steamboat service, 61; Sec. 3974 R. S., relative to discontinuance of service, 3202; Sec. 5438, 3182; Sec. 5440, conspiracy to defraud, 20, 27, 93, 414, 2882.

Statutes, Revised, section 3971 :

Supply of special offices not to exceed two-thirds postmaster's salary, 1087.

Steel, G. A. :

Letter of, failure of contractor (5 Q), 1352.

Steiniger, Fred. :

Letters of, December 2, 1879, filing subcontract (28 F), 958; and W. R. Winters, November 12, 1880, increase of schedule, no connection will be missed (16 F), 954; subcontract of November 25, 1879, guaranteed by S. W. Dorsey, route 38156 (29 F), 958-9.

Stevens, H. S., Delegate :

October 21, 1878, increase of service (15 P), 1305-6; 60 hours schedule (16 P), 1306.

Stone, George F., inspection clerk :

Testimony of, 790-5, 799-802.

Stone, Wilbur F., and Henry C. Thatcher :

Letter of, April 26, 1879, daily mail and reduction of time (4 I), 1022.

Subcontracts:

Act of Congress allows them to be filed, 329; amount due under, paid to subcontractor and charged against the contractor, 321; when filed in contract office, notification sent to Sixth Auditor, 321; when subject to fines and deductions, charged against the contractor, of Ames, E. M., route 38135 (26 B), 525; Carrey, John, route 44160 (32 Q), 1377; Dorsey, S. W., route 38135 (30 B), 526; route 38113 (32 L), 1172; route 38140 (10 K), 1069; route 38151 (24 F), 957; route 40113 (18 S), 1504; Earl, William E., route 38156 (21 F), 956-7; Foote and Dalton, route 38113 (20 L), 1150; French, C. H., route 34149 (16 A), 400; Hanson, Eli, route 38134 (14 I), 1033; Jaramillo, Pedro J., route 38145 (71 E), 846; Jennings, —, route 40104 (88 P), 1843; Johnson, Nephi, route 41119 (24 C), 612; the same (35 C), 613-14; Joseph, Anthony, route 38145 (118 E), 922; Major & Culverhouse, route 46247 (27 H), 1009; McKibben, J. C., route 40104 (39 P), 1314; Perkins, Charles F., route 38113 (1 L), 1116; Rerdell, M. C., route 38113 (24 L), 1171; route 40104 (34 P), 1312; route 41119 (20 C), 609; Salisbury, M., route 40104 (43 P), 1315; Sanderson, J. L., route 38145 (78 E), 848; route 38150 (4 R), 1406; route 38152 (7 M), 1179-80; Steineger, Fred., route 38156 (29 F), 958-9; Taylor, Eugene, route 38113 (15 L), 1135; Vaile, H. M., route 34149 (2 A), 376; route 35015 (16 N), 1199; route 35051 (14 O), 1204; route 40104 (29 P), 1311; route 41119 (16 C), 608; route 44155, 689-90; Watts, J. H., route 38145 (68 E), 844; Wright, J. A., route 38113 (22 L), 1170.

Sweeney, George M., clerk contract office:

Testimony of, identifies files route 38113, 1112-15; route 38134, 966-7; route 38135, 493-5; recalled, 501-3; route 38140, 997-9; route 38145, 803-5; route 38156, 943-7; route 41119, identifies files, 593-9; course of business in contract office, 595-600; route 44155, identifies jacket, 670; custom as to allowing one month's extra pay, 672-3; route 46132, 995-6; route 46247, 995-6.

Swift, Wilbur H., mail-carrier:

Testimony of, route 35051, 1256-9; employed by Vaile, Miner & Co., 1256; men and animals, 1258; time made, 1257.

Taggart, Hugh T., assistant United States attorney:

Testimony of, for the defense as to handwriting of Enoch Totten to letter, 2177.

Taylor, Eugene:

Subcontract of, on route 38113 (15 L), 1135; testimony of, 1133-42; as to temporary contract with postmaster at White River, 1134, 1139-42; identifies subcontract (18 L), 1135; weight of mail, 1135; men and animals, 1136; petitions (17 and 18 L), 1137; Indians, 1138-9.

Taylor, Jacob S.:

Notary public, 470, 472: acknowledged the oath of John M. Peck on routes 34149 (2 A), 44140 (48 A), 40105 (49 A), 44155 (50 A), 44160 (51 A), 46132 (52 A), 46247 (53 A), 470-2.

Taylor, Thomas S., assistant journal clerk:

Testimony of, 256-59; search of journal shows no general order for expedition, 258; manner of signing journal, 257.

Telegram:

Of Brady to Vaile, August 20, 1878, asking what service of Miner, Peck, Dorsey, and Watts he expects to put in operation, 2277-8; January 13, 1881, authorizing daily mail from Chama to Animas City (119 E), 933.

Of Woodward and Woodward, Portland, Oreg, May 12, to Brown and Putnam (37 T), 1597.

Temporary service, contract for, on route 44155, 674.**Thatcher, Henry C., and Wilbur F. Stone:**

Letter, April 26, 1879, daily mail, reduction of time (4 I), 1022.

The Dalles:

Testimony of the postmistress at, route 44155, 773-84, 827-34.

Third Assistant Postmaster-General:

Detail of business in the office of, examiner in the office of, examines extensions of pay, 339; but they have no date upon which to revise an order for expedition, 365.

Tobriner, Zachariah (salesman):

Accepted as a juror, 53.

Totten, Enoch :

Closing address of, to the jury, 2667-2721.

Tracy, George H. :

Letter of, August 24, 1878, temporary service (16 D), 679-80.

Trew, John M. :

Letters of, January 14, 1878, supply of Animas City (1 F), 948-9; April 14, 1880, physical impossibility to make schedule time, route 38145 (52 E), 837; testimony of, route 38145, 924-36; mail of local importance only, 924, 29; identifies papers 47 E and 48 E, 924; 12 E and 49 E, 926; impracticable to make schedule of less than 6 days, 925, 927, 933, 4; schedule circulars, 926-9; roads, 929, 931-2; Chama, 930; necessity for frequent mails, 932; progress of railroad, 935; streams bridged, 935, 6; route 38156, 935-73; route traveled, 965-6; completion of railroad to Durango, 965; mail carried by Animas City, 965-6, 971, 3; identifies letter, 967; and distance circular (1 F), 969.

Tulloch, Thomas L., cashier city post-office :

Testimony of, 469-70; as to lock-boxes 706 and 714, 469-70.

Tulloch, Seymour W., clerk city post-office :

Testimony of, 464-5; as to lock-boxes 706 and 714, 464-5.

Turner, William H. :

One of the defendants, duties of, 269-72; made one order for increase on route 35051 during Brewer's absence; error of, in computing expedition on route 38150, 1415.

Turpin, William B., clerk city post-office :

Testimony of, 465-9; as to lock-boxes 706 and 714, 465-9.

Tuttle, Frank A., mail-carrier, route 38134 :

Testimony of, 1036-42; men and animals, 1036-9; subcontract pay, 1038; length of route, 1038; identifies letters, 1039-40.

Vaile, Harvey M. :

Letters of, to Brady, Thomas J., and John M. Peck, May 5, 1879, withdrawal of subcontract (18 C), 608; and John W. Dorsey, M., May 5, 1879, withdrawal of subcontract (31 P), 1311; McGrew, J. M., relative to the Jennings's case, 2247-8.

Oath, *subcontractor*, sworn to May 14, 1879 (14 N), route 35015, 1199, 1247.

Subcontracts of (8 A), route 34149, 376; (16 N), route 35015, 1199; (14 O), route 35051, 1204; (29 P), route 40104, 1311; (16 C), route 41119, 608; (30 D), route 44155, 689-90.

Testimony of, 2198, 2249; his acquaintance with Miner, with Stephen W. Dorsey, John W. Dorsey, and Monfort C. Rerdell, 2198, 2122-3; denial of ever having given any consideration to Brady, 2199, 2203; his interest in the contracts, 2199, 2200; division of the routes and percentages withdrawn by the several parties, 2200-01; agreement of August 16, 1878, between Vaile, Miner, Peck, and John W. Dorsey, 2201-2; employed L. P. Williamson, 2202; relations with S. W. Dorsey, 2203-4; date service commenced on 34155 and 34160, 2204; ante-dating the contract, 2205, 2207; telegram from Brady as to which of the Miner, Peck, and Dorsey routes witness would see started, 2207-8; his understanding with Brady as to extension of time, 2208-9; why he was not declared a failing contractor, 2209-11; testimony as to route 35051, deduction, 2237-8, 2212-16; route 40104, 2216-19; route 41119, 2219-22; route 44155, 2222-28; route 46247, 2228; route 46132, 2229-32; route 35015, 2232-3; relations with Brady, 2223-4; oath of Peck, route 46132, written by Miner, oath of Vaile, route 35015, written by Miner, 2232; handwriting of petition, marked 10 N, 2235; of 17 N, 18 N, 19 N, 20 N, 21 N, 22 N, 23 N, 2236; of 32 D and 40 D, 2236; of 47 D, 48 D, and 56 D, 2239; of 14 D, 2244; authority of Miner 2236-7; as to whether he filed an oath as subcontractor, 2241; receipt of S. H. Abbott to Vaile, Miner & Co. (15 X), 2245; letter of J. M. McGrew, as to deductions on 40104, 2247-8.

Walsh, John A. :

Argument as to the admission of the testimony of, 1607-97; testimony of, 1602-7, 1699-1787, 1886-91; discounted postal drafts, 1604; was subcontractor and afterwards contractor on route 40101, 1604; conversation with Brady December 28, 1880, 1605, 1699-1702, 1742-45, 1763-4; note of witness and reply of Brady (2 X), 1606, 1739-41; loans to Brady, 1607, 1720-33, 1749-51; notes of Brady, 1700; Brady's admission as to the amount charged for expedition, 1700;

Walsh, John A.—Continued.

for remissions, 1701; Congressional corruption fund, 1700-1701; witness's payments to Hinds, 1702; Peterson and Price drafts, 1702, 1754-6; Price drafts (8 X and 9 X), 1781; Herald and Times interview, 1703-7, 1757; Kellogg drafts and Price note, 1706; residence in New Orleans, 1707-9; indictments, 1710; business in Washington, 1710-11; McDonough contract, 1712, 1757-8; deductions and remissions, 1713-15; witness's contract on route 40101, 1716; deductions and remissions on route 40101, 1718, 1758-9; statement of Gibson, 1719; suit against Brady, 1730-38; copy of declaration in suit of Walsh against Brady, 1751-2; payments to Buell, 1752-4; Buell checks (4 X, 5 X, and 6 X), 1773; transcript of suit against Brady in New York, 1764-6; "Ginger" letter excluded, 1776; letter of Hines to Walsh, with bill of particulars (7 X), 1777-8; corrects his testimony, 1745-8, 1886-92.

Walker, W. R. :

Letters of May 10, 1879, increase of service, indorsed by Whiteaker (12 T), 1521; May 10, 1879, to S. W. Dorsey, increase of service (13 T), 1521.

Walters, J. W. :

Letter of May 8, 1880, useless and expensive route (15 I), 1034; testimony of, on route 38134, 1057-65; weight of mail, 1058; through mail, Pueblo to Rosita, went by other route, 1059; no mail for three weeks, 1060; removal of site post-office, 1059-61; identifies petition (23 I), 1063.

Walton, Joshua A. :

Letters of, May 3, 1879, to S. W. Dorsey, a daily mail (16 T), 1522; from Woodward and Woodward, Portland, Oreg., May 12, to Brown and Putnam (37 T), 1597.

War, Secretary of:

Copy of letter of, December 12, 1878, inclosing letter of General Miles (27 O), 1213; original of letter (38 O), 1214.

Warrants :

On route 34149, 476-7; on route 35015, 1859; route 35051, 1299-1300; route 38113, 1173-5; route 38134 —; route 38135, 577-82; route 38140, 1109-11; route 38145, 1858-9; route 38150, 1180; route 38156, 1857, 1859; route 40104, 1862-3; route 40113, 1862; route 41119, 635-7; route 44140, 1863-4; route 44155, 702-4; route 44160, 1857; route 46132, 1107-9; route 46247, 1860-1; Post-Office Department, signed by the Third Assistant Postmaster-General, 333-4; issued by the Third Assistant upon report of the Sixth Auditor, 343; sometimes mailed to payee, 335; sometimes receipted for in the office, 336.

Watts, J. H. :

Subcontract of, route 38145 (68 E), 844.

Webster, Ed. :

Letter of, April 18, 1879, increase of service (19 E), 816-7.

Wheeler, Henry W., clerk pay division :

Produces reports, drafts, and warrants route 35051, 1298-1301; route 38140, 1101-9; route 38145, 900-1; route 40104, 1355; route 41119, 635-9; route 44155, 702-6.

Whiteaker, John, M. C. :

Indorsement of, on petitions (19 Q), 1357; (24 Q), 1359.

Wigginton, P. D. :

Indorsement of, on petitions (53 and 54 H), 2251.

Wilcox, Frank R. :

Testimony of, correspondence with S. W. Dorsey, 1545-61.

Wilcox, T. M. :

Testimony of, on route 44140, 1561-83, 1597-8; identifies papers, 1561-6.

Williams, A. B. :

Closing address of, to the jury, 2648-2667.

Williams, J. W. T., clerk Post-Office Department :

Testimony of, for defense, 2116-17; date S. H. Abbott ceased to be postmaster at Alvord, Oreg., 2117.

Williamson, L. P. :

Employed by H. M. Vaile as agent, 2202.

Wilson, Amos M., journal clerk :

Testimony of, detail of business in journal room, 262-8, 330-2.

Wilson, Elizabeth M. :

Letters of, July 26, 1878, temporary service (2 D), 675; July 1, 1878, Indians render service of utmost importance, indorsed, "Impossible to have service on account of Indian depredations" (44 E), 831-2; testimony of, on route 44155, 773-84, 827-34; through mails were not sent or received by this route, 773; mail bills, 773; failures to make schedule time, 773-4; contracts for temporary service, 773-4, 780-3, 827-8; Indiana, 829-30.

Wilson, Jeremiah M.:

Closing address of, to the jury, 2874-2951.

Winters, W. R., and Fred. Steineger :

Letter of, November 12, 1880, increase of schedule, no connection will be missed (16 F), 954.

Withers, H. C., subcontractor :

Testimony of, on route 38135, 573-5; men and animals, 573-5; pay, 573.

Woodward, P. Henry, post-office inspector :

Testimony of, as to custody of papers, route 34149, 347-53; route 38135, 495-501; route 38145, 808; route 40113, 1499; route 41119, 600; route 44155, 672-3; route 44160, 1350; as to lost letter-books of the Second Assistant Postmaster-General, 2158.

Woodward and Woodward, Portland, Oreg., telegram of, to Brown and Putnam (37 T), 1597.

Wright, C. B., letter of July 15, 1878, 3 trips and schedule 65 hours (24 O), 1207, 8; similar letter, same date, addressed to Postmaster-General (25 O), 1208.

Wright, John A. and J. W. Dorsey, M., letter of, withdrawal of subcontract (26 L), 1171; subcontract of, on route 38113 (22 L), 1170.

WITNESSES.

Adams, Joseph B., post-trader, Meeker, Colo. (route 38113), 1142-4, 1149.
Adamson, George, page, 2167-8.
Bergman, Jacob, mail-carrier, Oak Grove, Cal. (route 46132), 986-92.
Berry, C. P., M. C., 2194-6.
Bishop, William J., mail-carrier, Benson's Landing, Mont. (route 35051), 1259-63.
Blackburn, Joseph S. C., M. C., 2191-3.
Blois, James F. H., clerk finance division Post-Office Department, receipts for warrants, 503-5; handwriting, 1465-71, 1475-99, 1844-53.
Boone, Albert E., mail-contractor, general testimony, 1422, 1440-63.
Borden, James M., draughtsman, maps, 559-62, 610-11, 749-50.
Bradshaw, Aaron, testimony of, for defense, 2161-2.
Brewer, George J., corresponding clerk contract office, 300-6, 344-7, 362-3, 463-4, 1192-4, 1196, 1218-21, 1414-17.
Brown, James F., subcontractor, Fort McDermitt, Nev. (route 44160), 1362-76.
Brown, Charles S., Denver, Colo. (route 44140), 1587-91.
Buell, A. C., editor Daily Critic, 1217-55.
Burgner, William C., mail-carrier, Trinidad (route 38140), 1074-85.
Burns, Wilbur A., mail-carrier, Wicks, Mont. (route 35051), 1251-4.
Calleghan, John T., inspection clerk Post-Office Department, 562-73, 907-12, 921-4, 977, 1330-31.
Carrey, John, subcontractor, Grant County, Oreg. (route 44160), 1377-84.
Carson, Albert, mail-carrier, Rockwood, Colo. (route 38156), 962-4.
Clayton, Powell, ex-Senator, Rerdell confession, 1839-42.
Clendenning, James H., postmaster Fort Smith, general testimony, 1463-4.
Cole, John W., station keeper, Miles City, Mont. (route 35051), 1254-6.
Coon, Byron C., corresponding clerk, contract office, 652-69, 1297-8, 1348-50, 1404-5, 1505-7, 1843.
Cornell, Clarence W., mail-carrier, Durango, Colo., (route 38156), 938-43.
Cowne, William, mail-carrier, Camp Watson, Oregon, (route 44155), 761-65.
De Busk, S. W., postmaster, Raton, Colo. (route 38140), 1085-1101, 1156-8.
Falconer, John H., statistician Post-Office Department, 259-62, 299-300.
Farish, William B., mail-carrier, Pueblo, Colo. (route 38135), 530-40.
Fisk, John M., mail-carrier, Canyon City, Oreg. (route 44155), 709-30, 788-790.
Foote, John F., subcontractor, Rawlins, Wyo. (route 38113), 1149-53.
French, Charles H., subcontractor, Loup City, Nebr. (route 34149), 396-446, 478-480.
French, John L., ex-chief clerk contract office, 2041-50, 2084-2112.
Gooch, James A., postmaster Rosita, Colo. (route 38134), 1044-49.
Grimes, Ralph, postmaster Kearney, Nebr. (route 34149), 480-89.
Hall, Edwin, postmaster, Canyon City, Oreg. (route 44155) 769-72, 795-99.
Higgason, William, mail-carrier, Greenhorn, Colo. (route 38135), 576-7.
Hull, Alvah A., mail-carrier, Pueblo, Colo. (route 38134), 1042-4.
James, Thomas L., ex-Postmaster-General, 1821-1839.
Jaramillo, Pedro J., subcontractor, El Rito, N. Mex. (route 38145), 887-900.
Johnson, Nephi, subcontractor, Johnson, Utah (route 41119), 612-34, 645; (route 44160), 691-92.
Johnson, W. D., Kanab, Utah (route 41119), 645-52; (route 44160), 692-5.
Joseph, Anthony, subcontractor, Ojo Caliente, N. Mex. (route 38145), 851-87, 938.
Joyce, James F., clerk, National Hotel, 2256-2300.
Ketchum, Alvah, superintendent mail route (route 35051), 1263-91.
Key, David M., ex-Postmaster-General, 2058-74.
Keyser, Benjamin U., receiver German-American Bank, 1903-11, 1915-6, 1882.
King, Matthew, mail-carrier, Benson's Landing, Mont. (route 35051), 1291-2.
Kirby, Thomas B., clerk railway-mail service, 253-6.
Kridler, W. M., postmaster, Mineral Park, Ariz. (route 40104), 1319-34, 1342-4.
Lambert, Howard T., mail-carrier, Stillwater, Mont. (route 35051), 1247-51.
Lawrenson, James, notary public, Post-Office Department, 308-9.
Leech, William A., subcontractor, Kidder, Dak. (route 35015), 1160-5.
Lyman, Henry D., chief clerk, contract office, 2056-8.
MacVeagh, Wayne, ex-Attorney-General, 279; recalled, 1795, 1807-1821.
MacBean, Frank, mail-carrier, Canyon City (route 44160), 1384-97.

- McCormick, James, postmaster, Redding, Cal. (route 46247), 1012-15.
 McDonald, A. J., postmaster, Los Pinos (route 38152), 1167-70.
 McGrew, J. M., late Sixth Auditor, 2185.
 McLellan, Coll., ranch-keeper, Glendale, Mont. (route 35051), 1241-6.
 Maginnis, Martin, Delegate, 2112-7.
 Major, John N., subcontractor, Redding, Cal. (route 46247), 1010-12.
 Mark, Cyrus E., clerk in post-office, Pueblo, Colo. (route 38135), 1598, 1602.
 Masterton, Joseph E., mail-carrier, Canyon City, Oreg. (route 44155), 730-49.
 Maxey, Samuel Bell, United States Senator, 2051.
 Mitchell, John H., ex-United States Senator, 2002-18.
 Morgan, Charles W., journal clerk, Post-Office Department, 333, 363.
 Nelson, Henry L., correspondent, 2278, 2280.
 Nicholson, Walter L., topographer, Post-Office Department, 505-11.
 Nightingale, Thomas S., attorney, Loup City, Nebr. (route 34149), 446-63.
 Norton, Hanibal D., principal clerk, finance division Post-Office Department, 333-43, 363-5.
 Olcott, John H., corresponding clerk, contract office, 1294-7, 2277-8.
 Page, Horace F., member of Congress, 2163-7.
 Pennell, Joseph, ranch-builder, Billings, Mont. (route 35051), 1222-41.
 Perkins, Charles F., subcontractor, Dixon, Wyo. (route 38113), 1111, 1116-33, 1153-6.
 Peterson, D. H., 2024-5, 2039-41.
 Pierce, Clark S., mail-carrier, Canyon City, Oreg. (route 44155), 765-9.
 Piper, Jahzeel S., postmaster Agate, Pueblo, Colo. (route 38135), 550-7.
 Powers, A. S., subcontractor, McKenzie Bridge, Oreg. (route 44140), 1528-45.
 Pryor, John H., clerk contract office, 2174-7, 2279-80.
 Putnam, Thomas G., attorney, Denver, Colo., 1583-7, 1591-7.
 Reeve, James H., clerk Post-Office Department, 2293-4.
 Reighley, Henry W., bookkeeper of Hatch and Foote, New Jersey, 1992-3, 1891-1903, 1913-15.
 Ross, Samuel R., mail-carrier, Baker City, Oreg. (route 44155), 784-7.
 Saunders, Alvin, United States Senator (route 34149), 387-96.
 Schutz, Emil, stock-keeper, Camp Watson, Oreg. (route 44155), 750-61.
 Sears, George, postmaster Greenhorn, Colo. (route 38135), 540-50, 588-93.
 Shaw, C. C., postmaster Vermillion, Dak. (route 35015), 1159-60.
 Sherman, William T., General, 2074-83.
 Sleman, John B., chief pay division Sixth Auditor's office, 319-29, 472-8, 577-583; Vaile's letter to Sixth Auditor, 1787-1788.
 Smith, George C., notary public, Rawlins, Wyo. (route 38113), 1144-8.
 Snyder, Frank L., mail-carrier, Vermillion, Dak. (route 35015), 1166-7.
 Stone, George F., inspection clerk, contract office (route 44155), 790-5.
 Sweeney, George M., corresponding clerk, contract office, 268-78, 593-600, 669-72, 803-8, 943-8, 996-99, 1112-15.
 Swift, Wilbur H., ranch-keeper, Miles City, Mont. (route 35051), 1256-9.
 Taggart, Hugh T., assistant United States attorney, 2177.
 Taylor, Eugene, subcontractor, White River Colo. (route 38113), 1133-42.
 Taylor, Jacob S., notary public, Santa Fé, N. Mex. (oaths of J. M. Peck), 470-2.
 Taylor, Thomas S., assistant journal clerk Post-Office Department, 256-9.
 Teller, H. M., Secretary of the Interior, 2021-4.
 Trew, John M., postmaster Animas City, Colo. (route 38145), 924-36; (route 38156), 965-73.
 Tulloch, Seymour W., clerk city post-office (box 706 and 714), 464-63.
 Tulloch, Thomas L. (box 706 and 714), 469-70.
 Turpin, William B., clerk city post-office (box 706 and 714), 465-70.
 Tuttle, Frank A., mail-carrier, Rosita, Colo. (route 38134), 1036-42.
 Vaile, Harvey M., Valentine, Edward K., Member of Congress, 2018-21.
 Walsh, John A., banker (Brady's admissions), 1602-7, 1699-1787, 1886-91.
 Walters, J. W., postmaster, Greenwood, Colo. (route 38134), 1057-1064.
 Wheeler, Henry W., clerk pay division, Sixth Auditor's office, 634-9, 702-8, 900, 1100, 1298-1301, 1376-7; reports, drafts, and warrants, 1109, 1111, 1355.
 Wilcox, Frank R., Portland, Oreg. (route 44140) 1545-61.
 Wilcox, T. M., Portland, Oreg. (route 44140), 1561-83, 1592-80.
 Williams, J. W. T., corresponding clerk, 2116-17.
 Wilson, Amos M., journal clerk, Post-Office Department, 262-68.
 Wilson, Elizabeth M., postmistress, The Dalles, Oreg. (route 44155) 773-84, 827-34.
 Withers, H. C., subcontractor, Pueblo, Colo. (route 38135) 573-75.
 Woodward, P. Henry, post-office inspector, custody of papers, 347-53, 495-501, 600, 672-3, 808, 1301-2, 1350, 1499; lost letter-book, 2158.

INDEX BY ROUTES.

Papers marked A pertain to route 34149, Kearney to Kent, Nebr.
 B pertain to route 38135, Saint Charles to Greenhorn, Colo.
 C pertain to route 41119, Toquerville to Adairville, Utah.
 D pertain to route 44155, The Dalles to Baker City, Oreg.
 E pertain to route 38145, Garland to Parrott City, Colo.
 F pertain to route 38156, Silverton to Parrott City, Colo.
 G pertain to route 46132, Julian to Colton, Cal.
 H pertain to route 46247, Redding to Alturas, Cal.
 I pertain to route 38134, Pueblo to Rosita, Colo.
 K pertain to route 38140, Trinidad to Madison, Colo.
 L pertain to route 38113, White River to Rawlins, Colo.
 M pertain to route 38152, Ouray to Los Pinos, Colo.
 N pertain to route 35015, Vermillion to Sioux Falls, Dak.
 O pertain to route 35051, Bismarck to Tongue River, Dak.
 P pertain to route 40104, Mineral Park to Pioche, Ariz.
 Q pertain to route 44160, Canyon City to Camp McDermott, Oreg.
 R pertain to route 38150, Saguache to Lake City, Colo.
 S pertain to route 40113, Tres Alamos to Clifton, Ariz.
 T pertain to route 44140, Eugene City to Bridge Creek, Oreg.
 X pertain to general testimony.

ROUTE 34149, KEARNEY TO KENT, NEBR.

	Page.
Argument in support of the admission of letters (18 A to 41 A).....	411-16
Contract of John M. Peck with the United States (84 A).....	1853-4
Distance circular (71 A).....	465

Exceptions :

To letters of John W. Dorsey & Co., John R. Miner, and John M. Peck (18 A to 41 A), 410-11; to letter of C. H. French (42 A), 452; to oath of John M. Peck (2 A), 373; to order of French, July 10, 1879, 357-61; to petition "*schedule 13 hours*," 366-9; to revenues (14 A), 380; to sub-contract of Vaile (8 A), 380; of French (16 A), 397-9; to question as to men and animals, 404-6; as to pay for expedition, 402; as to increase of horses, 406; as to whether defendants inquired the men and animals necessary, 409; ruling of court excluding question as to time it would take with an ordinary team to go to Cedarville, 460.

Letters of:

Dorsey & Co., John W.; printed circular inviting bids (17 A), 416; to C. H. French, April 25, 1878, bid is too high (18 A), 416; May 5, 1878, making proposition (28 A), 417; May 24, 1878, inclosing sub-contract (19 A), 417; May 31, 1878, meet him at Kearney (21 A), 417; September 25, 1878, inclosing schedule (22 A), 418.

French, C. H., to John M. Peck, January 23, 1879, returning schedule (42 A), 437-8; same date, supply of Cedarville (45 A), 460; to Vale, Miner & Co., April 18, 1881, relative to Douglas Grove (44 A), 437; to John R. Miner, December 29, 1879, inclosing affidavit (46 A), 461; excluded, 461.

Hale & Nightingale, April 26, 1879, additional service, indorsed by Senator Saunders (5 A).....

Miner, John R., agent, to C. H. French, January 5, 1880, supply of Cedarville (26 A), 419; October 19, 1878, return schedule (27 A), 419; August 1, 1879, inclosing draft (31 A), 420; the same, November 1, 1879 (32 A), 420; January 31, 1881 (33 A), 420; May 1, 1881 (34 A), 420; July 31, 1881 (35 A), 420; —, 1880 (36 A), 420; February 1, 1881 (37 A), 420; May —, 1881 (38 A), 420; August —, 1881 (39 A), 420, and November, 1881 (40 A), 420.

Letters—Continued.

Peck, John M., to Brady, February 2, 1879, proposition to carry the mail on expedited schedule (83 A), 1844; to C. H. French, October 21, 187-, collection orders (23 A), 418; January 28, 1879, little probability of increase, supply of Cedarville (24 A), 418; April 25, 1879, supply of Douglas Grove (25 A), 418; November 6, 1878, statement of account and draft (28 A), 419; February 1, 1879, inclosing draft (30 A), 419; October 22, 1878, side supply (43 A), 444; March 4, 1878, address care lock-box 714 (47 A), 464.	
Seaman, John D., to Senator Saunders, April 14, 1879, tri-weekly mail (4 A), 374; the same to E. K. Valentine, April 14, 1879 (6 A), 375.	
Oath of John M. Peck, contractor, sworn to February 1, 1879 (2 A)	374, 1844
Order of French, July 10, 1879, for increase and expedition upon jacket, indorsed, "Do this—Brady" (1 A)	366
French, March 8, 1879, recognizing subcontract of H. M. Vaile (7 A)...	376
Payments, tabulated statement of (15 A).....	325-6
Petitions for increase to 3 trips, "schedule 13 hours," indorsed by A. Saunders (3 A)	370-1
Receipts for warrants	505
Revenues, certified transcript of (14 A)	381-4
Subcontract of H. M. Vaile, dated April 1, 1878 (8 A)	376
of C. H. French, June 5, 1878 (16 A)	400
Warrants, reports, and drafts	476-7
Witnesses:	
Blois, J. F. H., produces receipts for warrants	503-4
Handwriting, letter of John M. Peck (83 A), 1845-6; oath of J. M. Peck (2 A), 1480, 1496.	
Brewer, George J., identifies files, 345-7, 463-4; and jacket indorsed "Do this—Brady," 362-3.	
French, C. H., subcontractor	396-446
Subcontract, 397, 400-1; pay, 400-1; schedule time, 401-2; distances, 402, 421, 425, 428, 431; received no pay for expedition, 402; men and animals, 404-6, 408-9, 424, 427, 431-6, 441-2; petition, "schedule 13 hours" (3 A), 406-7, 437-40; fines, 407; Vaile's subcontract (8 A), 408-10; circular advertisement, 410; increased his horses only on account of increased trips, 406; defendants never inquired of him number of men and animals necessary, 408; identifies letters (18 A to 41 A), 410-11 (42 A), 438; passengers and express, 425-7, 440; quantity of mail, 432, 445-6; supply of Cedarville, 423-5, 427-31, 443, 445; Fitzalon, 431; recalled, question as to what was meant by travel of 60 miles in letter (45 A) excluded, 478.	
Grimes, Ralph, postmaster, Kearney	480-489
Distances, 480-1, 484-6; supply of Cedarville, 480-3; schedule time, 481; expedition, 482; distance circular (71 A), 485; report of failure, 487-8.	
Nicholson, Walter L., preparation of maps	505-7
Nightingale, Thomas S., attorney for French, petition, "sch dule 13 hours" (A), 446-7, 452; letter (42 A), 452; letters (44 A), 457 (45 A), 460; letter (46 A) excluded; letter (5 A), 463.	
Saunders, Alvin, United States Senator, 387-96. Petition, "schedule 13 hours" (3 A), and letters (4 A and 5 A), 387-90; expedition, 391; population of Kearney, 395.	
Sleman, John B., produces warrants	472-478
Taylor, Jacob S, notary public, acknowledged oath of J. M. Peck	470-472
Woodward, P. Henry, custody of papers	347-53

ROUTE 35015, VERMILLION TO SIOUX FALLS, DAK.

Contract of John W. Dorsey with the United States (17 N).....	1199, 1200
Distance circular of September 16, 1878 (5 N)	1196-7
Drafts drawn by J. W. Dorsey in favor of H. M. Vaile <i>et al</i>	1859-60
Letter of Boynton, A., January 1, 1878, error in distance in advertisement (2 N)	1196
Shaw, C. G., February 19, 1881, failure of contractor; route cannot be run on schedule time (8 N)	1197-8
Memorandum of Brewer that he had notified Brady that Vaile's oath instead of contractor's was filed (13 N).....	1199
Oath of H. M. Vaile, subcontractor, sworn to May 14, 1879 (14 N).....	1199, 1247
Order of Brady, May 2, 1878, embrace Brighton (3 N), 1196; to change address to lock-box 714 (4 N), 1196; March 31, 1879, subcontract of H. M. Vaile (15 N), 1199; of French, July 10, 1879, for increase and expedition upon jacket indorsed, "Do this.—Brady" (9 N), 1198.	

	Page.
Payments, tabulated statement of.....	1186-7
Petitions of postmasters for extension of schedule, indorsed, "Brewer, write Judge B. that cannot be done.—Brady" (7 N), 1197-1200; for daily service and schedule of 10 hours (10 N), 1198; similar petition, indorsed and recommended by G. G. Bennett (11 N), 1198; similar petition, inclosed in the last (12 N), 1199.	
Receipts for warrants, signed H. M. Vaile, by John R. Miner.....	1876
Reports, auditor's	1857, 1859
Revenues, certified transcript of (1 N).....	1181-5
Subcontract of H. M. Vaile, signed, John W. Dorsey by John R. Miner (16 N)	1199
Warrants in favor of H. M. Vaile.....	1859
Witnesses:	
Blois, J. F. H., handwriting of petition (10 N), and oath of H. M. Vaile, 14 M (N?), 1479.	
Brewer, George J., 1192-1194; identifies files, 1192-3; custom as to embracing special offices on routes, 1194.	
Leech, William A., subcontractor, 1160-5; Brighton and Kidder post-offices, 1161; men and animals, 1162-5; population, 1162; Worthing, 1165.	
Shaw, C. C., postmaster, Vermillion, 1159-60; identifies petition forwarded to C. G. Bennett; department replies that to grant it would do injustice to competing bidders, 1159; length of route 70 miles, advertised as 50 miles, 1160.	
Snyder, Frank L., mail-carrier.....	1166-1167
Distance to Worthing, 1166; time made, 1166; men and animals, 1166-7.	
Vaile, H. M., one of the defendants, 2232-2236; as to oath filed, 2232; swore to the oath theoretically, 2233; did not know the number of men and animals used, 2233; Miner filed his subcontracts, 2234; handwriting of papers, marked 10 N, 2235; 17 N, 18 N, 19 N, 20 N, 21 N, and 22 N, 2236.	

ROUTE 35051, BISMARCK TO TONGUE RIVER, DAK.

Affidavit of A. E. Boone, June 25, 1878, for discontinuance of route (5 O)	1202
Argument and right of counsel to submit affidavit to witness to refresh his memory.....	1278-82
Contract of John R. Miner with the United States (1 O).....	1201
Drafts drawn by John R. Miner in favor of H. M. Vaile et al., witnessed by Rerdell	1299, 1300
Exceptions to witness stating conversation of J. W. Dorsey, 1224; to reason for building ranches, 1224; to cost of ranches, 1225; to conversation of Rerdell, 1223; to estimate of men and animals, 1225; to ruling of court excluding question as to dispute of witness with the agent of one of the defendants; to ruling allowing affidavit to be shown witness to refresh his memory, 1282; to refusal to allow counsel for the defense to see affidavit before examination of witness, 1282.	
Jacket inclosing petitions (22 O)	1207
1879—indorsed with brief of letters (40 O)	1214
Letter of G. G. Bennett, June 18, 1879, daily service (41 O).....	1214-15
Frederick Billings, July 1, 1879, daily mail (47 O).....	1217
Boone, A. E., June 25, 1878, discontinuance of route (4 O).....	1201
Bingham, Henry H., June 11, 1879, increase of service (42 O).....	1215
Charles, John H., June 30, 1878, 3 trips and faster time, indorsed by J. P. Kidder (23 O).....	1207
Corey, E. N., July 20, 1878, 3 trips, 65 hours schedule (29 O).....	1209
Contract office and reply of postmaster, service commenced July 7, 1878 (9 O).....	1203
Dorsey, S. W., United States Senate Chamber, April 20, 1878, to General Rosser, asking distance (2 O).....	1201
Flannery, George P., July 20, 1878, increase of trips and 65 hours time (28 O).....	1209
Kidder, J. P., May 1, 1879, daily service, indorsed by M. Maginnis (46 O).....	1210-17
Lounsberry, C. A., telegram. January 5, 1880, failure of service (12 O), 1204; letter July 19, 1878, 65 hours schedule (30 O), 1210; October 18, 1878, asking that mail for Tongue River be sent by Bismarck (34 O), 1211.	
Maginnis, Martin, July 3, 1878, tri-weekly service, schedule of 65 hours (27 O).....	1209
Miles, Col. Nelson A., July 28, 1878, increase of service (35 O), 1211; December 4, 1878, tri-weekly or daily mail (36 O), 1212.	

	Page
Letter of Miner, John R. B., no date, discontinuance of route (6 O), 1202; October 4, 1878, proposition for a schedule of 65 hours (8 O), 1203; and H. M. Vaile, January 29, 1879, withdrawal of subcontract (16 O), 1205; February 3, 1879, refiling subcontract (8 O), 1205.	
Rosser, Thomas S., April 21, 1878, distance (3 O).....	1201
Raymond, J. W., July 18, 1878; increase to 3 trips; indorsed by J. P. Kidder (26 O).....	1203-9
Secretary of War; copy of December 12, 1878, inclosing letter of General Miles (27 O), 1213; original of letter (38 O), 1214.	
Wright, C. B., July 15, 1878; 3 trips and schedule 65 hours (24 O), 1207-8; similar letter, same date, addressed to Postmaster-General (25 O), 1208.	
Map, sketch (21 O).....	1207
Oath of John R. Miner, sworn to October 4, 1878 (7 O).....	1202-3
Order of Brady to change schedule (10 O), 1203 and 1233; October 1, 1878, subcontract of H. M. Vaile (13 O), 1204; January 20, 1879, withdrawal of subcontract (15 O), 1204, February 3, 1879, rescinding order of January 29, 1879 (17 O), 1205; December 23, 1878, for increase and expedition (19 O), 1206, 13; September 30, 1879, to change schedule (48 O), 1217, 18; French, August 2, 1879, increase 3 trips (39 O), 1214.	
Payments, tabulated statement of	1292-3
Petition for increase to 3 trips, and schedule of 65 hours (20 O), 1206; similar petition from Miles City (31 and 33 O), 1210-11; from Bismarck (32 O), 1210; from Saint Paul, for daily mail, and 65 hours (43 O), 1215; similar petition from Minneapolis (44 O), 1216; for daily mail, indorsed by Nelson A. Miles (45 O), 1216.	
Receipts for warrants signed by H. M. Vaile M., and John R. Miner (50 to 53 O).....	1294
Reports, Auditor's (54 to 68 O).....	1299-1301
Revenues, certified transcript of, 1317; read on 1347-8.	
Schedule recommended by postmasters (49 O).....	1218
Subcontract of H. M. Vaile, dated July 1, 1878 (14 O).....	1204
Warrants (54 O to 66 O).....	1299, 1300
Witnesses:	
Bishop, William J., mail-carrier, 1259-62; employed by Miner, Vaile & Co., 1261; men and animals, 1259-62.	
Brewer, George J., 1194-1196, 1218-1221; identifies files, 1194-6; custom of the office as to taking the oath of the subcontractor, 1218-21; oath that it would require 37 men and 73 horses to perform expedition lost, 1219; identifies calculation based on lost oath, 1220; order for expedition was based on oath for 150 men and 150 horses, 1220.	
Burus, Wilbur A., mail-carrier, 1251-1254; men and animals, 1251-3; time made, 1252-3; weight of mail, 1254.	
Cole, John W., mail-carrier, 1254-1256; men and animals, 1254-5; distances, 1254-5; carriers did not always connect, 1256.	
King, Mathew, mail-carrier; employed by John W. Dorsey, 1291; men and animals, 1291.	
Ketchum, Alvah, mail-carrier and superintendent, 1263-1291; employed by Vaile, Miner & Co., 1263; time made, 1263, 1266, 1283; men and animals, 1265-72, 1284-6, 1289; ranches, 1265, 1272; Indians, 1269-70; epizootic, 1272, 1284; distances, 1274-6; method of performing service, 1275-7; passengers and express, 1277, 1286; corrects his answer on page 1268, 1284; affidavit made before post-office inspector, 1287-9.	
Lambert, Howard T., mail-carrier, 1247-1251; time made, 1247; quantity of mail, 1247; men and animals, 1248-9, 1251.	
McLellan, Coll., 1241-1247; distances, 1241; men and animals, 1242-6.	
Pennell, Joseph, 1222-1241; employed by John W. Dorsey to help buy stock, build ranches, and locate road, 1222; ranches, 1222-3; men and animals, 1122, 1224, 1232; Dorsey drew on Peck for expenses, 1223; Rerdell petition from suppositions settlement, 1223, 1240-1; petition for increase, 1224; built ranches, expecting an increase, 1224; cost of ranches, 1225; Rerdell's estimate of men and animals, 1226; conversation with J. W. Dorsey, 1226, 1233, 1236-8; not a soul or settlement on route, 1239; Indians, 1230-1, 1239; topography of country, 1229-30; distances, 1232, 1235, 1240-1; desirability of frequent mails, 1228.	
Swift, Wilbur H., mail-carrier, 1256-1259; employed by Vaile, Miner & Co., 1256; men and animals, 1258; time made, 1257.	
Vaile, H. M., one of the defendants, 2212-2216, 2237-2238; as to his subcontract, 2212; this route was a perfect sea, 2212; increase service was	

Witnesses—Continued.

a fearful oppression, 2212; did not know that he could give up his contract, 2213-14; fines and deductions, 2237-8.
 Wheeler, Henry W.; reports, drafts, and warrants1298-1301

ROUTE 38113, WHITE RIVER TO RAWLINS, COLO.

Contract of John W. Dorsey with the United States, witnessed by John R. Miner (55 L.).....	1200
Drafts drawn by John W. Dorsey in favor of H. M. Vaile, S. W. Dorsey, et al., witnessed by M. C. Rerdell.....	1173-5
Exception to the admission of the subcontract of John A. Wright (22 L).....	1171
To ruling excluding question as to price of hay,.....	2232
Expedition, calculation for (8 L).....	1120
Letters of county officers of Carbon, January 20, 1879, increase of service, indorsed, petition for increase and expedition of service (7 L).....	1119, 20
Dorsey, J. W., by M. C. Rerdell to C. F. Perkins, March 7, 1879, inclosing form of petition (10 L), 1122; April 14, 1879, proposition for expedited schedule (11 L), 1122; April 26, 1879, relative to sworn statement (12 L), 1122; April 15, 1879, to C. F. Perkins, address care M. C. Rerdell, box 706 (14 L), 1127; and M. C. Rerdell, February 6, 1879, withdrawal of subcontract (28 L), 1172; May 5, 1879, address care M. C. Rerdell, box 706 (30 L), 1172; and S. W. Dorsey, October 19, 1880, withdrawal of subcontract (34 L), 1173.	
Post, W. H., received January 22, 1879; winter schedule, 6 days; summer, 5 days (35 L).....	1173
Wright, John A., and J. W. Dorsey, M., December 3, 1878, withdrawal of subcontract (26 L).....	1171
Payments, tabulated statement of.....	1188-9
Oath of Charles F. Perkins, subcontractor, sworn to March 26, 1879 (9 L).....	1121
J. W. Dorsey, sworn to April 26, 1879 (13 L).....	1122
Orders of Brady, February 7, 1879, subcontract of C. F. Perkins (2 L), 1117; October 20, 1880, subcontract of Eugene Taylor (16 L), 1135; March 8, 1881, to increase to 7 trips (19 L), 1138; October 1, 1878 (21 L), 1170; December 21, 1878, subcontract M. C. Rerdell (23 L), 1171; January 22, 1879, stop all payments to subcontractor (25 L), 1171; February 7, 1879, stop all payments to subcontractor (27 L), 1171; May 9, 1879, change address to care M. C. Rerdell, box 706 (29 L), 1172; October 20, 1880, stop all payments to subcontractor (33 L), 1172-3; May 1, 1879, increase 2 trips and expedite to 45 hours (6 L), 1119; June 18, 1878, to change address to lock-box 714 (56 L), 1844.	
French, November 11, 1879, subcontract S. W. Dorsey (31 L).....	1172
Payments, tabulated statements, on this route to H. M. Vaile, S. W. Dorsey, et al.....	1188-9
Petition from Dixon, January, 1879, 3 trips and 84 hour schedule (3 L), 1118; similar from Rawlins, January, 1879, for 3 trips and 84 hours, indorsed by J. B. Chaffee and W. W. Corlett (4 L), 1118; for 3 trips and 84 hours (5 L), 1119; for 7 trips and 36 hours (17 L), 1137; for 7 trips and 36 hours, approved and recommended by W. T. Sherman, General (18 L), 1137-8.	
Reports, auditor's	1173-5
Revenues, certified transcript of (54 L).....	1176-7
Subcontracts of Foote and Dalton, dated December 27, 1879, signed John W. Dorsey, by M. C. Rerdell (20 L).....	1150
Perkins, Charles F., dated January 16, 1879, signed John W. Dorsey, by M. C. Rerdell (1 L)	1116
Dorsey, S. W., dated April 1, 1879, signed John W. Dorsey (32 L)	1172
Rerdell, M. C., dated December 26, 1878, signed John W. Dorsey, by John R. Miner (24 L).....	1171
Taylor, Eugene, dated October 15, 1880, signed John W. Dorsey, by M. C. Rerdell (15 L)	1135
Wright, J. A., dated May 1, 1878, headed Miner, Peck & Co. (22 L) ...	1170
Warrants	1173-5
Witnesses:	
Blois, J. F. H., handwriting of, papers marked 34 L, 30 L, 28 L, 14 L, 13 L, 1478; and 11 L, 1479.	
Foote, John F., subcontractor, 1149-53; subcontract, 1150; men and animals, 1151-3.	
Adams, Joseph B., post-trader	1142-4, 1149-1153

Witnesses—Continued.

Adams, Joseph B.—Continued.

Contents of letter written by Rerdell to Taylor, 1142, 3, 1149; circulated petitions, some of the Army officers refused to sign, 1144; desirability of frequent and expeditions mails, 1144.

Bradshaw, Aaron, 2261-2262; price of hay in Colorado, excluded, 2261-2.

French, J. L., late chief clerk, contract office, 2259-2260; reason why the department expedited time to 45 hours instead of 84 hours as petitioned for.

James, Thomas L., ex-Postmaster-General; directions to revoke order for increase on this route..... 1827-8

Perkins, Charles F., subcontractor..... 1111, 1116-33, 1153-6

Made his subcontract with Rerdell, 1116; identifies petitions (3 L, 4 L, and 5 L) as written by Rerdell, 1117; identifies letters (10 L), 1120; (14 L), 1127; also letters marked W. E. W. L., 1124, 1126, 1133; the number of men and animals in the oath was blank when sworn to, 1121; men and animals, 1125-31; distances, 1124, 1127; reason he gave up subcontract, 1132; statements made to them by Steel as agent for J. W. Dorsey excluded after argument, 1153-6.

Smith, George C., notary public..... 1144-8

Identifies oath (9 L), the place for men and horses left bank when sworn to, 1144; contents of letter received by Taylor from Rerdell, 1145-8.

Sweeny, George M., identifies files..... 1112-15

Taylor, Eugene, subcontractor..... 1133-42

Temporary contract with postmaster at White River, 1134, 1139-42; identifies subcontract (18 L), 1135; weight of mail, 1135; men and animals, 1136; petitions (17 and 18 L), 1137; Indians, 1138-9.

ROUTE 38134, PUEBLO AND ROSITA, COLO.

Argument as to the propriety of putting petitions in evidence..... 1022-30

Contract of John R. Miner with the United States (17 I)..... 1034

Envelopes (20 and 22 I)..... 1041-2

Exceptions to the oaths of John W. Dorsey (10 I and 12 I), 1033; to subcontract of Eli Hanson (14 I), 1034; to letter of J. W. Walters (15 I), 1034; to contract (17 I), 1035; to letters (19 and 21 I), 1041; to table of payments, 1052; to question as to number of men and animals, 1036-7 and 1043.

Expedition, calculation of..... 1031

Jacket, no date, indorsed, "Do this—Brady" (18 I)..... 1035, 36

Letter of Chaffee, J. B., April 22, 1879, 7 times a week service, with good time (2 I)..... 1021

Chilcott, G. M., April 30, 1879, daily mail (5 I)..... 1022

Dorsey, John W., subcontractor, May 5, 1879, proposition for expediting schedule (9 I), 1032; May 8, 1879, withdrawal of oath (11 I), 1032.

Megrue, N. M., August 30, 1878, increased service not to accommodate the people (1 I)..... 1021

Miner, Peck & Co., August 19, 1878, accepting proposition of F. A. Tuttle (9 I), 1041; September 3, 1878, chance of increase not promising, Greenwood supplied by another route (21 I), 1041-2.

Monroe, A. Q., March 17, 1879, discontinuance of service (6 I)..... 1030

Pitkin, F. W., April 25, 1879, increase of service, fast time, indorsed by James B. Belford (3 I)..... 1021

Thatcher, Henry C., and Wilbur F. Stone, April 26, 1879, daily mail, reduction of time (4 I)..... 1022

Walters, J. W., May 8, 1880, useless and expensive route (15 I)..... 1034

Oath of John W. Dorsey, subcontractor, sworn to April 21, 1879 (10 I), 1032; second oath sworn to April 21, 1879 (12 I)..... 1032-3

Order of Brady, July 8, 1879, for increase and expedition (7 I)..... 1030

French, October 22, 1879, subcontract of Eli Hanson (13 I)..... 1033

October, 17, 1879, to change schedule (16 I)..... 1034

Payments, tabulated statements of..... 1053-4

Petition for daily service and shorter schedule (23 I)..... 1049-50

Daily line and fast schedule, indorsed by J. B. Belford and H. M. Teller (24 I), 1051; for 7 trips a week and fast schedule (25 I), 1051; for daily service and increase of speed, indorsed by J. B. Belford and H. M. Teller (26 I), 1051; for daily line and fast time, indorsed by J. B. Belford and H. M. Teller (27 I), 1052.

Receipts for warrants, signed H. M. Vaile, by John R. Miner et al..... 1055

	Page.
Revenues, certified transcript of.....	1056-7
Subcontract of Eli Hanson, October 4, 1879, signed John R. Miner, by M. C. Rerdell (14 I).....	1033
Warrants.....	
Witnesses:	
Blois, J. F. H., handwriting 3 I, 9 I, 10 I, 11 I, 12 D (I ?), 1477; and 4 I, 1477, 8.	
Gooch, James A., postmaster, Rosita, 1044-52; through mail carried on route 38132, 1045; recognizes several petitions, 1048-9; arrival of the mails, 1045; population, Rosita, 1046.	
Hull, Alvah A.; mail-carrier, 1042-4; men and animals, 1042-3; length of route, 1043; subcontract pay, 1043; weight of mail, 1044.	
Sweeney, George M., identifies files.....	966-7
Tuttle, Frank A., mail-carrier, 1036-42; men and animals, 1036-9; subcontract pay, 1038; length of route, 1038; identifies letters, 1039-40.	
Walters, J. W., postmaster, Greenwood, 1057-65; weight of mail, 1058; through mail, Pueblo to Rosita, went by other route, 1059; no mail for three weeks, 1060; removal of site, post-office, 1059-61; identifies petition (23 I), 1063.	
ROUTE 38135, SAINT CHARLES TO GREENHORN, COLO.	
Accounts postmaster at Agate, fourth quarter, 1880 (37 and 38 B).....	551-5
Contract of John R. Miner with the United States, witnessed by John W. Dorsey.....	490-3
Distance circular, June 14, 1878 (36 B).....	528
Drafts drawn by Miner, in favor Vaile, S. W. Dorsey, et al. (47 B to 60 B)....	577-82
Exceptions to letter of William Ingersoll, December 15, 1877 (4 B), 512-13; letter of Miner, May 8, 1879 (16 B), 521; April 16, 1879 (17 B), 521; oath of Miner, sworn to April 17, 1879 (18 B), 521; order of Brady, May 9, 1879 (2 B), 495; revenues, 584; to question as to distance, 531-3; as to schedule time, 548.	
Letter of Ames, E. M., November 19, 1878, withdrawal of subcontract (28 B).	525
Brady, November 10, 1880, relative to Agate (23 B), 524; inquiry of and answer of the postmaster relative to the supply of Agate (21 B), 523.	
Chaffee, J. B., April 23, 1879, for daily mail (8 B).....	516
Chilcott, J. G., to H. M. Teller, May 6, 1879, for daily mail (9 B).....	516-17
Fairhurst, James, August 15, 1878, Pueblo should be head of route (6 B).	514-15
Hunt, William L., superintendent railway mail service, July 10, 1880, schedule (35 B).....	527-8
Ingersoll, William, December 15, 1877, error in advertisement (4 B), 514; July 18, 1878, mail should be carried to Pueblo (7 B), 515-16; December 2, 1880, carrier will not stop at Agate (24 B), 524.	
Miner, John R., May 5, 1879, address care M. C. Rerdell, box 706 (2 B), 494-5; May 8, 1879, inclosing petitions (16 B), 520; April 16, 1879, proposition for expedition (17 B), 520.	
Piper, J. S., Sept. 30, 1880, supply of Agate (20 B).....	523
Oath of John R. Miner, sworn to April 17, 1879 (18 B).....	521, 1115
Orders of Brady, June 18, 1878, to change address to lock-box 714 (1 B), 494; May 9, 1879, to change address to care M. C. Rerdell, box 706 (2 B), 494; June 26, 1879, for increase and expedition (10 B), 517; December 1, 1880, embrace Agate (19 B), 522; December 14, 1880, omit Agate (22 B), 524; October 1, 1878, recognizing subcontract of E. M. Ames (25 B), 525; December 2, 1878, to stop payments to subcontractor (27 B), 525; December 7, 1880, to stop payments to subcontractor (31 B), 526; July 23 1880, to change schedule (34 B), 527.	
French, August 30, 1878, embrace Pueblo (5 B), 514; November 11, 1879, recognizing subcontract of S. W. Dorsey (29 B), 525; July 31, 1879, to change schedule (32 B), 526.	
Second Assistant, January 19, 1882, reconpment for Agate (39 B).....	567
Payments, tabulated statements of	584-5
Petition for 6 trips and schedule of 8 hours (11 B), 517; for 6 trips " <i>and a faster schedule</i> " (12 B), 517; for 6 trips " <i>on quicker time</i> " (13 B), 518; for daily mail (14 B) 518; for 3 trips " <i>and faster time</i> " indorsed by James B. Belford, H. M. Teller, and N. P. Hill (15 B), 519.	
Receipt of E. M. Ames for warrant.....	583
Reports, auditor's warrants and drafts (47 B to 60 B).....	577-82
Revenues, certified transcript of	586-7
Schedule circular (33 B).....	526-7

	Page.
Subcontract of Ames, E. M. (26 B).....	525
Dorsey, S. W., April 1, 1879 (30 B).....	526
Warrants, reports, and drafts (47 B to 60 B).....	577-82
Witnesses:	
Blois, James F. H., handwriting—petitions (12 B), " <i>and a faster schedule</i> ;" (13 B), " <i>on quicker time</i> ;" (15 B), " <i>and faster time</i> ," written by Rerdell, 1465-7; (16 B and 17 B) signature and all written by Rerdell; (18 B) all except signature of Kellogg, Rerdell's handwriting, 1467-8; Miner's signature, 1482; (26 B) letter and signatures John R. Miner and E. M. Ames, written by Miner, 1468; (28 B) letter of E. M. Ames, signature and all, written by Miner, 1468.	
Borden, James M., draughtsman, map of route.....	559-62
Calleghan, John T., recoupment for Agate and procedures as to fines and deductions.....	562-73
Farish, William B., mail carrier, 530-540: distances, 531-3; pay (excluded), 533; men and animals, 534-9; weight of mail, 536-7.	
French, J. L., late chief clerk contract office, as to error in advertised distance, 2098, 2100, 2109.	
Higgason, William, subcontractor, 576-577; men and animals, 576-7; pay, 577.	
Mark, Cyrus E., 1598-1602; departure of the mails from Pueblo, 1598; time of arrival from Greenhorn, 1599; quantity of mail, 1599; schedules recommended by postmasters, 1601.	
Piper, Jahzeel S., postmaster, Agate, supply of Agate.....	550-7
Sears, George, postmaster, Greenhorn, 546-9, 589-91; distances, 540-6; men and animals, 541-2; schedule time, 541, 548; no mines, 542; petition (13 B), <i>quicker time</i> , 543-4, 549; population, Pueblo, 545-6; Rosita mail, 547; carrier could lay over half a day and make schedule, 549; recalled for cross-examination; failure to receive the mail from the D. and R. G. R. R. water-tank, 589-91.	
Sleman, John B., 577-83; produces warrants, reports, and drafts, 577-84.	
Sweeney, George M., identifies files, 493-5; recalled, 501-3.	
Woodward, P. Henry, custody of papers.....	495-501
Withers, H. C., subcontractor, 573-5; men and animals, 573-5; pay, 573.	

ROUTE 38140, FROM TRINIDAD, COLO., TO MADISON, N. M.

Argument as to legality of embracing Raton on this route.....	1087-92
Contract of John R. Miner (1 K).....	1065
Distance circular, September 26, 1878.....	1066
Drafts drawn by John R. Miner in favor of H. M. Vaile, S. W. Dorsey, and J. W. Bosler, witnessed by M. C. Rerdell.....	1109-11
Exceptions to contract, 1065; to order of Brady (11 K), 1071; to question as to postmaster's compensation, 1093; to letter (11 K), 1101.	
Expedition, calculation for (25 K).....	1104
Letter of Belford, James B., April 28, 1879, improvement of service, both as to trips and speed (23 K), 1103; Burns, W. T., March 2, 1880, special mail-carriers (20 K), 1102.	
Chaffee, J. B., April 21, 1879, tri-weekly service, and trip to be made in one day (22 K).....	1102
Dorsey, John W., April 28, 1879, inclosing proposition for expediting schedule (14 K).....	1085
Miner, John R., February 8, 1881, to William Burgner, draft (12 K), 1083; same, July 30, 1881 (13 K), 1084; May 10, 1879; inclosing petition for increase (18 K), 1101; and S. W. Dorsey, December 6, 1880, withdrawal of subcontract (26 K), 1105.	
Rerdell, M. C., April 3, 1880, to S. W. De Busk, pay (16 K), 1095; October 21, 1880, pay (17 K), 1095.	
Rifenburg, W. G., May 5, 1879, forged petition (21 K).....	1102
Newspaper slip (24 K).....	1103
Oath of John W. Dorsey, sworn to April 26, 1879 (Miner was contractor) (15 K).	1085
Order of Brady, June 6, 1878, to embrace Raton (3 K), 1066; January 6, 1879, to change schedule (6 K), 1067; May 9, 1879, for expedition 8 K), 1068-9; December 7, 1880, stop all payments to subcontractor (11 K), 1070; of French, November 13, 1878, to allow pay for embracing Raton retroactive (5 K), 1067; November 11, 1879, subcontract to S. W. Dorsey (9 K), 1068.	
Payments, tabulated statement of.....	1072-3
Petition for 3 trips, and faster time (19 K).....	1102

	Page.
Reports, Auditor's.....	1109-11
Revenues, certified transcript of.....	1105-7
Schedule circular, November 13, 1878 (7 K).....	1067
Statutes, Revised, section 3971; supply of special offices not to exceed two-thirds postmaster's salary.....	1087
Subcontract of S. W. Dorsey, dated April 1, 1879, signed by John R. Miner and S. W. Dorsey, witnessed by Rerdell (10 K).....	1069
Warrants	1109-11
Witnesses:	
Burgner, William C., mail-carrier, 1074-84; men and animals, 1074-9; distances, 1074; failures, 1080; identifies letters (12 and 13 K), 1080-1; admitted, subject to proof of signature, 1083.	
De Bnsk, S. W., postmaster at Alfalfa, formerly Raton, 1085-1101, 1156-58; distances, 1086; identifies letter (2 K), as written by him; salary as postmaster at Raton, 1093; men and animals, 1093-4; mail connections at Trinidad, 1095; identifies letters (16 and 17 K), 1095; supply of Raton, 1096-7, 1157; remissions, 1158.	
Sweeny, George N., identifies files.....	997-9
Wheeler, Henry M., reports, drafts, and warrants.....	1101-9

ROUTE 38145, GARLAND TO PARROTT CITY, COLO.

Certificates of postmasters, failure to make schedule time (109 E).....	913
Contract of J. W. Dorsey with the United States, witnessed by John R. Miner (1 E)	809
Drafts, schedule of, drawn by John W. Dorsey in favor of H. M. Vaile and S. W. Dorsey et al. (120 E).....	937
Exceptions to oaths. 815; to subcontract of Watts, 845; to question as to whether subcontractor received remissions, 891; as to men and animals, 864; as to subcontract pay, 868; as to possibility of making schedule time, 871.	
Expedition, calculation for (20 E).....	817
Jacket indorsed "Do this.—Brady" (6 E).....	810-11
Letters of Atkinson, H. M., April 14, 1879, daily service (32 E).....	823
Barnes, Sidney M., April 24, 1879, daily service with fast time (10 E)..	813
Bowen, Thomas M., April 16, 1879, daily mail (23 E).....	818
Brady, Thomas J., telegram, January 13, 1881, authorizing daily mail from Chama to Animas City (119 E).....	936
Chaffee, J. B., April 14, 1879, 3 trips and faster schedule (22 E).....	818
Dodge, Capt. F. S., March 4, 1879, inefficiency of service (8 E).....	811-12
Dorsey, J. W., April 14, 1879, proposition for expedition (15 E), 814; April 23, 1879, second oath attached (17 E), 815; December 23, 1878, inclosing telegram from subcontractor (41 E), 826; no date, amendment of order (73 E), 846; August 16, 1878, with inclosures, remissions (108 E), 912-13.	
Dorsey, S. W., headed United States Senate Chamber, June 10, 1878, to Brady, 7 trips, fast schedule (5 E), 810; April 24, 1879, inclosing petition (14 E), 814; April 9, 1879, to Anthony Joseph, send protests against discontinuance, and get letters asking daily line with fast schedule, no two petitions to be written by the same person (19 E), 855; excluded as to Brady and Turner, 854-5; April 30, 1879, notifying Joseph of increase to 3 trips, schedule 50 hours, daily, July 1, 1879, personally responsible for all dues (94 E), 856; excluded as to Brady, Turner, Miner, and Vaile, 855; June 22, 1879, good horse will walk 4 miles an hour, average cost of service (95 E), 857; excluded as to Brady, Turner, and Vaile, 857.	
Hatch, Edward, to S. W. Dorsey, April 17, 1879, daily line to Pagosa (21 E).....	817
Hernandez, J., July 19, 1879, 5 days in summer, cannot be made in winter (34 E), 824; and J. M. Trew, extension of schedule to 60 hours (53 E), 838; February 13, 1881, mail from Animas City (59 E), 840; March 10, 1881, connection of Ojo Caliente with railroad (60 E), 841.	
Hill, N. P., April 20, 1881, supply of Durango (37 E).....	824
Jaramillo, Pedro J., relative to 50-hour schedule (51 E), 837; September 22, 1879, filing his subcontract (70½ E) 845-6; June 26, 1880, withdrawal of subcontract (74 E), 847.	
Joseph, Anthony, April 2, 1879, impossible to carry mail inside 100 hours (9 E), 812; May 5, 1879, distance circulars (50 E), 836-7; to John W. Dorsey, January 6, 1879, proposition (99 E, defense), 880; January 15,	

	Page.
Letters—Continued.	
1879, commenced service, January 1 (100 E, defense), 880; to S. W. Dorsey, January 20, 1879, stocked the route (101 E, defense), 880-1; to John W. Dorsey, February 10, 1879, increase of service (102 E, defense), 881; March 5, 1879, accumulation of mail matter (103 E, defense), 881-2; March 6, 1879, petitions, will commence tri-weekly service (104 E, defense), 882; March 26, 1879, certificates for service, blunder in taking subcontract (105 E, defense), 883.	
McCrary, George W., Secretary of War. March 25, 1879, inclosing letter of Captain Dodge (7 E).....	811
Miller, David J., to Rerdell, February 21, 1880, failures of Jaramillo (110 E).....	913
Miner, John R., December 22, 1878, at the request of Dorsey asks Joseph to stock the route (90 E), 853; excluded as to Miner, 854.	
Price, B., December 21, 1880, Price is a station on this route (39 E)....	825
Rerdell, M. C., agent, to Anthony Joseph, August 7, 1879, statement of fines (96 E), 857, 8; August 22, 1879, relet the route to Jaramillo (97 E), 858; December 13, 1879, statement of account (98 E), 858-9; (96, 97, and 98 E excluded as to Brady, Miner, and Vaile, 857-8).	
Rich, W. G., April 15, 1879, daily mail (214 E).....	817, 931
Sanderson, J. L., April 23, 1881, supply Durango, without increase of pay (36 E).....	824
Teller, H. M., November 18, 1880, service from railroad to Animas City (57 E), 839; November 13, 1880, inclosing petitions (61 E), 841; November 22, 1880, service to Animas City (69 E), 845.	
Trew, John M., April 14, 1880, physical impossibility to make schedule time (52 E).....	837
Webster, Ed., April 18, 1879, increase of service (19 E).....	816-17
Oath of John W. Dorsey, contractor, sworn to March 11, 1879 (16 E).....	814-15
second oath sworn to April 26, 1879 (17 E).....	815
Orders of Brady, June 26, 1878, curtail to Ojo Caliente (2 E), 809; April 24, 1879, from July 1, 1878, allow for embracing Pagosa Springs, retroactive (11 E), 813; April 29, 1879, increase and expedition (13 E), 814, 1185; January 5, 1881, embrace Price (38 E), 825; December 26, 1878, termination of service of subcontractor (40 E), 825; March 21, 1879, to change schedule (42 E), 826; February 26, 1881, increase to 7 trips from January 15, 1881 (56 E), 839; retroactive, 859; October 1, 1878, recognizing subcontract of Watts (67 E), 843-4; September 29, 1879, subcontract of P. J. Jaramillo (70 E), 845; August 19, 1880, remissions (107 E), 912; August 3, 1880, deductions (116 E), 920.	
French, October 1, 1878, amending order June 26, 1878 (3 E), 809; January 23, 1879, curtail to end at Animas City (4 E), 809; April 23, 1881, embrace Durango (35 E), 824; April 25, 1880, to change schedule (54 E), 838; October 25, 1879, amending order relative to subcontract of Jaramillo (72 E), 846; July 1, 1880, to stop all payments to subcontractor (75 E), 847; no date, subcontract of Sanderson (77 E), 847.	
Payments, tabulated statement of	842-50
Petition for daily service and increase of speed (18 E).....	815-16
from Ojo Caliente for 3 trips and shorter schedule (24 E).....	818
Petition, similar from Pagosa Springs, indorsed by H. M. Teller and N. P. Hill (25 E), 820; from Park View, indorsed by H. M. Teller and N. P. Hill (26 E), 821; from Pine River (27 E), 821; from Navajoe (28 E), 821; from Turia Amarilla (29 E), 822; from El Rito (30 E), 822; for weekly mail from Parrott City to Albuquerque (31 E), 822; for increase and faster time (33 E), 823-4; printed, asking daily mail from railroad to Animas City (58 E), 839-40; printed, dated Mancas, Colo., October 20, 1880 (62 E), 842; to Governor, Colo., asking change of service, indorsed by F. W. Pitkin (63 E), 842; from Parrott City, November 18, 1880 (64 E), 843; from Rico, October 20, 1880, daily mail from railroad to Animas (65 E), 843; similar, November 9, 1880 (66 E), 843; for daily line, one-third shorter time (67 E), 855; from State officers April 28, 1879, for 3 trips and faster time, indorsed by H. M. Teller (89 E), 851-2; form of, in lead-up, indorsed, "Mr. Joseph, please have this copied, signed, and sent to me at once" (92 E), 855.	
Receipts for warrants, signed H. M. Vaile, by John R. Miner, John W. Dorsey, by Donnell, Lawson & Co. et al. (79 E to 88 E)	851
Register of arrivals and departures, with indorsements as to cause of failure to arrive (112 E to 115 E and 117 E).....	918-20
Release dated June 8, 1880, signed John W. Dorsey, releasing Jaramillo from his subcontract in consideration of \$500 (76 E)	847

Revenues, certified transcript of	Page. 903-7
Reports, auditor's	1857
Schedule circulars April 29, 1879 (12 E), 813, 4; January 23, 1879 (43 E), 826, 7; May 26, 1879 (45 E), 834; June 23, 1879 (46 E), 834; no date (47 E), 835; no date, indorsed, allows only 37 hours (48 E), 835; October 17, 1879 (49 E), 836; January 8, 1880 (55 E), 838.	
Subcontract of Jaramillo, Pedro J., dated August 7, 1879, signed John W. Dorsey, by M. C. Rerdell (71 E)	846
Joseph, Anthony, January 30, 1879, signed John W. Dorsey, by M. C. Rerdell (118 E)	922
Sanderson, J. L., June 12, 1880, signed John W. Dorsey, by M. C. Rer- dell (78 E)	848
Watts, J. H., March 31, 1878, signed John W. Dorsey, witnessed by John R. Miner (68 E)	844
Warrants payable to H. M. Vaile	1858-9
Witnesses:	
Blois, J. F. H., handwriting	1475
41 E, purporting to be letter of John W. Dorsey, signature and all in Miner's handwriting, 1475; 16 E, oath of contractor; body written by Rerdell; signature is John W. Dorsey's, 1475; 15 E, proposition of John W. Dorsey, signature and all written by Rerdell, 1475.	
Calleghan, John T., inspection clerk, 907-12; identifies files from in- spection division, 907; course of business as to making fines and de- ductions, 908-12.	
Jaramillo, Pedro J., subcontractor, 887-900; subcontract, 888; failure to make schedule time, 888, 892-96, 898; quantity of mail, 888-93; Pay, 889; men and animals, 889; release, 889, 894; never received remis- sions, 891 (excluded as to Vaile and Miner, 891); subcontract with Sau- derson, 894-5; resolution of the legislature, N. Mex., 897-8; identifies letter of D. J. Miller, 900.	
Joseph, Anthony, subcontractor, 851-87, 938; identifies letters 852-3, 874-5; contents of letter of S. W. Dorsey, 861 (excluded as to Vaile, Miner, Brady, and Turner); subcontract, 861 (excluded as to Brady and Turner); men and animals, 864-5, 874-6, 878-9, 881, 886-7; papers, 45 E, 47 E, 48 E, 49 E, and 12 E, 865; impracticable to make 50-hour sched- ule, 865, 869, 876; paid by S. W. Dorsey, 868; subcontract pay, 868-9; conversation with S. W. Dorsey, 868-9, 873; distances, 872-4, 878; fines, 872; weather, 877; quantity of mail, 879; petition (15 E), 883; 28 E and 29 E, 884; resolution, legislature N. Mex., 884; conversation with Rerdell, 885; prepared petitions at the request of ex-Senator Dorsey, 887.	
Sweeney, George M., identifies files	803-8
Trew, John M., postmaster, Animas City, 924-36; mail of local impor- tance only, 924-29; identifies papers 47 E and 48 E, 924; 12 E and 49 E, 926; impracticable to make schedule of less than 6 days, 925, 927, 933-4; schedule circulars 926-9; roads, 929, 931-2; Chama, 930; ne- cessity for frequent mails, 932; progress of railroad, 935; streams bridged, 935-6.	
Wheeler, Henry W., reports, drafts, and warrants (not read)	900-1
Woodward, P. Henry post-office inspector; custody of files	808

ROUTE 38150, SAGUACHE TO LAKE CITY, COLO.

Contract of John R. Miner with the United States, witnessed by John W. Dorsey (1 R)	1405
Exceptions to admission of any further evidence on the ground that Miner had sold out the route, 1411; to oath, 1412.	
Letter of contract office July 18, 1878, and answer of postmaster, Saguache, July 27, 1878, service commenced (2 R)	1405-6
Memorandum: "Saguache to Barnum reduce to 3 times a week.—Brady" (11 R)	1472
Oath of J. L. Sanderson, subcontractor sworn to September 19, 1878	1412
Order of Brady, September 18, 1878, contract of J. L. Sanderson, (3 R), 1406; September 20, 1878, for an increase and expedition (5 R), 1407; October 1, 1878, curtail to end at Barnum (8 R), 1413; July 26, 1880, reduce to 3 trips (10 R), 1472; August 24, 1880, increase from Powder Horn to Barnum (12 R), 1472.	
Elmer, August 11, 1881, recouping amount overpaid for expedition (13 R., defense)	2000

	Page
Payments, tabulated statement of	1418-19
Petition for a daily service and increased schedule, indorsed by H. M. Teller (6 R)	1407, 1411
Reports, auditor's	1856
Revenues, certified transcript of	1420-2
Subcontract of J. L. Sanderson, dated May 15, 1878, (4 R)	1406
Warrants in favor of John R. Miner et al	1856
Witnesses:	
Coon, Byron C., identifies files	1404-5, 1507
Brewer, George J., 1414-1416; method of computing expedition, 1414; error of Turner's in computing expedition, 1415.	

ROUTE 38152, OURAY TO LOS PINOS, COLO.

Contract of John W. Dorsey with the United States (15 M)	1200
Drafts, contractors', in favor of H. M. Vaile and M. C. Rerdell	1180
Letter of Barlow and Sanderson, February 8, 1879, to postmaster, Los Pinos, service has not been discontinued (2 M)	1179
McDonald, A. J., March 18, 1879, to department, service on route 38152 is quite superfluous (4 M), 1177-8; to Sanderson, January 27, 1879, performance of service (5 M), 1179.	
Sanderson, J. L., January 21, 1879, to postmaster Los Pinos, performance of service (3 M)	1178
Order of Brady, May 12, 1880, subcontract of J. L. Sanderson (6 M), 1179; August 3, 1880, to discontinue service (14 M), 1185.	
Payments, tabulated statement showing, on this route to H. M. Vaile, John W. Dorsey, et al.	1190-1
Receipts for warrants signed, H. M. Vaile and John W. Dorsey (16 M and 17 M)	1876
Reports, auditor's (8 M to 13 M)	1180
Subcontract of J. L. Sanderson, dated May 11, 1880, signed, John W. Dorsey by M. C. Rerdell (7 M)	1179-80
Warrants	1180
Witnesses:	
McDonald, A. J., postmaster, Los Pinos, 1167-70; from Los Pinos to Ouray, routes 38146 and 38152 were identical, 1168; identifies letters 1168; service on route 38152 was not discontinued for a year or two after he had notified the department, 1169.	

ROUTE 38156, SILVERTON TO PARROTT CITY, COLO.

Argument as to admission of papers, showing deductions and remissions	977-80
Contract of John W. Dorsey with United States, witness, John R. Miner (30 F)	960
Distance circular, June 14, 1878	949
Drafts drawn by J. W. Dorsey in favor of S. W. Dorsey	1859
Exception to the admission of the revenue	992
Jacket, no date, increase of schedule in winter and decrease in summer (14 F), 954; jacket, February 16, 1881, supply of Durango (19 F), 956.	
Letters of Belford, James B., May 5, 1879, transmits letter of State officers of Colorado (10 F)	952
Letters, Chaffee, J. B., April 23, 1879, daily mail with a fast schedule (12 F)	953
Colorado, State officers of, April 28, 1879, 3 trips, and faster schedule, indorsed by H. M. Teller (89 E)	952
Dorsey, J. W., May 5, 1879, proposition for expedited schedule (7 F), 951; November 15, 1880, extension of schedule to 24 hours (15 F), 954.	
Dorsey, John W. and S. W., January 7, 1880, withdrawal of subcontract (26 F)	958
Hill, N. P., November 8, 1880, petition for extension of schedule (17 F)	955
McDonald, A., April 24, 1879, daily fast line (9 F)	952
Reynolds, A. E., April 26, 1879, daily service, fast line (11 F)	953
Rerdell, M. C., agent, November 27, 1879, provision, continuance of service (22 F)	957
Steiniger, Fred., December 2, 1879, filing subcontract (28 F), 958; and W. R. Winters, November 12, 1880, increase of schedule, no connection will be missed (16 F), 954.	
Trew, John M., January 14, 1878, supply of Animas City (1 F)	948-9
Oath of John W. Dorsey, contractor, sworn to April 21, 1879 (6 F)	950

	Page.
Orders of Brady, March 17, 1879, to change schedule (4 F), 949-50; October 1, 1880, subcontract of William E. Earl (20 F), 956; January 21, 1880, to stop all payments to subcontractor (25 F), 958; January 21, 1880, subcontract of Fred. Steineger (27 F), 958.	
Orders of French, January 23, 1879, embrace Animas City (3 F), 949; April 17, 1880, reduce 1 trip (13 F), 953; November 11, 1879, subcontract of S. W. Dorsey (23 F), 957; June 12, 1879, for increase and expedition (8 F), 954.	
Payments, tabulated statement showing, to S. W. Dorsey et al, (31 F).....	973-4
Petitions of postmasters for extension of schedule (18 F)	955
Reports, auditor's	1857
Revenues, certified transcript of	993-4
Schedule circular, January 23, 1879 (5 F)	950
Subcontract of Dorsey, S. W., April 1, 1879 (24 F)	957
Earl, William E., May 1, 1878, headed Miner, Peck & Co. (21 F)	956-7
Steineger, Fred., November 25, 1879, guaranteed by S. W. Dorsey (29 F) ..	958-9
Warrants	1857, 1859
Witnesses:	
Blois, J. F. H., handwriting of papers marked 15 F, 1475-6; 7 S (F ?), 6 F, and 26 F, 1476.	
Callaghan, John T., case of deductions and remissions, 977; excluded, 978-80.	
Carson, Albert, mail-carrier, 962-4; men and animals, 963-4; time made, 963.	
Cornell, Clarence W., mail-carrier, 938-43; men and animals, 939, 941-42; schedule time, 939; distances, 940; population, 943.	
Sweeny, George M., identifies files	943-7
Trew, John M., postmaster, Animas City, 965-73; route traveled, 965-6; completion of railroad to Durango, 965; mail carried by Animas City, 965-6, 971-3; identifies letter, 967; and distance circular (1 F), 969.	
ROUTE 40104, MINERAL PARK TO PIOCHE, ARIZ.	
Contract of John W. Dorsey with the United States (44 P)	1319
Drafts drawn by John W. Dorsey in favor of M. C. Rerdell, S. W. Dorsey, and H. M. Vaile	1862-3
Exceptions to subcontract of J. C. McKibben (39 P), 1314; to petition, 1321; to all papers dated prior to May 20, 1879, 1846.	
Jacket, December, 1878, indorsed, "Do this.—Brady" (10 P)	1304
Letter of Beene, Horace D., August 25, 1879, average mail is less than 6 letters a day, better supplied by another route (23 P)	1308-9
Contract office, August 21, 1880, answer of postmaster Mineral Park, average mail (84 P), 1341, 2; August 21, 1880, answer postmaster Pioche, average mail (85 P), 1342.	
Dorsey, J. W., November 26, 1878, for schedule of 60 hours (14 P), 1305; May 5, 1879, to address care M. C. Rerdell, box 706 (19 P), 1306; and M. C. Rerdell, July 29, 1880, withdrawal of subcontract (37 P), 1314; and Joseph McKibben, August 12, 1880, withdrawal of the subcontract (41 P), 1315.	
Dillon, Sidney, received May 20, 1879, daily service from Pioche to Prescott (21 P)	1307
Fremont, J. C., October 21, 1878, 2 trips and 60-hour schedule (17 P)...	1306
French, July 23, 1879, notifying postmaster Mineral Park of increase of 4 trips (24 P)	1309
Krider, W. M., July 15, 1878, no service; that old schedule be restored (4 P)	1303
Meyers, Charles F., July 31, 1878, contractor has failed to report (3 P), 1302; service not yet commenced (2 P), 1302; September 3, 1878, service commenced August 31, 1878 (5 P), 1303; August 5, 1879, 7 trips not yet commenced (22 P), 1308.	
Peck, John M., November 27, 1878, permission to sublet (Dorsey was the contractor) (8 P)	1303
Randall, Alder, August 28, 1878, service commenced (6 P)	1303
Rerdell, M. C., May 7, 1879, filing subcontract (33 P), 1312; and John W. Dorsey, R., May 15, 1879, withdrawal of subcontract (35 P), 1312.	
Stevens, H. S., Delegate, October 21, 1878, increase of service (15 P), 1305-6; 60 hours schedule (16 P), 1306.	
Vaile, H. M., and John W. Dorsey, M., May 5, 1879, withdrawal of subcontract (31 P)	1311

	Page
Letters—Continued.	
Vaile, H. M., to J. M. McGrew, July 9, 1880, relative to the Jennings's case	
Memorandum of Brady, January 21, 1880, to reduce service to original letting, without one month's extra pay (26 P).....	1310
Oath of J. W. Dorsey, sworn to November 26, 1878 (13 P).....	1305
Order of Brady, June 18, 1878, to change contractor's address to lock-box 714 (1 P), 1302; November 29, 1878, permission to sublet (7 P), 1303; December 24, 1878, increase and expedition to 60 hours (9 P), 1304; May 9, 187 —, to change contractor's address to care M. C. Rerdell, box 706 (18 P), 1306; January 22, 1880, reducing service to 1 trip, on 84 hours schedule (25 P), 1309-10; January 28, 1880, rescinding order of January 22, 1880, reduce service 4 trips (27 P), 1310; December 31, 1878, subcontract of H. M. Vaile (28 P), 1310-11; May 8, 1879, stop all payments to subcontractor (30 P), 1311; May 8, 1879, subcontract M. C. Rerdell (32 P), 1311; August 23, 1880, stop all payments to subcontractor (40 P), 1315; August 23, 1880, subcontract M. Salisbury (42 P), 1315; January 21, 1880, making deductions for failures (86 P), 1343.	
French, July 23, 1879, increased trip (20 P), 1307; June 29, 1880, stop all payments to subcontractor (36 P), 1313; June 29, 1880, subcontract of McKibben (38 P), 1314.	
Payments, tabulated statement of.....	1344-5
Petitions, December 20, 1878, for 3 trips and 60 hours schedule (11 P), 1304; December 20, 1878, for expedition of the schedule on 40105 for 48 hours; signatures identical with those on 11 P (12 P), 1305.	
Reports, auditor's.....	1862-3
Revenue, certified transcript of (87 P)	1346-7
Subcontract of McKibben, J. C., dated June 29, 1880; John W. Dorsey by M. C. Rerdell (39 P)	1314
Rerdell, M. C., dated April 1, 1878, (34 P).....	1312
Salisbury, M., dated August 20, 1880, signed John W. Dorsey, by M. C. Rerdell (43 P)	1315
Vaile, H. M., dated December 1, 1878, signed John W. Dorsey, by John R. Miner, (29 P).....	1311
Jennings, ———, indorsed: "Turner file this subcontract, to take effect July 1, 1879; instruct Auditor for P. O. Dep't. to readjust payment accordingly. Brady" (88 P)	1843
Warrants.....	1862-3
Witnesses:	
Blois, J. F. H., handwriting of papers marked 8 P, 11 P, and 12 P, 1845; 13 P, 14 P, 19 P, 37 P, 41 P, 1846.	
Calleghan, John T., identifies from inspection files, 1330; deductions for failures, 1331.	
Coon, Byron C., identifies files.....	1297-8
Krider, W. M., postmaster Mineral Park, 1319-30, 1334, 1342-43; no mail on this route in 1878, 1320, 1325; in 1879 very often nothing except the mail bill was received, at other times from 2 to 4 letters; 1320; no through mail for Signal passed by Mineral Park, 1320, 1327-9; population, 1320; distances, 1320; Signal, 1320; identifies signatures to petition 11 P, as residents of Signal, 1321; signatures on 12 P identical with those on 11 P, 1324; they drew a line on a map and called it a mail route, 1325; failures, 1326; did not write any portion of petition, 11 or 12 P, 1329; identifies 39 mail bills, 1330; all matter was put on mail bill, 1342; salary as postmaster, 1342.	
Sleman, John B., produces letter of Vaile to McGrew, excluded, 1787-8; afterwards admitted, 2247-8.	
Olcott, John H., identifies files.....	1294-7
Vaile, H. M., one of the defendants, 2216-2219; route sublet to witness, 2216; what he does not know about the route, 2216-9; parted with his interest in April, 1879, 2219.	
Wheeler, Henry W., reports, drafts, and warrants.....	1355

ROUTE 40113, TRES ALAMOS TO CLIFTON, ARIZ.

Contract of John W. Dorsey with the United States (1 S).....	1499
Drafts drawn by John W. Dorsey in favor of S. W. Dorsey, H. M. Vaile et al..	1861-3
Expedition, calculation for (15 S).....	1503
Letter of Barnes, Sidney M., May 15, 1879, asking increase of service and fast time.....	1501-2

	Page
Letters—Continued.	
Campbell, John G., Delegate, increase to 3 trips, on shorter schedule (9 S)	1501
Dorsey, John W., May 3, 1879, inclosing petition (2 S), 1499; May 3, 1879, inclosing petition (12 S), 1502; May 7, 1879, proposition for 3 trips, on a reduced schedule (13 S), 1502.	
Letter of Dorsey, S. W., December 6, 1878 (1), withdrawal of subcontract (20 S)	1504
Danbar, Thomas, March 10, 1879, opinion is that contractor will fail (11 S)	1502
Oath of John W. Dorsey, sworn to April 21, 1879 (14 S)	1502
Order of Brady, June 3, 1879, for increase and expedition (16 S), 1503; December 7, 1890, to stop all payments to subcontractor (19 S), 1504.	
French, November 11, 1879, subcontract of S. W. Dorsey (17 S)	1504
Payments, tabulated statement of	1503-9
Petitions of citizens of Clifton, asking for increased mail facilities, with faster time (3 S), 1499, 1500; similar (4 S), 1500; of military officers, Camp Grant, daily service (4 S), 1500; for increase to 3 trips and faster time (6 S), 1500; citizens of Santa Fé, urging a daily or at least tri-weekly service, with fast time (7 S), 1501; from Clifton, Ariz., for 3 trips and faster time (8 S), 1501.	
Reports, auditor's	1861-2
Revenue, certified transcript of	1510-12
Subcontract of S. W. Dorsey, dated April 1, 1879 (18 S)	1504
Warrants	1862
Witnesses:	
Blois, J. F. H., handwriting of papers marked 2 S and 12 S, 1846; of 13 S, 14 S, and 20 S., 1847.	
Coon, Byron C., identifies files	1505
Woodward, P. Henry, custody of papers	1499

ROUTE 41119, TOQUERVILLE TO ADAIRVILLE, UTAH.

Contract of John M. Peck with the United States.	593
Drafts, contractors (42 C to 54 C)	635-7
Exceptions to revenues, 641; to subcontract of Nephi Johnson, 611; to conversation with J. W. Dorsey, 622; to letter of S. W. Dorsey (34 C), 622; to, was not inquired of by any of the defendants as to number of men and animals, 634; as to words and figure 7 in petition (6 C), 645-6.	
Expedition, calculation for (13 C)	606
Letter of Bosler, J. W., January 30, 1882, no further interest in draft (55 C) ..	638
Dorsey, John W., to Nephi Johnson, July 9, 1879, error in contract (30 C)	619
Dorsey, S. W., May 5, 1879, dissolution of firm (34 C)	623
Johnson, M. D., to George Q. Cannon, December 8, 1879, deductions (14 C)	607
Peck, John M., June 23, 1879, proposition for expedited schedule (10 C), 605; October 11, 1878, notifying Johnson of increase to 3 trips (26 C), 618; November 6, 1878, to Nephi Johnson, petitions for 48 hours (27 C), 618; April 15, 1879, asking Johnson to address M. C. Rerdell, box 706 (28 C), 618; and Vaile, May 5, 1879, withdrawal of subcontract (18 C), 608.	
Rerdell, M. C., May 6, 1879, filing his subcontract (21 C), 610; April 3, 1880, to Nephi Johnson, increase of pay, objection, withdrawal of, to present schedule (31 C), 619; May 9, 1880, write Delegate to withdraw objection to schedule (32 C), 619-20; July 10, 1879, to notify him to increase to 7 trips, schedule 33 hours (33 C), 620.	
As agent of J. M. Peck, April 12, 1879, inclosing form of petition (29 C).	618
And John M. Peck, May 15, 1878, asking withdrawal of subcontract (22 C)	611
Smithson, Nephi, December 16, 1879, informs department that expedition is not needed (11 C)	605
Vaile, H. M., and John M. Peck, May 5, 1879, withdrawal of subcontract (18 C)	608
Oath of John M. Peck, contractor, sworn to January 23, 1879 (8 C)	603
Orders of French, October 10, 1878, increased trips (2 C), 601; July 10, 1879, curtail, to end at Pahreah (9 C), 604; March 8, 1879, recognizing subcontract of H. M. Vaile (15 C), 607-8.	

	Page
Orders—Continued.	
Elmer, January 3, 1882, terminating subcontract of Rerdell, and recognizing that of Nephi Johnson (23 C).....	611-12
Brady, July 8, 1879, increase and expedition to 33 hours (5 C), 602; May 8, 1879, to stop payments to subcontractor (17 C), 608; the same, date subcontract of M. C. Rerdell (19 C), 609.	
Payments, tabulated statement of.....	639-40
Petitions, May 24, 1879, asking that part of route 41122 be embraced upon 41119 (1 C), 600; September 23, 1878, more service (3 C), 601; September 12, 1878, for tri-weekly service (4 C), 601-2; May 6, 1879, for 7 trips and 48 hours schedule, indorsed by George Q. Cannon (6 C), 602-3; May 24, 1879, for 7 trips and 48 hour, schedule (7 C) 603; indorsed by George Q. Cannon, 626; postmasters, November 12, 1879, that expedition is unnecessary (12 C), 605-6.	
Power of attorney from John M. Peck to M. C. Rerdell, September 26, 1879, authorizing him to collect amounts due on this route (16 X).....	2257
Receipts for warrants (35 C to 41 C).....	634
Reports, auditor's	635-7
Revenues, certified transcript of	642-3
Subcontract of H. M. Vaile, April 1, 1878 (16 C).....	608
M. C. Rerdell, April 1, 1878 for 3 trips (20 C).....	609
Nephi Johnson, July 10, 1879, guaranteed by S. W. Dorsey (24 C).....	612
The same, May 27, 1878 (35 C).....	613-14
Warrants, reports, and drafts (42 C to 54 C).....	635-7
Witnesses:	
Blois, J. F. H.; handwriting 8 C, 1468; 10 C, 16 C, 20 C, 22 C, 1470; 24 C, 26 C, 27 C, 28 C, 1471.	
Borden, James M., draughtsman, map.....	610-11
Coon, Byron C., contract clerk, 663-9; course of business as to allowing one month's extra pay, 663-9; as to jacket and order (9 C) allowing one month's extra pay before it went into effect, 663-4.	
Johnson, Nephi, subcontractor, 612-33; subcontract (25 C), 613; population, 614-15; quantity of mail, 616, 625; petitions (6 C), 625; (7 C), 626, 616; men and animals, 617, 628-9; subcontract (24 C), 617; identifies letters of Peck (26, 27, and 28 C), 617-18; of Rerdell (29 C), 618; (31 C), 619; (32 and 33 C), 620; of J. W. Dorsey (30 C), 619; conversation with J. W. Dorsey, 621, 629-30; excluded as to Vaile, 621; as to Miner, 630; identifies letter of S. W. Dorsey, (34 C), 623; carried the mail on 41122 and 41120; fines and deductions, 627-8, 631; identifies a number of letters not offered, 633; petitions asked for 48 hours and got 33; was not inquired of by any of the defendants as to men and horses, 633.	
Johnson, W. D., petition (6 C), word and figure 7 not in it, 645-6; petition (7 C), 647-50; petition (4 C), 647; petition (12 C), 651.	
Sweeney, George M., identifies files, 593-9; course of business in contract office, 595-600.	
Vaile, H. M., one of the defendants, 2219-2222; witness's subcontract, did not see Rerdell sign as a witness, and did not know him at that time, 2220.	
Wheeler, Henry W., reports, drafts, and warrants.....	635-9
Woodward, P. Henry, custody of papers.....	600

ROUTE 44140, EUGENE CITY TO BRIDGE CREEK, OREG.

Affidavit of A. S. Powers, subcontractor, William Gebhart and P. C. Renfrew, postmasters, as to causes of failure (28 T).....	1526-7
Contract of John M. Peck with the United States (2 T).....	1518
Drafts drawn by John M. Peck in favor of S. W. Dorsey et al.....	1863-4
Exception to subcontract pay, 1531; to telegram of Woodward and Woodward, 1597.	
Expedition, calculation for (21 T)	1523-4
Jacket inclosing petitions, indorsed, "Do this.—Brady" (6 T). 1519; no date, no papers on file recommending additional service (22 T), 1524.	
Letters to Brown and Putnam (38 T).....	1597
of Dorsey, S. W., May 23, 1879, to Thomas J. Brady, inclosing letters asking increase of service (18 T).....	1522
Finn, B. F., May 10, 1879, to S. W. Dorsey, daily mail (14 T).....	1521
Mitchell, John H., April 20, 1879, 3 trips and 100 hours (8 T).....	1520
Maxwell, W. S., no date, daily service and fast time, indorsed by Whiteaker (9 T).....	1520

	Page.
Letters—Continued.	
Osborne, S. W., April 30, 1879, increase of service and of speed, indorsed by Whiteaker (11 T).....	1521
Peck, John M., May 5, 1879, address care M. C. Rerdell, box 706 (5 T), 1519; May 24, 1879, proposition for expedited schedule (19 T), 1522; October 23, 1879, subcontractor's pay (24 T), 1525; J. M., November 15, 1880, change of schedule (26 T), 1525; November 15, 1880, remission of deductions (27 T), 1525-6.	
Powers, A. S., September 15, 1880, to M. C. Rerdell, cannot possibly carry the mail in winter on present schedule (31 T).....	1539-40
Rerdell, M. C., February 20, 1880, to A. S. Powers, reduction of service (32 T), 1541; March 23, 1881, to A. S. Powers, draft for remissions (33 T), 1541; April 26, 1881, to A. S. Powers, compensation (34 T), 1541; July 26, 1881, to A. S. Powers, reduction of service (35 T), 1542; January 5, 1882, to A. S. Powers, account for third quarter 1881 (36 T), 1542.	
Walker, W. R., May 10, 1879, increase of service, indorsed by Whiteaker (12 T), 1521; May 10, 1879, to S. W. Dorsey, increase of service (13 T), 1521.	
Walton, Joshua A., May 3, 1879, to S. W. Dorsey, a daily mail (16 T)...	1522
Woodward and Woodward, Portland, Oreg. May 12, to Brown and Putnam (37 T).....	1597
Oath of John M. Peck, sworn to January 22, 1879 (20 T).....	1523
Order of Brady, April 21, 1879, curtail, to end at Mitchell (3 T), 1519; May 9, 1879, to change address to care M. C. Rerdell, box 706 (4 T), 1519; June 26, 1879, for increase and expedition (7 T), 1520; November 20, 1880, changing schedule to 40 hours in summer, and 50 in winter (25 T), 1525; March 29, 1881, summer and winter schedule (29 T), 1527-8.	
French, October 24, 1879, to change pay of subcontractor (23 T).....	1524
Payments, tabulated statement of.....	1512-13
Petitions for daily service and greatly increased speed (10 T), 1520; for daily service and greatly increased speed (15 T), 1521-2; from Eugene City, May 10, 1879, asking increase to 3 trips, and much faster speed (17 T), 1522.	
Power of attorney from J. M. Peck to M. C. Rerdell, September 26, 1879, to collect amounts due on this route (16 X).....	2257
Reports, auditor's	1863-4
Revenues, certified transcript of.....	1514-18
Schedule circular, June 26, 1879 (30 T)	1528
Warrants	1863-4
Witnesses:	
Blois, J. F. H., handwriting of papers marked 5 T, 1844; 17 T, 1844; 19 T, 20 T, and 48 T, 1844; 24 T and 27 T, 1844; 26 T, 1845.	
Brown, Charles S., identifies papers.....	1587-91
Coon, Byron C., identifies files.....	1506-7
Powers, A. S., 1528-1545; subcontractor, under Peck, 1528; quantity of mail; 1529-30; men and animals, 1530-1, 1533; subcontract pay, 1531. petitions (10 T, 15 T, and 17 T) possibility of making a 50-hour schedule, 1531, 1536, 1538; route traveled, 1532; distances, 1532; fines and deductions, 1535; had more horses than he could use, 1536; identifies letters, 1540; deductions and remissions, 1542, 1543, 1545.	
Putnam, Thomas G., attorney at law, 1583-7, 1591-7; suit of Wilcox against Dorsey, 1583-7; telegrams of Woodward and Woodward, 1597.	
Taylor, Jacob S., notary public, acknowledged the oath of J. M. Peck..	470-472
Wilcox, Frank R., correspondence with S. W. Dorsey.....	1545-61
Wilcox, T. M., 1561-83, 1597-8; identifies papers, 1561-6.	

ROUTE 44155, THE DALLES TO BAKER CITY, OREG.

Certificates for temporary service (3 D and 4 D).....	675
Contract for temporary service (1 D).....	674
Contract of John M. Peck with United States.....	652
Drafts drawn by John M. Peck in favor of John R. Miner, H. M. Vaile et al., some witnessed by Rerdell (32 D, 34 to 36 D, 38 to 41 D).....	702-4
Exception to ruling admitting papers (1 D to 8 D), 677; to question as to schedule time, 723; men and animals, 726, 741, 750.	
Jacket indorsed "Do this.—Brady" (7 D).....	676
Letter of Peck, John M., M., October 21, 1878, proposition for expedited schedule (11 D).....	678
Tracy, George H., August 24, 187(8?), temporary service (16 D).....	679-80

	Page.
Letters—Continued.	
Wilson, Elizabeth M., July 26, 1878, temporary service (2 D), 675; July 1, 1878, Indians renders service of utmost importance, in- dorsed, "Impossible to have service on account of Indian depreda- tions" (44 E).....	831-2 678 679
Memoranda penciled (12 and 13 D).....	678
Oath of John M. Peck, September 18, 1878 (50 A and 14 D).....	679
Order of Brady, October 29, 1878, for increase and expedition (6 D), 675, 6; January 17, 1879, to increase pay of subcontractor (15 D), 679; June 27, 1879, increase 4 trips (20 D), 681; July 16, 1880, increase to 7 trips (28 D), 689; October 1, 1878, recognizing subcontract of H. M. Vaile (29 D), 689; French, September 27, 1878, to suspend pay (5 D), 675; November 12, 1878, amending order suspending pay (17 D), 680; No- vember 19, 1878, removing suspension of pay (18 D), 680; April 17, 1880, reduce trip (27 D), 688-9.	
Payments, tabulated statement of.....	707-8
Petitions for daily service in expedition time of 72 hours (8 D), 676, 7; to 6 trips in 72 hours (9 D), 677; for 6 trips and 72 hours, indorsed by John H. Mitchell (10 D), 677-8; for daily service (21 D, 22 D, 23 D), 681, 2. December 18, 1878, for daily service, indorsed by James H. Slater and John Whiteaker (24 D), 683; from The Dalles, for daily service (25 D), 684-5; of members of Oregon legislature, for daily service, 72 hours schedule, indorsed, John H. Mitchell (26 D), 685.	
Receipt of John Hailey to John M. Peck, for temporary service (19 D).....	680
Register of arrivals and departures (57 D).....	801-2
Reports, Auditor's (33 D to 46 D).....	703-5
Revenues, certified transcript of	695-700
Subcontract of H. M. Vaile, July 1, 1878, signed, John M. Peck, by John R. Miner (30 D).....	689-90 702-4
Warrants (32 D to 40 D, 43 D and 44 D).....	702-4
Witnesses:	
Blois, J. F. H., handwriting of papers marked 50 A and 14 D, 1475, 1496; 21 D, 1475; 23 D, 1475, 1498, 1850; 30 D, 1475; 39 D and 41 Q, 1481; 40 D and 42 Q, 1481; 38 D and 40 Q, 1481, 1496-7, 1849; 36 D and 38 Q, 1481, 1496; 35 D and 37 Q, 1481, 1497; 32 D and 35 Q, 1481; 41 D and 43 Q, 1481; 46 D, 1496.	
Borden, James M., draughtsman, 749-750; map, 749; different colored lines indicates the number of trips; black, 6 times a week; blue, 3 times a week; yellow, 2 times a week; red, 1 time a week. 749.	
Cowne, William, mail-carrier, 761-765; men and animals, 762-5; dis- tances, 763.	
Hall, Edwin, postmaster, 769-772, 795, 799; failures of carriers to con- nect, 769; population, 770; his name signed to petition, not written or authorized by him, and the names of Robinson and Max Metsban not their signatures, 795; identifies his name signed to several papers as his signature, and to some as not his, 796-8; through mail from Baker City to The Dalles was sent by Pendleton, 770.	
Fisk, John M., 709-730, 784-790 mail-carrier; distances, 709; schedule time, 723; men and animals, 726; quantity of mail, 726-7, 729; fail- ure of carriers to connect, 788-9.	
Masterton, Joseph E., mail-carrier, 730-49; men and animals, 742-8; no expedition until the fall of 1879, 742; quantity of mail, 745.	
Pierce, Clark S., mail-carrier, 765-9; employed by Miner, Peck & Co., 766; men and animals, 766-8; schedule time, 767-8.	
Ross, Samuel R., mail-carrier, 784-7; men and animals, 784-6.	
Schutz, Emil, stock-keeper, 750-761; stocked the route, 750; men and animals, 751-5; quantity of mail, 754; carried passengers, 753; In- dians, 758-9; petitions (10 and 26 D), 756-7.	
Stone, Geo. F., inspection clerk, 790-795, 799-802; an examination shows no deduction for loss of expedition, 690; course of business as to making deductions, 791-5.	
Sweeney, George M., 670-672; identifies jacket, 670; customs as to al- lowing one month's extra pay, 672-3.	
Taylor, Jacob S., notary public, acknowledged the oath of J. M. Peck..	470-472
Vaile, H. M., one of the defendants, 2222-2223, 2239, 2244; service put on in September, 1878, asked for extension of service for J. W. Dorsey, Miner, and Peck as a friendly act, 2222; his acquaintance with Miner and Brady, 2223-4; handwriting of papers marked 47 D, 48 D, and 56 D, 2239; of 32 D and 40 D, 2236; of 14 D, 2244.	

	Page
Witnesses—Continued.	
Wheeler, Henry W., reports, drafts, and warrant.....	702-6
Wilson, Elizabeth M., postmistress at The Dalles, 773-84, 827-32; through mails were not sent or received by this route, 773; mail bills, 773; failures to make schedule time, 773-4; contracts for temporary service, 773-4, 780-3, 827-8; Indiana, 829-30.	
Woodward, P. Henry, custody of files.....	672-3
ROUTE 44160, CANYON CITY, OREG., TO CAMP M'DERMOTT, NEV.	
Contract of John M. Peck with the United States (1Q).....	1351
Draft drawn by John M. Peck in favor of John R. Miner.....	1857
Exceptions to oath, 1354; to subcontract pay, 1365; to letter of Miner, (31Q) 1374; to letter of Miner (33Q), 1381; to men and animals, 1386; to revenues 1397.	
Expedition, calculation for (17Q).....	1356
Jacket, no date, inclosing petition (9Q).....	1352-3
Letters of Bowling, Charles, December 14, 1878, contractor not yet reported (7Q).....	1352
Brown, James F., per J. S. C. B., May 20, 1879, addressed to lock-box 714, inclosing petitions, (27Q).....	1359
Contract office, and answer of postmaster Camp McDermott, July 29, 1878, contractor has failed to report, (3Q).....	1351
Hall, Edwin, failure of contractor July 4, 1878 (2Q), 1351; October 24, 1878, failure of contractor (4Q), 1351-2.	
Service commenced as far as Camp Harney, November 1, 1878 (6Q)....	1352
Metschan, Phil., September 21, 1878, to J. H. Mitchell, more and faster service, (13Q).....	1355
Miner, John R., agent, February 20, 1880, to subcontractor, reduction of service (31Q), 1374; April 15, 1881, to John Carrey, asking him to see S. H. Abbott, satisfy him, pay him whatever is reasonable (33Q), 1382.	
Mitchell, J. H., November 16, 1878, inclosing letter of military officers at Camp Harney (14Q).....	1355
Officers, military, at Camp Harney, July 15, 1878, no mail received for 36 days, routes and roads open (12Q).....	1354
Peck, John M., M., December 23, 1878, for schedule of 96 hours, (11Q)...	1353
Steel, G. A., November 7, 1878, failure of contractor, (5Q).....	1352
Oath of John M. Peck, sworn to September 18, 1878 (10 Q).....	1353
Order of Brady, December 23, 1878, for increase and expedition (8 Q), 1352; July 16, 1878 (20 Q), increase four trips, 1357; indorsed, "Make this daily—Brady" (18 Q), 1360; December 28, 1878, subcontract of H. M. Vaile (29 Q), 1361.	
Payments, tabulated statement of.....	1400-1
Petition from Canyon City, September 23, 1878, for daily mail and expedition to (96) <i>ninety-six hours</i> , indorsed by John H. Mitchell (15 Q), 1355-6; from Camp Harney, September 23, 1878, for daily mail and expedition to 96 hours (16 Q), 1356; for daily service and reduction of time to 60 hours, indorsed by J. H. Slater, L. F. Grover, and John Whiteaker (19 Q), 1357; by residents of Canyon City and vicinity, for daily service (20 Q), 1357-8; for daily service (21 Q and 22 Q), 1358; for daily service, presented by John Whiteaker (23 Q), 1358; for daily service, recommended by J. H. Slater and John Whiteaker (24 Q), 1359, for daily service (25 Q), 1359; for daily service (26 Q and 28 Q), 1359-60.	
Reports, auditor's.....	1857
Revenues, certified transcript of.....	1399, 1400
Subcontract of John Carrey (32 Q), 1377; of H. M. Vaile (30 Q), 1361-2	1361-2
Warrants in favor of H. M. Vaile.....	1857
Witnesses:	
Blois, J. F. H., handwriting of papers marked 12, 1479-80; 15 and 16 Q, 1480; 41 D and 43 Q, 1480; 39 Q 1480, 1, 1497; 39 D and 41 Q, 1481; 40 D and 42 Q, 1481; 38 D and 40 Q, 1481, 1497, 1849; 36 D and 38 Q, 1481, 1496; 35 D and 37 Q, 1481, 1497; 36 Q, 1481,; 32 D and 35 Q, 1481; 20 Q, 1481, 2, 1498; 19 Q and 21 Q, 1482; 26 Q 1498; 33 Q, 1847.	
Brown, James F., subcontractor; subcontract with Vaile, 1362; men and animals, 1363, 1366, 1369-70; schedule time, 1362, 1367-8; quantity of mail, 1363; Indians, 1363; identifies letter (27 Q), 1363; petition (28 Q and 25 Q), 1364; (21 Q and 24 Q), 1365; passengers, 1365-6; fines and failures, 1366-7; petitions, 1364-5, 1368-72, 1374-6; subcontract pay, 1365.	

Witnesses—Continued.

Carrey, John, subcontractor under Vaile, 1377-84; Miner paid him, 1378; identifies letter, 1378; fines, 1383-4; subcontract pay, 1384.	
Coon, Byron C.; identifies files.....	1348-50
Johnson, Nephi, subcontractor on route 41119, 691-692; identifies signatures to petition on route 44160 as those of persons living along the line of route 41119, Southern Utah, 691-2.	
Johnson, W. D., 692-694; corroborates Nephi Johnson's testimony as to petition, 692-4.	
McBean, Frank, subcontract with John M. Peck, 1385; with H. M. Vaile, 1385; men and animals, 1387-91; commencement of service, 1386, 7; identifies letter (33 Q), 1391; 20 Q, 1393; 15 Q, 1394; 19 Q, 1396; Miner paid him, 1392; subcontract pay, 1392; Indians, 1393; expeditious mails, 1394-5.	
Spencer, George E., called, does not respond.....	1351
Taylor, Jacob S., notary public, 470-472; acknowledged the oath of John M. Peck, 470-2.	
Vaile, H. M., one of the defendants, 2209, 2211-2212; put service on from Canyon City to Camp Harney in November, 1878; route expedited before service was put on the whole route, 2211-12.	
Wheeler, Henry W., reports, drafts, warrants.....	1376-7
Woodward, P. Henry, custody of papers.....	1350

ROUTE 46132, JULIAN TO COLTON, CAL.

Contract of John M. Peck with the United States (1 G).....	980
Drafts drawn by John M. Peck in favor of H. M. Vaile, witnessed by M. C. Rerdell.....	1102-9
Letter of Booth, Newton, April 10, 1877, concurred in by J. P. Farley, increase of service (4 G).....	982
Craig, Scipio, April 1, 1879, increase of service (5 G).....	982-3
Peck, John M., proposition for schedule of 26 hours (3 G), 981; and J. C. Hayes, November 2, 1878, withdrawal of subcontract (15 G), 986.	
Oath of John M. Peck, contractor, sworn to December 30, 1878 (4 G and 52 A).	981-2
Order of Brady, June 24, 1879, increase trips and expedition to 26 hours (2 G), 981; December 12, 1878, to stop all payments to subcontractor (14 G), 985; May 24, 1879, subcontract of H. M. Vaile (16 G), 986.	
Payments, tabulated statement of.....	999, 1000
Petition from Temecula for continuation of route to Riverside (6 G), 983; for tri-weekly service, 36 hours schedule (7 G), 983; for 36 hours schedule (8 G), 983; for tri-weekly service and 36 hours schedule (9 G), 984; for tri-weekly service and 38 hours schedule (10 G), 984; five similar petitions and one signed by postmaster for increase of service (11 G), 984; for 38 hours schedule (12 G), 984; for 38 hours schedule (13 G), 984-5.	
Receipts for warrants signed H. M. Vaile, and H. M. Vaile by John R. Miner.	1109
Reports, auditor's, showing amounts due.....	1107-9
Revenues, certified transcript of.....	975-6
Subcontract of H. M. Vaile (17 G)	986
Warrants	1107-9

Witnesses:

Blois, J. F. H., handwriting of papers marked 1 G, 1476, 1496-7; of 15 G, 1476, 1496; of 3 G, 1477; of 52 A, 1477, 1497.	
Bergman, Jacob, mail-carrier, 986-92; recognizes papers (6 G to 13 G), 987, 26 hours schedule not petitioned for and missed connections, 987; men and animals, 988-9; distances, 988; petitions, 989-90; fines, 991.	
Sweeney, George M., identifies files	947-8
Taylor, Jacob S., notary public, 470-472; acknowledged the oath of John M. Peck, 470-2.	
Vaile, H. M., one of the defendants, 2229, 2230; subcontract was antedated 2229; knows nothing about increase or expedition, 2230.	

ROUTE 46247, REDDING TO ALTURAS, CAL.

Contract of John M. Peck with the United States (1 H).....	1001
Exceptions to oath of John M. Peck (53 A), 1006; to revenues, 1119.	
Drafts drawn by John M. Peck in favor of John R. Miner and S. W. Dorsey....	1860-1
Letters of Bush, C. C., August 17, 1878, 6 times a week service (15 H).....	1003
Jacket (52 H).....	2250-51
Culverhouse, Jerry, April 23, 1879, indorsed by Luttrell (58 H).....	2253

	Page.
Letters—Continued.	
Hendricks, A. L., asking restoration of service (49 H).....	2170
McKusick, Supt. R. M. S., recommends increase to 6 trips (46 H).....	2165
Peck, John M., December 3, 1878, schedule of 72 hours (20 H).....	1005
Postmaster at Beaver, Cal., May 7, 1880, return to the old service (51 H)	2171
Representatives of California and Oregon, for 6 trips (46 H).....	2165
Rive, N. B., August 12, 1878, increase to 6 trips, schedule of 72 hours (16 H), 1003-4; June 21, 1878, letter attached to schedule (23 H), 1007.	
Oath of John M. Peck, sworn to September 18, 1878 (53 A)	1005
Second oath sworn to January 22, 1879.....	2281
Order of Brady, June 3, 1878, increase 1 trip (2 H), 1001; December 3, 1880, increase and expedition (14 H), 1003; July 31, 1878, to change schedule (21 H), 1006.	
French, April 17, 1880, reduce 3 trips (24 H), 1007; August 26, 1880, increase 3 trips (25 H), 1007.	
Hazen, August 6, 1879, amending order of October 1, 1878, relative to pay of subcontractor (26 H)	1009
Payments, tabulated statement of.....	1019-20
Petitions for 6 trips and a schedule of 72 hours (3 H), 1001; ten similar (4 H to 13 H), 1001, 2; for an increase to 6 trips (17 H and 18 H), 1004.	
Protesting against reduction of service, indorsed by C. P. Berry (47 H), 2169; similar petition (48 H) 2169-70; and (50 H), 2170, 2171; for one additional trip and expedition, indorsed by J. P. Farley and P. D. Wigginton (53 H), 2251; for daily service and increased speed, indorsed by J. K. Luttrell, M. C., and P. D. Wigginton (54 H), 2251; for 7 trips, indorsed by C. P. Berry (56 H), 2252; for 7 trips indorsed by J. K. Luttrell and J. P. Farley (57 H), 2252.	
Power of attorney from J. M. Peck to M. C. Rerdell, dated September 26, 1879, to collect amounts due on this route (16 X).....	2257
Receipts for warrants signed by John M. Peck, J. M. Peck by Darnell, Lawson & Co., J. W. Bosler, and Major and Culverhouse (29 H to 44 H).....	1021
Reports, auditor's	1860-1
Revenue, certified transcript of the (28 H).....	1016-19
Schedule, dated June 13, 1878 (22 H).....	1006
Subcontract of Major and Culverhouse, dated May 20, 1879, signed John M. Peck, by M. C. Rerdell and John W. Dorsey (27 H).....	1009
Warrants payable to John M. Peck et al.....	1860-1
Witnesses:	
Blois, J. F. H., handwriting of papers marked 1 H, 4 H, 29 H, and 53 H.	1479
McCormick, James, postmaster at Redding, 1012-15; mails were carried in passenger coaches in 42 hours in summer, and 60 hours in winter, 1013.	
Major, John M., subcontractor, 1010-12; carried the mail in passenger coaches, also express, 1010; always carried it in from 41 to 45 hours in summer, and 65 hours in winter, 1010; weight of mail, 1011; subcontractor, page 1012.	
Page, Horace F., M. C., 2163; urged restoration of trips.....	2163
Sweeney, George M., identifies files.....	995-6
Taylor, Jacob S., notary public, 470-472; acknowledged the oath of John M. Peck, 470-2.	
Vaile, H. M., one of the defendants, 2228; knows nothing about the route, 2228.	

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